RECORD NO. 13-5061

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

SABINA LOVING; ELMER KILIAN; JOHN GAMBINO,

Plaintiffs – Appellees,

v.

INTERNAL REVENUE SERVICE; DOUGLAS H. SHULMAN, Commissioner of the Internal Revenue Service; UNITED STATES OF AMERICA,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFFS – APPELLEES

William H. Mellor
Scott G. Bullock
Dan Alban
Ari S. Bargil
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

Counsel for Plaintiffs – Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici.* Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are correctly listed in the Brief for the Appellants. Additionally, five former IRS Commissioners filed an *amicus curiae* brief in support of the Appellants. Plaintiffs-Appellees also anticipate that the Tax Foundation and several independent tax-return preparers will file a joint *amicus curiae* brief in support of the Plaintiffs-Appellees.

B. *Rulings under Review.* Except for the following, references to the rulings at issue correctly appear in the Brief for the Appellants. The initial order and memorandum opinion of the district court (Judge James E. Boasberg) were dated January 18, 2013.

C. *Related Cases.* To the best of their knowledge, counsel for Plaintiffs-Appellees are not aware of any previous or pending related cases in this Court.

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GLOSSARY

APA:	Administrative Procedure Act
CE:	continuing education
Circular 230:	Treasury Department Circular No. 230, a compilation of regulations governing practice before the IRS from 31 C.F.R. part 10. Originally issued in 1921, the current edition of Circular 230 is Rev. 8-2011 (August 2011).
CPA:	certified public accountant
EA:	enrolled agent, for the purposes of this brief, this term also includes the related categories of enrolled retirement plan agent and enrolled actuary
GAO:	Government Accountability Office
RTRP:	registered tax return preparer
RTRP regulations:	The regulations constituting the IRS's new licensing scheme governing registered tax return preparers (RTRPs), which became effective in August 2011, and are currently part of Circular 230 (31 C.F.R. part 10), although, at present, enjoined by the district court in this case.
Secretary:	The Secretary of the Treasury of the United States
Section 330:	31 U.S.C. § 330, the statute which governs "the practice of representatives of persons before the Department of the Treasury"
Treasury:	The United States Department of Treasury, including the Secretary of the Treasury (and, where relevant, the Internal Revenue Service)

Unenrolled preparer:	A tax-return preparer who is not an attorney, CPA or any type of EA, and thus is not enrolled to "practice" before the IRS under Circular 230
VITA program:	the Volunteer Income Tax Assistance program administered by the IRS to provide free tax help, including tax-return preparation, to qualifying taxpayers by IRS-trained-and-certified volunteers

STATEMENT OF THE ISSUE

Under 31 U.S.C. § 330 ("Section 330"), the Secretary of the Treasury (the "Secretary") may "regulate the practice of representatives of persons before the Department of the Treasury." Such "representatives" may be required to demonstrate "competency to advise and assist persons in presenting their cases." The only issue on appeal is whether the district court correctly held that the Defendants-Appellants ("the IRS") acted without statutory authority by imposing licensing regulations on tax-return preparers because tax-return preparers are not "representatives" who "practice" before the Department of the Treasury ("Treasury") under Section 330.

STATUTES AND REGULATIONS

Excerpts from the most relevant statute, Section 330, and the most pertinent regulations, from 31 C.F.R. part 10, are contained in the Addendum to the Brief for the Appellants. Also relevant is the original 1884 version of the Act later codified at 31 U.S.C. § 330, which appears at J.A. 55-56. Other relevant statutory provisions, 26 U.S.C. §§ 6694, 6695, 7407 and 7408 are included in the Addendum to this brief.

STATEMENT OF FACTS

I. The Collection, Examination, and Appeals Functions of the IRS.

In order to understand Section 330, it is important to recognize the IRS's different functions and how those functions dictate IRS interaction with taxpayers. The IRS is a bureau of the Department of Treasury ("Treasury") under the immediate direction of the Commissioner of Internal Revenue.[1] 26 C.F.R. § 601.101.[2] Its functions can be summarized as (1) Collection, (2) Examination (audit), (3) Appeals, and (4) Criminal Investigations. *See* 26 C.F.R. §§ 601.103–107. In the tax industry, Collection is known as "compliance," while Examination and Appeals are known as "controversy."[3] (Criminal Investigations are not relevant to this matter.) This case raises the question of whether Section 330 applies to people (tax-return preparers) who are solely engaged in tax compliance, and not tax controversy matters.

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[1] The IRS acts under congressional grants of authority to Treasury, and must promulgate regulations via Treasury. References to actions by the IRS should thus be understood to include Treasury, where relevant.

[2] Citations to the Code of Federal Regulations are to the 2012 edition, unless otherwise indicated.

[3] *See, e.g.*, J.A. 52-53, *West's Tax Law Dictionary* 1054 (Robert Sellers Smith ed., 2009 ed.) (defining "Tax Compliance" as "[r]esponse of a taxpayer to the tax laws including filing appropriate tax returns and paying the taxes due in a timely manner"; defining "Tax Controversy" as "[d]istinguishable dispute with respect to a tax matter, usually between a taxpayer and taxing authority, such as the I.R.S. A concrete case admitting of an immediate and definitive determination of legal rights of parties upon facts involving tax issues or claims.").

A. Collection.

Collection involves the preparing and filing of tax returns along with the payment or withholding of taxes or estimated taxes, and any penalties, as well as enforcement. 26 C.F.R. §§ 601.103(a), 601.104. "The Federal tax system is basically one of self-assessment. In general each taxpayer . . . is required to file a prescribed form of return which shows the facts upon which tax liability may be determined and assessed." 26 C.F.R. § 601.103(a); *see also* 26 U.S.C. §§ 6011-12. In other words, taxpayers simply report the financial figures used to calculate their tax liability, as well as the results of their calculations, in the manner dictated by the tax-return form. Tax returns do not present any arguments or advocacy for the taxpayer, nor do they typically present any original evidence supporting the financial figures reported. Taxpayers are not required to provide the underlying receipts supporting the financial figures reported in their tax return (but may present such evidence if the matter proceeds to the "controversy" stage).

After a taxpayer's return is filed, the IRS may conduct its own internal assessment of the taxpayer's tax liability (and any penalties due). *See* 26 C.F.R. § 601.104(a); 26 U.S.C. §§ 6201-6204.[4] After an assessment, the IRS collects any

[4] *See also United States v. Galletti*, 541 U.S. 114, 122 (2004) ("In most cases, the Secretary accepts the self-assessment and simply records the liability of the taxpayer. . . . [W]here the Secretary rejects the self-assessment of the taxpayer or discovers that the taxpayer has failed to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books.").

unpaid taxes or penalties. *See* 26 C.F.R. § 601.104(c)(1); *see also* 26 U.S.C. §§ 6301-6306. The IRS's assessment of a taxpayer's tax liability is conducted in an "*ex parte*, non-adversarial manner" where there is no entitlement to a hearing and no role for a taxpayer's representative.[5] *See* 26 C.F.R. § 601.104(c).

B. Examination.

After returns are filed and assessed by the IRS, some returns are selected for examination (audit). 26 C.F.R. §§ 601.103(b), 601.105(a). At this stage, a return departs the realm of tax "compliance" and enters the world of tax "controversy." *See* J.A. 53. Examinations may be conducted by correspondence or by "taxpayer interview." 26 C.F.R. § 601.105(b)(2); *see also* 26 U.S.C. § 7521 (procedures for "taxpayer interviews"). During examination, a taxpayer may consult with, and be represented before the examiner, by an attorney, CPA, or other representative. *See* 26 C.F.R. § 601.105(b)(1); 26 U.S.C. § 7521(b)(2). "Representation" of a taxpayer requires obtaining that taxpayer's power of attorney (usually by completing IRS Form 2848, Power of Attorney and Declaration of Representative). 26 C.F.R. § 601.504(a).

[5] *3M Co. v. Browner*, 17 F.3d 1453, 1459 n.11 (D.C. Cir. 1994) (noting that "[a]n [IRS] *assessment* of a penalty (or tax), however, is an *ex parte* act. It is merely the determination of the amount of the penalty and the official recording of the liability. Indeed, the taxpayer is not even entitled to a pre-assessment hearing . . .") (quoting *United States v. Capozzi*, 980 F.2d 872, 874 (2d Cir. 1992)); *see also* Fmr. Comm'rs. *Amicus* Br. 8-9 (repeatedly acknowledging that the collection stage does not involve a contested proceeding).

C. Appeals.

If a taxpayer disagrees with adjustments proposed by the IRS during an examination, she may appeal to an IRS Appeals Office. 26 C.F.R. §§ 601.103(b), 601.106. An Appeals Officer will hear the taxpayer's appeal at a "conference" if the office has jurisdiction. 26 C.F.R. § 601.103(c). In some cases a written "protest" is required to obtain Appeals consideration. 26 C.F.R. §§ 601.106(a)(1)(iii)(c)–(e). During Appeals proceedings, taxpayers may designate a qualified representative to act on their behalf. 26 C.F.R. § 601.106(c). The same power-of-attorney requirement for "[r]epresentation" of taxpayers applies. *See* 26 C.F.R. § 601.504(a).

II. Regulation of "Practice" Before the IRS Prior to August 2, 2011.

Congress has long authorized Treasury to regulate those who represent people as advocates in presenting cases before Treasury, as explained below. In 1884, Congress authorized Treasury to regulate "agents, attorneys, or other persons representing claimants before [Treasury]." J.A. 55. In 1921, not long after the modern income tax was instituted, the IRS adopted a set of regulations known as Circular 230, which governed the "practice" of these representatives before the IRS in tax controversy proceedings (but not tax-return preparers). Ninety years later, the IRS promulgated a new version of the Circular 230 regulations (effective

August 2, 2011) that newly interpreted "practice" to include tax-return preparation, as explained *infra* in Parts III–IV.

A. In 1884, Congress authorized the Secretary to regulate "agents, attorneys, or other persons representing claimants before his Department."

On July 7, 1884, in response to mounting complaints about misconduct by unscrupulous attorneys and claims agents who represented soldiers with claims for lost horses, and others with claims for military-related compensation from the federal government, Congress passed a War Department appropriations bill containing a proviso to an appropriation for "horses and other property lost in the military service":

> . . . That the Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. . . .

J.A. 55-56 (Act of July 7, 1884, ch. 334, sec. 3, 23 Stat. 258) ("Act of 1884").[6]

[6] *See also* J.A. 58-61 (48 Cong. Rec. H5219–22 (daily ed. June 16, 1884) (especially statements of Rep. Townshend)); J.A. 63-65 (George M. Morris, *Growth and Regulation of Treasury Bar*, 8 A.B.A. J. 742, 743 (1922)).

This Act is currently codified at 31 U.S.C. § 330 ("Section 330"). It was subject to a purely stylistic revision in 1982; "when the Act of 1884 was recodified . . . Congress explicitly stated that it was simplifying the language without making any substantive changes in meaning." *Poole v. United States*, 1984 WL 742, at *2, 1984 U.S. Dist. LEXIS 15351, at *5 (D.D.C. 1984) (citing H.R. Rep. No. 651, 97th Cong., 2d Sess. 19 (1982)). Among the 1982 stylistic revisions, "the words 'representatives of persons' [were] substituted for 'agents, attorneys, or other persons representing claimants before his department' to eliminate unnecessary words."[7]

Section 330 governs "practice" before Treasury and authorizes the Secretary to "regulate the practice of representatives of persons before the Department of the Treasury." Section 330(a)(1). Section 330(a)(2)(D) describes the type of "practice" of "representatives" contemplated by the statute: "advis[ing] and assist[ing] persons in presenting their cases." As referenced in Section 330(a), attorneys and CPAs are permitted to "practice" before the IRS under 5 U.S.C. §§ 500(b)–(c), which governs administrative practice before federal agencies, but are still subject to regulation under Section 330.

[7] Historical and Revision Notes, 31 U.S.C. § 330. Since the 1982 recodification, the statute has been amended four more times. *See id.* None of these changes have expanded the scope of Treasury's authority over more than "the practice of representatives of persons before [Treasury]." 31 U.S.C. § 330(a)(1).

B. Regulation of "practice" under Circular 230 prior to August 2, 2011.

Under the authority of Section 330, the IRS began regulating the "practice" of "representatives" before the IRS under a set of regulations known as Treasury Department Circular No. 230 ("Circular 230"), 31 C.F.R. pt. 10, first published in 1921. J.A. 64. In addition to regulating the "practice" of CPAs and attorneys before the IRS, the IRS offered special categories of licensure under Circular 230 to various types of "enrolled agents" ("EAs"), enabling those who were not attorneys or CPAs to be enrolled to "practice" before the IRS by representing taxpayers in IRS proceedings, as their qualifications permit. 31 C.F.R. §§ 10.3–10.6; *see also* Administrative Record ("A.R.") at 000143–44.

III. Regulation of "Tax Return Preparers" Prior to August 2, 2011.

In contrast to those who "practice" under Section 330 by representing others in presenting cases before Treasury, Congress has never given the IRS plenary authority to license tax-return preparers. Indeed, for over a century, neither Treasury nor the IRS interpreted Section 330 as authorizing it to license tax-return preparers, and the agency repeatedly foreswore that authority in official documents and testimony. *See* Part III.B. Rather than grant plenary authority, Congress has passed specific, limited statutes regulating the conduct of tax-return preparers through statutory penalties and injunctions, as well as an identification-number registry. *See* Part III.C.

As described in Part III.D, from 2005 to the present, Congress has considered a series of bills that would have amended Section 330 to authorize the IRS to license tax-return preparers, but has not passed any of them. After several of these bills floundered, the IRS announced in its December 2009 *Return Preparer Review* report that it had reversed its interpretation of Section 330, and now interpreted "practice" to include tax-return preparation. *See* Part III.E. In summer 2011, the IRS promulgated new Circular 230 regulations purporting to authorize the IRS to license tax-return preparers, as detailed *infra* in Part IV.

A. Definition of "tax return preparer."

"Tax return preparer" is defined by federal statute, in relevant part, as "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by [Title 26]." 26 U.S.C. § 7701(a)(36)(A).[8] This statutory definition has existed, with minor changes, since 1976.

B. For over a century prior to the recent regulatory change, neither Treasury nor the IRS had interpreted Section 330 as authorizing it to license tax-return preparers.

From the passage of the Act of 1884 up until the December 2009 publication of the *Return Preparer Review*, neither Treasury nor the IRS interpreted Section

[8] When the term "tax return preparer(s)" appears in quotes in this brief, it is a reference to this statutory definition of the term in the Internal Revenue Code.

330 as authorizing the federal licensure of tax-return preparers. *See* J.A. 66; A.R. at 000127, 000143. For the nearly 100-year history of the modern income tax (prior to December 2009), the IRS did not view "tax return preparers" to be "representatives" of taxpayers, and specifically rejected that interpretation in congressional testimony and official guidance.[9] Nor did the IRS consider the preparation of a tax return for compensation to constitute "practice" before the IRS.[10] Indeed, as recently as April 2009, the official IRS publication regarding "Practice Before the IRS" stated that, "[j]ust preparing a tax return [or] furnishing information at the request of the IRS . . . is not practice before the IRS. These acts

[9] *See*, *e.g.*, Testimony of Nancy J. Jardini, IRS, Chief, Criminal Investigations Division, Hearing before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, (July 20, 2005), *available at* http://waysandmeans.house.gov/media/transcript/10164.html#Jardini. ("Tax return preparers are not deemed as individuals who represent individuals before the IRS . . . ."); Rev. Proc. 68-29, 1968-2 C.B. 913, § 2.01 (guidance issued in 1968—and still current—explaining that, during a tax examination, a tax return preparer who prepared the return in question is a factual witness, and not a "representative").

[10] *See*, *e.g.*, Taxpayer Advocate Service, IRS, *National Taxpayer Advocate FY 2003 Report to Congress* at 296–97 (Dec. 31, 2003) (hereinafter "2003 Report to Congress"), *available at* http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf (official response of IRS to Taxpayer Advocate's 2002 legislative proposal explaining that licensing has historically been the domain of the states, the IRS only regulates the "representational activity" of "practice before the IRS," and Congress has recognized the rights of states and localities to regulate tax preparers independent of the federal government).

can be performed by anyone."[11] Thus, the IRS did not view "tax return preparers" as engaged in "practice" under Section 330 (or Circular 230) unless they were also attorneys, CPAs, or EAs who actually represent taxpayers in proceedings before the agency.[12] J.A. 66; A.R. at 000127, 000143. As a result, prior to August 2, 2011 (when the RTRP licensing scheme became effective), most tax-return preparers were unlicensed by the IRS, and were not generally regulated under Circular 230. J.A. 66; A.R. at 000127, 000143.

C. Congress developed a statutory scheme for limited regulation of tax-return preparers by statutory penalties and injunctions.

Although most tax-return preparers were unlicensed by the IRS before August 2, 2011, Congress nonetheless authorized their conduct to be regulated under a number of federal civil and criminal statutes governing tax-return

[11] IRS Publication 947, *Practice Before the IRS and Power of Attorney* at 2 (Rev. April 2009), *available at* http://www.irs.gov/pub/irs-utl/publication_947_practice_before_the_irs_and_poas_rev_4_09.pdf. Current Treasury regulations still reflect this. *See* 26 C.F.R. § 301.7701-15(d) ("[a] person may be a tax return preparer without regard to educational qualifications and professional status requirements").

[12] Also indicative are the admissions of the National Taxpayer Advocate: "*[T]he IRS currently has no authority to license preparers* or require basic knowledge about how to prepare returns." Testimony of Nina E. Olson, National Taxpayer Advocate, IRS, before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, (July 20, 2005) (emphasis added), *available at* http://waysandmeans.house.gov/media/transcript/10164.html; *see also* Taxpayer Advocate Service, IRS, *National Taxpayer Advocate FY 2002 Report to Congress* at 71, (Dec. 31, 2002), *available at* http://www.irs.gov/pub/irs-utl/nta_2002_annual_rpt.pdf ("Until the IRS is able to regulate this group of [unenrolled return] preparers . . .").

preparation; these statutes prohibited misconduct ranging from knowingly preparing a return that understates the taxpayer's liability to failing to sign or provide an identification number on a tax return they prepare. *See, e.g.*, 26 U.S.C. §§ 6694, 6695, 6700, 6701, 6702, 6707A, 6713, 7201, 7206, 7207, 7213, 7216, 7407; *see also* A.R. at 000127, 000143–144. The earliest of these statutes were passed in 1954, s*ee, e.g.*, 26 U.S.C. §§ 7201, 7206, 7207, 7213, and Congress continues to amend these statutes to this day, most recently amending 26 U.S.C. § 6695(g) in 2011 to raise the penalty from $100 to $500 per occurrence for failure to exercise due diligence on returns claiming an earned income credit.[13] Tax-return preparers are regulated by these statutes today. The penalties for violating these statutes include fines of up to $100,000 per occurrence and even felony conviction and imprisonment of up to five years. *See, e.g.*, 26 U.S.C. §§ 7201, 7206, 7213. Repeat offenders may also be enjoined from further preparing returns. *See* 26 U.S.C. § 7407.

D. Congress declines to authorize the IRS to license tax-return preparers under Section 330.

From 2005 to the present, Congress has considered at least nine bills that would have amended Section 330 to specifically grant authority to Treasury (and

[13] United States-Korea Free Trade Agreement Implementation Act of 2011, Pub. L. 112-41, Title V, § 501(a), 125 Stat. 428, 459.

thus, the IRS) to regulate "tax return preparers."[14] To date, none of these bills has passed.

E. The IRS reverses its longstanding interpretation of Section 330.

In December 2009, after several of the proposed bills had failed, the IRS announced that it had reversed its interpretation of Section 330 in Publication 4832, the *Return Preparer Review* report. Citing Section 330, the IRS simply stated that, "[t]he IRS believes that increased oversight of paid tax return preparers does not require additional legislation." A.R. at 000159. It provided no explanation for this major change in its interpretation of the statute. *See id*.; *see also* J.A. 68 (no explanation for reversal in final regulations).

IV. The Registered Tax Return Preparer ("RTRP") Licensing Scheme.

In the summer of 2011, Treasury enacted and promulgated a set of final regulations to impose an IRS-administered licensing scheme on "tax return preparers" who had not previously been licensed.[15] *See* J.A. 66-92. The IRS

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[14] *See* A.R. at 000151; *see also* S. 832, 109th Cong. § 4 (2005); H.R. 5047, 111th Cong. § 202 (2010); S. 3215, 111th Cong. § 202 (2010); H.R. 6050, 112th Cong. § 202 (2012); S. 3355, 112th Cong. § 202 (2012); H.R. 1570, 113th Cong. § 2 (2013).

[15] The IRS had previously imposed a mandatory identity number (PTIN) requirement on all tax-return preparers in January 2011 under the authority of 26 U.S.C. § 6109(a)(4). *See* A.R. at 000022–35; 26 C.F.R. § 1.6109-2. Obtaining a PTIN simply involved filling out a brief form and paying a fee; there was no testing or continuing education ("CE") requirement. Plaintiffs do not challenge the PTIN requirement.

originally estimated that 600,000 to 700,000 tax preparers would be subject to this licensing scheme. J.A. 77, 79.

The new RTRP licensing regulations were published in the Federal Register on June 3, 2011 and became effective on August 2, 2011. *See* J.A. 66. These regulations amended 31 C.F.R. pt. 10, the current version of which is Circular No. 230 (Rev. 8-2011). Under this new version of Circular 230, the IRS purported to license the preparation of tax returns by "tax return preparers" under the authority of Section 330 because it defined "Practice before the Internal Revenue Service" as including "preparing documents; filing documents." 31 C.F.R. § 10.2(a)(4); *see* J.A. 68; A.R. at 000159.

Under this new licensing scheme, "tax return preparers" who were not attorneys, CPAs, or EAs had to become an RTRP in order to file tax returns for compensation. 31 C.F.R. §§ 10.3(f), 10.4(c). Under Circular 230, "[p]ractice as a registered tax return preparer is limited to preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service." 31 C.F.R. § 10.3(f)(2).

To become an RTRP, one had to pass a written examination approved by the IRS. 31 C.F.R. § 10.4(c). To renew one's status as an RTRP, one had to pay a renewal application fee and certify that one has satisfied the annual CE requirements. 31 C.F.R. §§ 10.6(d)–(e). A minimum of 15 hours of CE credit,

including two hours of ethics or professional conduct, three hours of federal tax law updates, and 10 hours of federal tax law topics, had to be completed each registration year. 31 C.F.R. § 10.6(e)(3).

The nonrefundable fee for the RTRP exam was $116. Defs.' Answer, ECF No. 8, ¶ 44.[16] This was in addition to the costs of taking 15 hours of CE courses, the cost of taking an exam-preparation course, and any expenses for travel, lodging, and meals incurred in order to take the exam and attend the CE courses (or the exam-preparation course), which could total over a thousand dollars annually. *Id*. at ¶¶ 44-46.

V. Plaintiffs Are Independent Tax-Return Preparers Who Would Be Harmed by the RTRP Licensing Scheme.

Plaintiffs-Appellees ("Plaintiffs") are three independent tax-return preparers who would be harmed if the RTRP licensing scheme was reimposed. J.A. 39-42 ("Loving Decl."), ¶¶ 9–17; J.A. 43-46 ("Kilian Decl.") ¶¶ 10–17; J.A. 47-50 ("Gambino Decl."), ¶¶ 11–18. In order to continue preparing tax returns for compensation under the RTRP scheme, each Plaintiff would be forced to comply with the various licensing requirements to become an RTRP or face fines or sanctions. Loving Decl. ¶ 6; Kilian Decl. ¶ 7; Gambino Decl. ¶ 10; *see, e.g.*, 31 C.F.R. § 10.50. The monetary costs of compliance with the RTRP regulations, as

[16] Citations to Defendants' Answer should be construed to include the corresponding allegations in Plaintiffs' Complaint.

well as the substantial opportunity cost of the time spent on compliance, would force one Plaintiff to charge higher prices, Loving Decl. ¶ 11-13, and will force the other two Plaintiffs to prematurely close their tax-preparation businesses. Kilian Decl. ¶¶ 11–17; Gambino Decl. ¶¶ 11-13, 16–18.

Plaintiff Sabina Loving owns Loving Tax Services, Inc., a relatively new tax-preparation business in an impoverished neighborhood on the South Side of Chicago where there is high unemployment and many homes and businesses are boarded up. Loving Decl. ¶¶ 2, 7. Loving Tax Services is the first business to occupy its storefront since at least 2000, and serves the residents of its community, many of whom are low-income. *Id.* ¶ 7. Prior to starting Loving Tax Services, Sabina Loving worked as an accountant for approximately 12 years for several large businesses while earning her Master's degree. *Id.* ¶ 3. She is a member of the American Institute of Professional Bookkeepers and has been preparing taxes professionally for the past four years. *Id.* She prepared approximately 100 tax returns in 2012. *Id.*

Sabina Loving objects to the new licensing regulations as unfairly burdensome on small tax businesses like hers that meet clients in person and provide personalized service. *Id.* ¶ 15. Complying with the RTRP licensing regulations would be costly, forcing her to increase the fees she charges her customers, thereby making her less competitive with large tax-preparation firms,

particularly those exempted from the regulations. *Id.* ¶¶ 13–14. In addition, she would like to hire and oversee "supervised preparers" to assist her during tax season, but only CPAs, attorneys and EAs may oversee "supervised preparers" under the RTRP scheme *Id.* ¶¶ 9, 16; J.A. 69. Although she has worked as an accountant for a dozen years, she is not a CPA and would not be able to supervise other tax preparers even if she were an RTRP. *Id.* ¶¶ 3, 9, 16; J.A. 69. Before the RTRP regulations, an unenrolled signing preparer could supervise non-signing preparers. *See, e.g.*, 26 C.F.R. § 301.7701-15(b).

Plaintiff Elmer Kilian is an 81-year-old retired Korean War veteran living in the small village of Eagle, Wisconsin, where he has a wooden shingle outside his house advertising his business, Eagle Tax Services. Kilian Decl. ¶¶ 2, 3, 8. He began preparing taxes on a part-time basis after studying to become a bookkeeper at a vocational school. *Id.* ¶ 4. He has been preparing taxes part-time and seasonally on his dining room table for about 30 years. *Id.* He prepares about 80 to 100 paid tax returns per year for people in his community, many of them longtime customers. *Id.* ¶¶ 4, 8, 9.

Elmer Kilian prides himself on providing low-cost tax preparation services to the residents of Eagle, and prepares a number of free returns for charitable reasons. *Id.* ¶ 9. He objects to the costs imposed by the RTRP licensing scheme, which would force him to either substantially raise the fees he charges his

customers or go out of business altogether. *Id.* ¶ 14. Since it is very unlikely that any CE courses would be offered in Eagle, his travel time and costs could be substantial. *Id.* ¶ 13. Because he is not willing to substantially raise his fees, he will have to close his tax business if forced to comply with the RTRP licensing regulations. *Id.* ¶¶ 15, 17.

Plaintiff John Gambino is a Certified Financial Planner ("CFP") and registered investment advisor in Hoboken, NJ who works primarily on assisting his clients with wealth management. Gambino Decl. ¶ 2. Gambino also offers tax-return preparation as a convenient service for his clients, and has done so since 2004. *Id.* ¶ 6. He prepares approximately 50 tax returns for compensation annually. *Id.* He holds Bachelor's and Master's degrees from the Massachusetts Institute of Technology, and worked as an equity analyst on Wall Street from 2001 to 2003. *Id.* ¶ 4. He has passed the two-day CFP exam and takes 30 hours of CE courses every two years to maintain his CFP certification. *Id.*

John Gambino objects on principle to the RTRP licensing regulations; he believes they are an infringement on his right to earn an honest living free from unreasonable government intrusion. *Id.* ¶ 14. He also thinks that these licensing regulations harm consumers (including his clients) by reducing their choices in tax preparers and increasing the cost of tax preparation. *Id.* ¶ 15. The time and opportunity cost of compliance with the RTRP regulations will make it no longer

profitable for him to continue preparing tax returns. *Id.* ¶ 16. He stopped taking new tax clients when the RTRP regulations took effect and plans to close his tax preparation business if the RTRP licensing scheme is reimposed. *Id.* ¶¶ 17, 18.

SUMMARY OF THE ARGUMENT

This lawsuit is a challenge under the Administrative Procedure Act ("APA") to the absence of statutory authority for the IRS's new RTRP licensing regulations, which were adopted in the August 2011 revision of Circular 230. This unprecedented federal licensing scheme, which the IRS seeks to impose on hundreds of thousands of previously unlicensed tax-return preparers, exceeds the clear boundaries of the statute upon which the IRS relies. As this brief explains, the district court correctly struck down the RTRP licensing scheme as *ultra vires*.

The district court correctly interpreted the text and structure of Section 330, which unambiguously forecloses the IRS's interpretation of the statute. Although the IRS suggests that the statute is ambiguous because statutory terms are undefined, its position is contrary to clear precedent. Instead, the context provided by Section 330(a)(2)(D) indicates that the nature of "practice" contemplated by the statute involves "advis[ing] and assist[ing] persons in presenting their cases," a description which excludes tax-return preparation, as even the IRS itself admits. In addition, the IRS's claim that Section 330(a)(2)(C) would be rendered surplusage by the district court's interpretation fails because the IRS misinterprets Section

330(a)(2), ignoring its language and structure. Finally, the IRS fails to give ordinary meaning to the key term "representative(s)" in Section 330, and instead wrongly assumes that tax-return preparers are "representatives" under Section 330 with no explanation.

The district court also appropriately analyzed the overall statutory scheme to help determine the meaning of Section 330. That analysis demonstrated that Congress has not given the IRS plenary authority to regulate tax-return preparers, but instead has provided tightly controlled grants of statutory authority under Title 26 to impose penalties for specific violations and seek injunctions in Article III courts. If the IRS's interpretation of Section 330 was followed, it would enable the IRS to bypass the strict limitations imposed by Title 26 penalty provisions. The IRS's argument that such statutory "overlap" is permissible ignores the appropriate analysis under *Chevron* step one, which requires courts to interpret statutes so that they form a coherent and harmonious regulatory scheme in which no statutory provision is rendered a nullity. But contrary to the IRS's claims, if Section 330 was interpreted to include tax-return preparers, the injunction remedy available under 26 U.S.C. § 7407 would effectively be displaced by the "disbarment" penalty of Section 330(b). In addition, the IRS fails in its attempt to argue that 26 U.S.C. § 7408 shows that Congress was not concerned about statutory overlap, because the limited injunction against future illegal acts under that statute provides

a wholly different remedy from any of the remedies available under Section 330(b).

In addition, the legislative history and purpose of Section 330, as well as the IRS's long-held interpretation of the statute, buttress the district court's findings. Congress could not have intended for Section 330 to authorize the licensure of tax-return preparers when it passed the original Act in 1884, nor has Congress since amended the statute to include tax-return preparers. Instead, Congress has repeatedly declined to pass proposed legislation that would amend Section 330 to authorize the IRS to license tax-return preparers. In addition, the agency's century-long interpretation of the statute as not authorizing the licensure of tax-return preparers is persuasive evidence of the true meaning of Section 330. The IRS's failure to explain its sudden reversal in interpretation indicates the agency is impermissibly attempting to use regulations to amend the statute.

LEGAL STANDARD FOR REVIEW OF AGENCY ACTION

Under the APA, a reviewing court must strike down regulations that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(C). Under this provision of the APA, "[a]n essential function of the reviewing court is to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority." *Planned Parenthood Fed'n, Inc. v. Heckler*, 712 F.2d 650, 655 (D.C.

Cir. 1983). For regulations to be upheld as valid, they must be "consistent with the congressional purposes underlying the authorizing statute." *Id*.

When an *ultra vires* challenge is brought under the APA, as it was here, "appellate courts review the agency's actions under the two-step process from *Chevron*." *Am. Airlines, Inc. v. TSA*, 665 F.3d 170, 176 (D.C. Cir. 2011). Under *Chevron* step one, a reviewing court must determine whether "the intent of Congress is clear."[17] *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation omitted). A court thus determines "whether Congress has unambiguously foreclosed the agency's statutory interpretation . . . either by prescribing a precise course of conduct other than the one chosen by the

[17] Both *amicus curiae* briefs submitted in support of the IRS rely primarily on policy arguments—such as tax code complexity or anecdotal allegations of tax-preparer errors—which are improper for this Court to consider in evaluating an *ultra vires* challenge to agency regulations. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"). Moreover, neither brief offers any evidence that the harms alleged are unique to preparers subject to the RTRP regulations or that the RTRP regulations would solve the various alleged problems. Notably, both briefs conspicuously ignore a 2011 Treasury study which found a 61 percent error rate on returns prepared by IRS-trained-and-certified volunteer preparers in the VITA program. Treasury Inspector General for Tax Information, *Accuracy of Tax Returns, the Quality Assurance Processes, and Security of Taxpayer Information Remain Problems for the Volunteer Program*, at 6 (Aug. 26, 2011) *available at* http://www.treasury.gov/tigta/auditreports/2011reports/201140094fr.pdf. The only legal argument raised by the former IRS Commissioner *amici* is both untenable and has been waived by the IRS itself, as explained *infra* at Argument, Part I.B.

agency, or by granting the agency a range of interpretive discretion that the agency has clearly exceeded."[18] *Id.* (internal quotation omitted).

This case was properly resolved by the district court under *Chevron* step one. No deference is owed to the agency during this first step of the *Chevron* inquiry. *See id.* at 660. Only if Congress's intent is ambiguous does a court turn to *Chevron* step two, and ask, "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

ARGUMENT

The district court determined that this case "boils down to one question: Is § 330 ambiguous as to whether tax-return preparers are 'representatives' who 'practice' before the IRS?" J.A. 18. The district court answered that question in the negative, holding that "together the statutory text and context unambiguously foreclose the IRS's interpretation of 31 U.S.C. § 330." J.A. 28. Accordingly, the

[18] The IRS posits that "the Secretary was authorized to issue regulations" because "Congress was silent." IRS. Br. 45. However, administrative agencies are only permitted to exercise authority that has been expressly granted by Congress by statutory provision, and cannot manufacture their own authority based on Congress's failure to expressly withhold such authority. "To suggest, as the [agency] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (emphasis in original).

district court struck down the RTRP licensing scheme as *ultra vires* under step one of *Chevron*.

As the district court recognized, this case is a dispute over the interpretation of a single federal statute, Section 330, which provides in pertinent part:

> (a) Subject to section 500 of title 5, the Secretary of the Treasury may—
> (1) regulate **the practice of representatives of persons before the Department of the Treasury**; and
> (2) before admitting a representative to practice, require that the representative demonstrate—
> (A) good character;
> (B) good reputation;
> (C) necessary qualifications to enable the representative to provide to persons valuable service; **and**
> (D) competency to **advise and assist persons in presenting their cases.**
>
> (b) After notice and opportunity for a proceeding, the Secretary may suspend or **disbar from practice** before the Department, or censure, a representative who—
> (1) is incompetent;
> (2) is disreputable;
> (3) violates regulations prescribed under this section; or
> (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

31 U.S.C. §§ 330(a)–(b) (emphasis added).

The language of this statute "simply will not bear the meaning the [agency] has adopted." *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988). Although Section 330 does not even mention tax returns or tax-return preparers—it was originally drafted in 1884, well before modern income tax returns even existed,

and has never since been amended to include tax-return preparers—the IRS interprets the statute as authorizing the agency to impose a licensing scheme on tax-return preparers. The IRS's strained reading of the statute ignores the clear statutory context indicating that the "practice of representatives" which Congress is authorizing the IRS to regulate involves "advis[ing] and assist[ing] persons in presenting their cases" rather than mere preparation of tax returns. It also necessitates ignoring the ordinary meaning of statutory terms such as "representative," "practice," and "disbar." This unduly expansive interpretation of Section 330 stretches the language (and purpose) of the statute well past its breaking point, as the district court conclusively found, and as Plaintiffs will demonstrate below.

To determine whether Section 330 will bear the sweeping new meaning adopted by the IRS, this Court must also examine the statute under *Chevron* step one.[19] To do so, a court must "exhaust the traditional tools of statutory construction . . . [in] a search for the plain meaning of the statute." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (internal citations and

[19] Contrary to the IRS's claim, *see* IRS Br. 46, the Plaintiffs have not waived their arguments under *Chevron* step two. Rather, Plaintiffs brought arguments under both steps of *Chevron* in the district court, but did not restate them for the sake of brevity. *See* Pls.' Br. Supp. Mot. Summ. J., ECF No. 12, at 16 n.12 ("Plaintiffs assert these same arguments under step two of *Chevron*, as demonstrating that the IRS's interpretation is not 'based on a permissible construction of the statute[s].'"). Nonetheless, with one exception—*see infra* note 35 and accompanying text—Plaintiffs focus this brief on arguments brought under *Chevron* step one.

quotations omitted). The traditional tools of statutory construction include an examination of (1) the statute's text and structure, viewed in context, (2) the place of the statute in the overall statutory scheme, and (3) the statute's legislative history and purpose. *See id*. at 1047, 1049.

As shown in Part I, the district court correctly found that the text of Section 330, as well as the context provided by its structure, unambiguously forecloses the IRS's interpretation. As explained in Part II, the district court also correctly found that the context provided by the overall statutory scheme regulating tax-return preparers runs counter to the IRS's interpretation of Section 330. In Part III, Plaintiffs demonstrate that the district court's ruling is also supported by both the legislative history and purpose of Section 330—including proposed amendments that Congress has declined to enact—and the IRS's previous century-long interpretation of the statute.

I. The District Court Correctly Found That Section 330's Text and the Context Provided by the Statute's Structure Unambiguously Foreclose the IRS's New Interpretation of the Statute.

As the district court noted, analysis of a statute begins "with the language of the statute itself." J.A. 19 (internal citation omitted). In this section, Plaintiffs first explain how the district court correctly rejected the IRS's claim that Section 330 was ambiguous because it did not define its terms. Second, Plaintiffs discuss how the district court properly noted that the IRS's interpretation of Section 330 was

unambiguously foreclosed by Section 330(a)(2)(D), which provides crucial context for understanding the meaning of the critical term at issue in this case, "the practice of representatives." Third, Plaintiffs demonstrate how the IRS's reliance on Section 330(a)(2)(C) is misplaced, and fails to offer any indication that "the practice of representatives" means anything other than the meaning indicated by Section 330(a)(2)(D). Fourth, Plaintiffs explain how the IRS's failure to give ordinary meaning to terms such as "representative" also renders its interpretation of Section 330 at odds with the statutory language.

A. The district court correctly rejected the IRS's argument that a statute is ambiguous unless it expressly defines statutory terms.

As it argued before the district court, the IRS argues before this Court that Section 330 is ambiguous because it fails to define its terms. *See* IRS Br. 16, 22, 26. The district court was correct to reject this argument. Statutes are not required to expressly define their terms in order to have unambiguous meaning.

As the district court noted, under *Chevron* step one, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." J.A. 19 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). In the world of statutory interpretation, "[a]mbiguity is a creature not of

definitional possibilities but of statutory context." J.A. 19 (*quoting Brown v. Gardner*, 513 U.S. 115, 118 (1994)).[20]

Moreover, as the district court noted in rejecting this argument below, "the D.C. Circuit has specifically rejected the argument that a statute is ambiguous when it fails to define a broad term." J.A. 19 (citing and quoting *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) ("The lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous, just as the presence of a definition does not necessarily make the meaning clear.")).

B. The district court correctly found that Section 330(a)(2)(D) unambiguously forecloses the IRS's new interpretation of Section 330.

The district court wasted no time zeroing in on a key flaw in the IRS's new interpretation of Section 330: "the text of § 330(a)(2)(D) defines the 'practice of representatives' in a way that does not cover tax-return preparers." J.A. 19. As the district court correctly noted, "while the 'practice of representatives' may not be defined in § 330(a)(1), the very next subsection of § 330 provides critical guidance on what the term means." J.A. 20. Indeed, Section 330(a)(2)(D) "tell[s] us what the representatives do—what their 'practice' is, in the words of both subsections: representatives 'advise and assist persons in presenting their cases.'" J.A. 20.

[20] "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

Having recognized that Section 330(a)(2)(D) is the Rosetta Stone for interpreting Section 330, the district court found that the IRS's attempt to expand the statute's language to cover tax-preparer licensing was bizarre and nonsensical:

> **Filing a tax return would never, in normal usage, be described as "presenting a case."** At the time of filing, the taxpayer has no dispute with the IRS; there is no "case" to present. **This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages** of the process.

J.A. 20 (emphasis added). In other words, "presenting a case" indicates that the type of "practice" contemplated by Section 330 is in tax "controversy" matters, not tax "compliance."

By failing to give ordinary meaning to Section 330(a)(2)(D), the IRS's interpretation is at odds with a fundamental canon of statutory interpretation. "[A]ll words in a statute are to be assigned meaning, and . . . nothing therein is to be construed as surplusage." *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (internal quotations omitted). The IRS's interpretation of 31 U.S.C. § 330 as permitting the IRS to license all "tax return preparers" ignores much of Section 330(a)(2)(D), effectively treating the words as surplusage. The words "presenting their cases" in Section 330(a)(2)(D) indicate an advocacy role for the representative in tax "controversy" matters that goes well beyond the role of a "tax return preparer" as defined by statute. *See* 26 U.S.C. § 7701(a)(36)(A).

As the district court noted, preparing a tax return is nothing like "presenting" a "case." A tax return is informational, and does not contain advocacy or argument. It is simply a (mandatory) self-assessment of one's tax liability that reports financial information, such as income, tax payments, and charitable contributions, as well as any relevant life events, such as a change in marital status, a change of job, or children, and shows the calculations made to determine one's tax liability. Indeed, even the IRS's initial assessment of penalties and taxes is non-adversarial and *ex parte*. *See 3M Co.*, 17 F.3d at 1459 n.11. Taxpayers simply have no "case" to "present" until they enter the world of tax "controversy" (Examination and Appeals). *See supra* Statement of Facts, Part I.

Moreover, as the district court recognized, "[t]he IRS seems to accept that tax-return preparers are not advising and assisting in presenting a case." J.A. 20. As in the district court, the IRS on appeal has only argued that preparation of a tax return amounts to "practice" before the agency under Section 330(a)(1); the agency has never argued that preparing a return is "presenting" a "case" under Section 330(a)(2)(D), and in fact repeatedly indicates that presenting a case is mutually exclusive with preparing a return. *See* IRS Br. 21-22, 31, 37-38.[21]

[21] The IRS has thus waived the novel argument raised in the *amicus curiae* brief filed by five former IRS Commissioners that preparing a tax return is somehow "presenting" a "case." *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) (recognizing that courts should not consider arguments not advanced by a party to the case).

Therefore, as the district court correctly found, the IRS's interpretation of Section 330 is foreclosed by the plain meaning of the statute when one properly assigns ordinary meaning to each statutory provision, including Section 330(a)(2)(D).

C. The IRS misinterprets Section 330(a)(2)(C).

The IRS argues that Section 330(a)(2)(C) undercuts the district court's interpretation of Section 330 because it claims that Section 330(a)(2)(C) presents an alternative type of "practice" to that described in Section 330(a)(2)(D). Therefore, the IRS claims, Section 330(a)(2)(C) "demonstrates that Congress regarded the term practice before the Treasury Department as also including representatives providing other valuable services." IRS Br. 35. The IRS further claims that the district court "entirely overlooked" Section 330(a)(2)(C) and "issued a decision that renders that provision meaningless" because of purported redundancy with Section 330(a)(2)(D). IRS Br. 39.

But this argument is unavailing; the IRS has made crucial interpretive errors that have caused it to misread Section 330(a)(2)(C). First, the agency wrongly conflates "necessary qualifications" and "competency" to reach its erroneous conclusion that the district court's interpretation of Section 330(a)(2)(D) renders Section 330(a)(2)(C) superfluous. Second, the IRS fails to consider the context

provided by the structure of Section 330(a)(2) and ignores critical statutory language.

For the sake of convenience, here is the text of 31 U.S.C. § 330(a):

> (a) Subject to section 500 of title 5, the Secretary of the Treasury may—
>
> (1) regulate the practice of representatives of persons before the Department of the Treasury; and
>
> (2) before admitting a representative to practice, require that the representative demonstrate—
>
> (A) **good character**;
>
> (B) **good reputation**;
>
> (C) **necessary qualifications** to enable the representative to provide to persons valuable service; **and**
>
> (D) **competency** to advise and assist persons in presenting their cases.

(emphasis added).

1. Section 330(a)(2)(C) is not rendered superfluous by the district court's interpretation of Section 330.

The IRS claims that if all instances of the "practice of representatives of persons before the Department of the Treasury" involve advising and assisting persons in presenting their cases, as described in Section 330(a)(2)(D), then Section 330(a)(2)(C) is rendered superfluous. But the IRS's argument relies on the erroneous assumption that "necessary qualifications" and "competence" are identical, and also overlooks the original language of the statute, which offers further clarity on this point.

As an initial matter, Section 330(a)(2)(C)-(D) are connected by the word "and" at the end of Section 330(a)(2)(C), which indicates that the two provisions are intended to be read in conjunction, not as alternative options. Moreover, despite the IRS's claim of redundancy, Sections 330(a)(2)(C) and 330(a)(2)(D) authorize Treasury to verify different qualities about prospective practitioners. Section 330(a)(2)(C) authorizes Treasury to verify that representatives have "necessary qualifications," while Section 330(a)(2)(D) authorizes Treasury to verify "competency." These two terms are not identical and permit Treasury to require a demonstration of different attributes before admitting a representative to practice before Treasury. For example, one may be a very skilled and experienced lawyer who is fully *competent* to represent clients in a particular type of proceeding, but until one is admitted to the bar of a particular court, one does not have the *necessary qualifications* to represent someone in that court. Thus, even on their face, these two terms do not have the same meaning. Sections 330(a)(2)(C) and 330(a)(2)(D) are therefore not redundant.

This is reinforced by the original statutory language that existed prior to the wholly stylistic 1982 revision. *See supra* note 7 and accompanying text. As passed in 1884, the provisions now codified as Section 330(a)(2)(C)–(D) authorized Treasury to require that prospective representatives show that they were "possessed of the necessary qualifications to enable them to render such claimants

valuable service, **and otherwise competent** to advise and assist such claimants in the presentation of their cases." J.A. 56 (emphasis added). The use of "otherwise" further demonstrates that Congress intended the provisions now codified as Sections 330(a)(2)(C) and 330(a)(2)(D) to be read in conjunction—not as alternatives, as the IRS claims—and also accounts for any possible overlap between "necessary qualifications" and "competency" in the current version of the statute.

2. The IRS fails to consider the context provided by the structure of Section 330(a)(2).

The IRS claims that Section 330(a)(2)(C) "confirms that Congress did not express an unambiguous intent to limit the term 'practice of representatives before the Treasury Department' in 31 U.S.C. § 330(a)(1) to only those representatives who assist others in presenting their *cases* to the Department." IRS Br. 34-35. Instead, the IRS argues, Section 330(a)(2)(C) "demonstrates that Congress regarded the term practice before the Treasury Department as also including representatives providing other valuable services." IRS Br. 35. In contrast to Section 330(a)(2)(C), the IRS argues that Section 330(a)(2)(D) "merely equips the Secretary with the authority to inquire into a representative's competency to assist and advise in the presentation of cases – as to those representatives actually providing those particular services." IRS Br. 37-38.

The IRS's interpretation thus essentially views the four subsections under Section 330(a)(2)—or at least Subsections 330(a)(2)(C) and (D), since it fails to mention (A) and (B)—as categories of practitioners. So, under the IRS's interpretation of Section 330(a)(2), some taxpayers might merely obtain the "valuable services" of a Section 330(a)(2)(C) practitioner, while other taxpayers might need a Section 330(a)(2)(D) practitioner to "advise and assist [them] them in presenting their cases."

However, the IRS has critically misinterpreted Section 330(a)(2)(C) by failing to consider its language and its context within Section 330(a)(2). *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) (noting that "[an agency] cannot uncouple the first sentence of [a statutory section] from the rest of the section in order to expand its authority beyond the aims and limits of the section as a whole").[22] Viewed in context, the IRS's interpretation of Section 330(a)(2) makes little sense given that subsections (A) and (B) under Section 330(a)(2) are "good character" and "good reputation," respectively. They are plainly not categories of representation, and there is no obvious answer why these provisions should be read any differently than subsections (C) and (D). In addition, the word "and" at the end of Section 330(a)(2)(C) indicates that the four subsections of Section 330(a)(2) are intended to be read in conjunction, and not as

[22] In fact, Section 330(a) was all part of a single sentence when passed in 1884. *See* J.A. 55-56.

alternatives. Thus, Section 330(a)(2) is clearly not an à la carte list of potential services that Treasury practitioners may offer (and for which the IRS may require a demonstration of proficiency), but a list of attributes that may be required of each and every practitioner before Treasury. Indeed, as the district court correctly noted—in a clear indication it did not overlook this subsection—Section 330(a)(2) "allows the IRS to require certain qualifications before admitting a 'representative to practice.'" J.A. 21.

D. The IRS fails to assign ordinary meaning to the statutory term "representative(s)."

Section 330 authorizes the Secretary to "regulate the practice of *representatives of persons* before the Department of the Treasury." Importantly, the IRS's interpretation of Section 330 fails to give ordinary meaning to the key term "representative(s)," even though it appears multiple times in relevant parts of the statute, including in the key phrase, "the practice of representatives of persons before the Department of the Treasury." Instead, the IRS baldly asserts in a footnote that "[t]here can be no serious dispute that paid tax-return preparers are 'representatives of persons.'" IRS Br. 31 n.11. The IRS offers no explanation for this conclusory claim, even though this was a key issue of dispute (and briefing) before the district court. *See, e.g.*, Defs.' Mem. Supp. Mot. Summ. J., ECF No. 13-1, at 32-34. Tax-return preparers are not "representatives" and the IRS has recognized this in official statements and publications.

1. Tax-return preparers are not "representatives."

Merely preparing a tax return for a paying customer is not an act of representation; a tax-return preparer is no more a "representative" than an outside bookkeeper who is hired annually to organize accounts, or a mechanic hired to repair a car to pass a government inspection. "Representatives" are ordinarily understood to be agents of the represented party, who act on behalf of the represented party and can even obligate the represented party (if acting within the scope of their agency).[23] But the statutory meaning of "tax return preparer" neither imposes nor implies any requirement of representation or of an agency relationship between the preparer and the taxpayer. *See* 26 U.S.C. § 7701(a)(36)(A). Notably, taxpayers must ordinarily sign their own tax returns (and bear legal responsibility for their contents) even when their return is prepared by a tax-return preparer. Furthermore, as a general matter, "tax return preparers" are independent contractors, not agents or fiduciaries.[24]

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[23] The term "representative" is ordinarily defined as "[o]ne that serves as a delegate or agent for another." *The American Heritage Dictionary of the English Language*, http://www.ahdictionary.com/word/search.html?q=representative (last visited May 15, 2013); *see also Black's Law Dictionary* 1328 (8th ed. 2004) ("[o]ne who stands for or acts on behalf of another . . . See AGENT").

[24] The statutory definition of "tax return preparer" excludes employees who prepare tax returns for their regular employer, as well as anyone who prepares a return as a fiduciary. *See* 26 U.S.C. § 7701(a)(36)(B)(ii)-(iii).

2. Even the IRS recognizes that tax-return preparers are not "representatives."

The IRS fails to assign ordinary meaning to the term "representatives" because even the IRS itself does not actually view "tax return preparers" as "representatives" and has long recognized the distinction between the two. *See supra* note 9.[25] IRS regulations also recognize a clear distinction between "representation" and tax-return preparation. Even the new Circular 230 regulations tacitly admit that the true meaning of "representation" before the IRS is **"**representing a taxpayer **before an officer or employee of the [IRS]**." 31 C.F.R. § 10.51(a)(18) (emphasis added). In addition, under 26 C.F.R. § 601.504(a), "[r]epresentation" of a taxpayer requires obtaining that taxpayer's power of attorney. *See supra* Statement of Facts, Part I.B-C. But preparing tax returns for taxpayers does not require, and has never required, preparers to obtain the power of attorney from those taxpayers. *See, e.g.*, Defs.'Answer ¶¶ 37, 57. Thus, tax-return preparation is not "representation" under the IRS's own definition of the term in its regulations governing taxpayer "representatives."

[25] Further underscoring the difference between unenrolled tax-return preparers (designated as RTRPs in the latest revision of Circular 230) and "representatives" historically regulated under Circular 230, the IRS determined that the confidentiality privilege for "federally authorized practitioners" under 26 U.S.C. § 7525 will not apply to RTRPs "because the advice a registered tax return preparer provides ordinarily is intended to be reflected on a tax return and is not intended to be confidential or privileged." J.A. 68.

Despite its attempt to gloss over this issue, the IRS's failure to give ordinary meaning to the term "representative(s)" in Section 330, coupled with its own recognition that "tax return preparers" are not actually "representatives," shows that its interpretation of Section 330 is foreclosed by the plain meaning of the statute.

II. The District Court Correctly Found That the Overall Statutory Scheme Regulating Tax-Return Preparers Unambiguously Forecloses the IRS's New Interpretation of Section 330.

A reviewing court must also examine a statute in the context of the overall statutory scheme enacted by Congress in order to discern its meaning, "and fit, if possible, all parts into an harmonious whole." *See Brown & Williamson*, 529 U.S. at 133 (internal quotation omitted). Applying this principle, the district court found two reasons that the overall statutory scheme unambiguously forecloses the IRS's interpretation of Section 330. First, the district court observed that the IRS's interpretation of Section 330 would allow the IRS to use the penalty provisions of Section 330(b) to sidestep Congress's tightly controlled system of penalties for tax-return preparers. Second, the district court recognized that the IRS's interpretation of Section 330 would effectively permit Section 330(b) to displace 26 U.S.C. § 7407, a federal statute permitting injunctions against tax-return preparers. In this section, Plaintiffs explain why the district court's rulings on these two issues were correct, and responds to the IRS's claims that there is merely permissible "statutory

overlap" between Section 330(b) and the Title 26 statutes regulating tax-return preparers.

A. The IRS's new interpretation of Section 330 sidesteps the existing Title 26 statutory scheme that comprehensively regulates penalties that may be imposed on tax-return preparers.

In this section, Plaintiffs first explain why the district court correctly found that the IRS's expansive new interpretation of Section 330 would impermissibly enable it to use the penalty provisions of Section 330(b) to bypass Congress's tightly controlled regime of statutory penalties for tax-return preparers. Second, Plaintiffs demonstrate how tightly Congress controls and frequently fine-tunes the statutory scheme regulating tax-return preparers. Third, Plaintiffs respond to the IRS's arguments that such statutory "overlap" is permissible.

1. The district court rightly ruled that the IRS's new interpretation of Section 330 would allow it to bypass Congress's careful, regimented scheme of penalties for tax-return preparers.

The district court first found that the IRS's new interpretation of Section 330 creates an impermissible end-run around the "careful, regimented schedule of penalties for misdeeds" already enacted by Congress in Title 26 to regulate tax-return preparation while tightly controlling the potential monetary penalties for violations. J.A. 22. Listing many of these provisions and the corresponding monetary penalty limits, J.A. 22-23, the district court noted that, "Title 26, in fact, has at least ten penalties *specific to tax-return preparers*, each of which targets

particular conduct related to preparing and filing tax returns, and each of which comes with a specific fine." J.A. 22; *see*, *e.g.*, 26 U.S.C. §§ 6694, 6695, 6713, 7216. The problem is that "if § 330 covers tax-return preparers, the IRS would have the discretion – with few restraints – to impose an array of penalties" under Section 330(b) for the same behavior that is covered by these other, much more specific statutes. J.A. 23. As a result, such "unstructured independence by the IRS would trample the specific and tightly controlled penalty scheme in Title 26." J.A. 23.

Noting the statutory canon that specific statutes override general statutes, even when "when both statutes authorize similar action," the court observed that the general/specific canon holds "particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." J.A. 24 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012)). The district court concluded that the IRS's expansive interpretation of Section 330 is foreclosed "[b]ecause the U.S. Code already sets forth a comprehensive scheme targeting specific problems with specific solutions" which would be too easily bypassed if the IRS could use disciplinary proceedings under Section 330(b) to evade those specific limitations and requirements. J.A. 24.

2. The overall statutory scheme regulating tax-return preparers is tightly controlled by Congress and is periodically adjusted in a very specific, delineated manner.

Despite the IRS's claims that it has been granted "broad" authority and powers, IRS. Br. 3, 25, Congress has never granted plenary authority to the IRS to license tax-return preparers under Section 330 or any other statute. Instead, Congress has passed statutes expressly delegating specific, delineated authority to the IRS to regulate tax preparers in particular, and limited, circumstances.[26] *See, e.g.*, 26 U.S.C. §§ 6694(a)-(b), 6695. Congress has tightly controlled these grants of authority, and periodically adjusts the specified penalties imposed. In 2011, Congress amended 26 U.S.C. § 6695(g) to increase the penalty from $100 to $500 on tax-return preparers who fail to exercise due diligence in preparing a return with an earned income credit.[27] Similarly, subsections (a)-(c) of 26 U.S.C. § 6695 were amended in 1989 to increase the penalty from $25 to $50.[28] Similar amendments

[26] Congress knows how to clearly delegate broad licensing authority to Treasury, which looks very different from the statutory scheme for tax-return preparers. *See, e.g.*, 26 U.S.C. § 7001 (persons collecting foreign payment of interest or dividends "shall obtain a license from the Secretary and shall be subject to such regulations . . . as the Secretary shall prescribe").

[27] United States-Korea Free Trade Agreement Implementation Act of 2011, Pub. L. No. 112-41, Title V, § 501(a), 125 Stat. 428, 459.

[28] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Title VII, § 7733(a)-(d), 103 Stat. 2105, 2402-03.

to the penalties in 26 U.S.C. § 6694 were made in 1989, 2007, and 2008.[29] As the district court observed, "[i]f the IRS had open-ended discretion under § 330(b) to impose a range of monetary penalties on tax-return preparers," J.A. 22, surely Congress would not bother tinkering with these Title 26 penalties.

Congress also frequently adjusts the specific powers granted to the IRS to regulate tax-return preparers. In November 2009, Congress mandated the use of e-filing by all tax-return preparers who file 10 or more tax returns beginning in January 2011.[30] Congress also found it necessary to give specific statutory authorization to the Secretary to require the use of PTINs (unique identification numbers) by tax-return preparers.[31] If Congress thought it had already given the IRS plenary power to regulate tax-return preparers under Section 330, it would not have needed to pass these specific statutory provisions.

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[29] *Id*. at 2404; U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, Pub. L. No. 110-28, Title VIII, § 8246(b), 121 Stat. 112, 203; Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, Title V, § 506(a), 122 Stat. 3765, 3880.

[30] Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, § 17, 123 Stat. 2984, 2996 (codified at 26 U.S.C. § 6011(e)(3)).

[31] IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3710(a), 112 Stat. 685, 779 (codified at 26 U.S.C. § 6109(a)(4)).

3. The IRS fails to rebut the district court's holding that the IRS's new interpretation of Section 330 would render other statutes superfluous.

The IRS attempts to discredit the district court's opinion by arguing that statutory "overlap" between Section 330 and other Title 26 statutes is minimal and permissible, s*ee* IRS Br. 39-45, but fails to undercut the fundamental soundness of the district court's analysis of the overall statutory scheme enacted by Congress to regulate tax-return preparation. The district court compared Section 330 with the other statutes because, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." J.A. 22 (quoting *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012)). Below, Plaintiffs first explain how the IRS fails to minimize the statutory "overlap" in its attempt to draw a distinction based on the purpose of the penalties under Section 330(b) and the purpose of the Title 26 penalty provisions. Plaintiffs then respond to the IRS's mistaken characterization of the district court's analysis of the statutory scheme, which ignores the purpose of *Chevron* step one.

a. The IRS's attempt to distinguish between the penalties that would be available under its interpretation of Section 330(b) and the penalties currently available under Title 26 draws a distinction without a difference.

The IRS first attempts to minimize the statutory "overlap" between Section 330 and the other Title 26 statutes by differentiating between the penalties against

tax-return preparers that would be available under Section 330(b) under the IRS's interpretation of the statute, and the statutory penalties for tax-return preparers that are currently available under the Internal Revenue Code (such as those at 26 U.S.C. §§ 6694, 6695, 6713, 7216). IRS Br. 23. The IRS claims that they serve "different tax-administration purposes." *Id*. However, both are directed toward enforcing the tax code and related regulations, and the IRS's description of the purpose of the Title 26 penalties seems to apply equally well to its own understanding of Section 330(b). Although the IRS claims that the Title 26 penalties are distinguishable because they only apply after the fact, the same is true of any penalties that might be imposed under the IRS's interpretation of Section 330(b), as required by due process.

b. The IRS mischaracterizes the district court's reasoning on statutory "overlap" and thus fails to diminish the strength of the district court's interpretation of Section 330.

The IRS also argues that the statutory "overlap" between Section 330 and the other Title 26 statutes is permissible because, "where statutes overlap, so long as there is no positive repugnancy between the two laws, courts must give effect to both." IRS Br. at 41 (quotations omitted).[32] This argument mischaracterizes the purpose of the district court's analysis of the overall statutory scheme, wrongly

[32] Both of the cases quoted by the IRS on this point are inapposite because neither are applying *Chevron* analysis—instead, they are simply noting permissible overlap between two statutes that are not mutually exclusive.

implying that the district court somehow suggested that the agency *cannot enforce* similar or overlapping statutory provisions. This misses the point—the question at issue under *Chevron* step one is not whether different statutes can permissibly overlap to some degree, but whether the overall statutory scheme offers context for understanding the meaning of Section 330, such as by indicating potential interpretations to be avoided because they would render other statutes redundant or superfluous. Under *Chevron*, courts must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (internal quotations omitted). This is in part because, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.*

Here, the district court identified a number of subsequently enacted statutory provisions in Title 26 that specifically regulate tax-return preparers. Following the general/specific canon of statutory construction, the court found that the more recent and specific statutes regulating tax-return preparers in Title 26 *give context* for the proper interpretation of the older and more general Section 330. *See* J.A. 24. Applying the general/specific canon of statutory construction, the district court found that assigning the IRS's interpretation to Section 330 would render many of the Title 26 penalties superfluous, J.A. 23-24, a result that runs against a cardinal

rule of statutory interpretation. *See RadLAX*, 132 S. Ct. at 2071; *see also Hawke*, 211 F.3d at 644. Thus, the court properly applied the canons of statutory construction in order to discern what context the overall statutory scheme could provide for understanding the meaning of Section 330, and to ensure that it gave full meaning and effect to each statute in that scheme.

B. The district court correctly observed that the IRS's new interpretation of Section 330 would displace 26 U.S.C. § 7407, a federal statute that provides for injunctions against tax-return preparers.

The district court also found that the expansive IRS interpretation of Section 330 would effectively displace another Title 26 statute designed to help regulate tax-return preparation, 26 U.S.C. § 7407 ("Section 7407"), which allows the IRS to seek injunctions in an Article III court to prevent tax-return preparers from further engaging in tax-return preparation. J.A. 25-27. Below, Plaintiffs first explain why the court was right to identify this problem. Next, Plaintiffs address the superficial distinctions the IRS relies on in attempting to counter this concern. Finally, Plaintiffs debunk the IRS's attempt to use 26 U.S.C. § 7408 ("Section 7408") to show that there already was statutory overlap between Section 330(b) and a statutory injunction provision.

1. The district court recognized that injunctions against tax-return preparers would be eclipsed by disbarment under the IRS's expansive new interpretation of Section 330(b).

Section 330(b) permits the IRS to "disbar" "representatives." If "representatives" is interpreted to include tax-return preparers, as the IRS argues, then "disbarment" of tax-return preparers under Section 330(b) would be duplicative of the injunctions against tax-return preparation available under Section 7407. As the district court noted, "if § 330 covers tax-return preparers, the IRS could sidestep every protection § 7407 affords—judicial review, the demanding standards for the extraordinary remedy of an injunction, and the elevated hurdle for enjoining preparation of tax returns (instead of further violation)—while effectively obtaining the same result." J.A. 26. This effectively relegates Section 7407 to the statutory dustbin, because Section 330(b) presents fewer obstacles to the agency while achieving the same result.

The Section 7407 problem further demonstrates how the IRS's broad interpretation of Section 330 is fatally at odds with the statutory scheme that Congress enacted to regulate the field of tax-return preparation. The IRS's overly broad interpretation of Section 330 raises the question: Why would Congress have bothered to pass Section 7407 (or the other Title 26 statutes regulating tax-return preparation) if Treasury already had equal or greater powers under Section 330? It would not, as the district court concluded. The IRS's interpretation of Section 330

would swallow the statutory scheme that Congress has put in place to regulate the field of tax-return preparation.

2. The IRS unduly emphasizes superficial differences in enforcement mechanisms to claim that Section 7407 would not be displaced by its new interpretation of Section 330.

The IRS claims that because the enforcement mechanism is not completely identical between IRS disbarment under Section 330(b) and an injunction against preparing tax returns under Section 7407, there is "no true overlap" between the statutes and thus Section 7407 would not technically be rendered entirely superfluous by the IRS's interpretation of Section 330. IRS Br. 23. But this is a distinction without a meaningful difference, as the district court itself already recognized, noting this minor distinction but observing that, as a practical matter, "IRS disbarment would surely be sufficient in almost every case." J.A. 26. Thus, the real-world effect of the IRS's interpretation of Section 330(b) would be to displace Section 7407 (and its accompanying protections for tax preparers, such as judicial review) because, as the district court noted, "with § 330(b) and § 7407 leading to the same destination, but § 330(b) offering a far easier path, it is hard to imagine the IRS turning to § 7407 more than once in a blue moon." J.A. 26.

3. Section 7408 is a red herring.

In an attempt to cloud the waters about whether its interpretation of Section 330 would displace Section 7407, the IRS attempts to capitalize on an apparent

overlap between Section 7408—a statute that neither party relied on before the district court—and the penalties currently available against "representatives" under Section 330(b) to argue that there is already overlap between Section 330(b) and statutory injunctions. IRS Br. 43-44.

Although Section 7408 does provide "remedies against the same people" as Section 330(b), IRS Br. 44, it provides an entirely different remedy from Section 330(b). Under Section 7408, a court may only enjoin someone from "further engaging in specified [illegal] conduct." Such a narrow, targeted prohibition against only *future illegal conduct* is simply unavailable under Section 330(b), because penalties such as disbarment or suspension prevent "representatives" from further engaging in the *otherwise legal conduct* of "practice." This stands in stark contrast to Section 7407, which authorizes injunctions against future tax-return preparation, a remedy that would effectively be identical to disbarment under Section 330(b) if the term "representatives" in Section 330 were interpreted to included tax-return preparers, as the IRS urges.

III. The Legislative History and Purpose of Section 330 and the IRS's Previous Century-Long Interpretation of the Statute Also Support the District Court's Ruling.

Although not relied on by the district court, both the legislative history of Section 330—including proposed amendments to the statute that were not enacted—and the IRS's past practice (prior to December 2009) in consistently

interpreting Section 330 as not granting any authority to license tax-return preparers also support the district court's ruling.

A. The legislative history and purpose of Section 330 also foreclose the IRS's new interpretation and support the district court's ruling.

The legislative history and purpose of Section 330 also foreclose the IRS's interpretation of Section 330. Congress could not have contemplated empowering the IRS to regulate tax-return preparers when it originally passed the statute in 1884, nor has Congress since made any substantive amendments to the statute that would expand the scope of persons who may be regulated beyond the statute's original meaning. In fact, in the past eight years, Congress has considered nine bills that would amend Section 330 to give the IRS authority to license tax-return preparers, but it has not passed any of them. This is telling; not only does Congress apparently not believe it has already granted this authority to the IRS, but it also seems to be aware that the statutory text would need to be amended to allow for tax-preparer licensing.

1. In passing the 1884 Act now codified at Section 330, Congress did not contemplate—let alone authorize—allowing the IRS to impose a licensing scheme on tax-return preparers.

For regulations to be upheld as valid under *Chevron*, they "must be found to be consistent with the congressional purposes underlying the authorizing statute." *Planned Parenthood*, 712 F.2d at 655. Challenged regulations "can be sustained

only if [the] 'reviewing court [is] reasonably able to conclude that the grant of authority contemplates the regulations issued.'" *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979)).

Here, placing the statute in context by examining its overall purpose and legislative history forecloses the interpretation assigned by the IRS. The Act eventually codified as Section 330 was passed in an era when Congress could not possibly have intended to empower the IRS to license tax-return preparers—it was passed nearly 30 years before the modern income tax[33]—and instead only gave Treasury the authority to regulate those who engaged in advocacy before it on behalf of others, much like a court. Congressional intent has never been altered by the amendments to the statute since that time—indeed, the only changes to the operative clauses of Section 330(a) have been stylistic modifications.

After the Civil War, a large number of claims were brought by soldiers against the federal government for lost horses and other property. J.A. 63. Many attorneys and claims agents competed to present these claims, sometimes in unscrupulous ways, burdening federal departments with resolving related disputes. *Id.* In response, Congress passed the Act of July 7, 1884, giving the Secretary the power to regulate, recognize, and disqualify those representing claimants before

[33] *See* Revenue Act of 1913, Pub. L. No. 63-16, ch. 16, 38 Stat. 114.

Treasury, as a proviso to an appropriation for "horses and other property lost in the military service." J.A. 55-56, 64. *See supra* Statement of Facts, Part II.A.

The text of the June 6, 1884 floor debate on the proviso confirms that its purpose was to regulate attorneys and claims agents who were advocating for clients before officers of the Treasury. *See* J.A. 58-61 (particularly the remarks of Rep. Townshend). For example, Rep. Keifer of Ohio noted the importance of having representatives who can "present the claims properly and intelligently before the proper officers of the Government." J.A. 60. Rep. Townshend explained that problems arose because many soldiers are "unable to be here in person" to attend to their claims. J.A. 61. These remarks, among others, indicate that the "practice of representatives" to be regulated under the 1884 Act involved advocacy in a live "in person" hearing, to prevail in claims against the government for property lost due to military action. Representatives in such proceedings, unlike tax-return preparers, plainly engaged in advocacy on behalf of their clients and "present[ed] their cases."

In view of this legislative history, it is hard to imagine how Congress could be said to have contemplated and authorized the sweeping changes imposed by the RTRP licensing scheme under Section 330. In evaluating a claim under *Chevron* step one, a reviewing court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic

and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133 (rejecting FDA's attempt to regulate tobacco because it required a strained interpretation of "safety" and ignored the plain implications of subsequent tobacco-specific legislation). Thus, an interpretation should be rejected when "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id*. at 160. The same logic applies here. If Congress had intended for a statute governing tax controversy work to also delegate authority to the IRS to license hundreds of thousands of tax-return preparers engaged in tax compliance work, it would not likely have done so "in so cryptic a fashion," *id*., particularly given the frequency and specificity with which Congress amends the relevant statutes governing tax-return preparer regulation, *see supra* Part II.A.2, as well as Section 330 itself, as discussed next.

2. Congress closely controls the authority granted to the IRS under Section 330.

Congress has kept a tight rein on the authority it grants to the IRS under Section 330, periodically amending the statute to grant specific authority. For example, Congress specifically amended Section 330(b) by adding "or censure" to the list of potential disciplinary measures available in order to authorize the IRS to discipline representatives through "censure" (even though the IRS already had the

authority to disbar or suspend them).[34] Given that Congress bothered to specifically authorize the IRS to "censure" representatives, it strains credulity to think that a far more drastic change, such as bringing hundreds of thousands of tax-return preparers under the regulatory authority of the statute, would not require a statutory amendment. In fact, Congress has considered such amendments, but rejected them, as discussed next.

3. The repeated introduction of bills to amend Section 330 to authorize tax-preparer licensing indicates that Congress does not believe it has already granted the IRS the authority to license tax-return preparers.

Since 2005, Congress has considered nine bills, including one currently pending in the House (H.R. 1570, the Taxpayer Protection and Preparer Fraud Prevention Act of 2013), that would amend Section 330 in order to grant the IRS the authority to regulate "tax return preparers" under that statute. *See supra* note 14. None have passed.

This language is typical of these proposed amendments to Section 330:

> (a) Authorization.—Section 330(a)(1) of title 31, United States Code, is amended by inserting '(including compensated preparers of Federal tax returns, documents, and other submissions)' after 'representatives'.

[34] American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 822(a), 118 Stat. 1418, 1586-87.

S. 1219, 110th Cong. § 4 (2007). Notably, this proposed amendment to Section 330 refers to itself as an "[a]uthorization," indicating that Congress had not previously authorized the IRS to regulate tax-return preparers under Section 330.

The most recent proposed bill would add a new subsection (e) to Section 330, authorizing the IRS to "regulate tax return preparers **who do not practice as representatives** of persons before the Department of the Treasury." Taxpayer Protection and Preparer Fraud Prevention Act of 2013, H.R. 1570, 113th Cong. § 2(a) (emphasis added). The remainder of the proposed Section 330(e) generally follows the language of Section 330(a) except that it allows Treasury to require that a tax preparer demonstrate "competency to perform the functions of a tax return preparer" (rather than Section 330(a)(2)(D)'s "competency to advise and assist persons in presenting their cases"). The language of this bill, which was introduced several months after the district court decision in this case, indicates agreement with the district court's interpretation of Section 330 and an understanding that an additional grant of authority would be required for the IRS to license tax-return preparers.

These proposed amendments would hardly be necessary if Congress believed it had already authorized the IRS to license tax-return preparers under the existing language of Section 330. After all, "Congress cannot be presumed to do a futile thing." *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997); *see also*

Hawke, 211 F.3d at 644. Rather, the existence of these bills indicates that Congress does not believe it has granted such licensing authority to the IRS, and the failure of the bills to pass indicates that Congress has not reached any consensus to grant such authority. The IRS simply has not received congressional authorization to license tax-return preparers in this manner.

B. The IRS's contrary interpretation of Section 330 for the past century is indicative of the statute's true meaning and the IRS's failure to explain the sudden reversal in its interpretation is telling.

The fact that the IRS's stated policies and actions for the past century directly contradict its current interpretation is persuasive evidence that Section 330 does not empower the IRS to license tax-return preparers. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490-91, 498 (finding an agency's "own actions for the last 65 years suggest[ive]" of the true meaning of the statute, and citing as a weakness in an agency's interpretation of a statute that it "flouts six decades of consistent [agency] understanding of its authority"); *see also Ry. Labor Execs.' Ass'n*, 29 F.3d at 669 (explaining that "[w]e find it telling that only in the last five years of its sixty-year history has the Board claimed [new authority under the statute]," and describing the agency's recent regulatory changes as "much more than a midstream change in course"). Indeed, it is quite peculiar that the IRS has employed its expertise in this area for such a long time before finally "realizing" it has statutory

authority to implement these regulations without any legislative change whatsoever.

As the district court found, "Plaintiffs seem to be correct that the new Rule contradicts previous interpretations of § 330 . . . the Court could find no explanation for the IRS's flip-flop in the new Rule." J.A. 29.[35] For over a century, Treasury had never taken the position that the IRS was entitled to license tax-return preparers under Section 330, and the IRS repeatedly stated—to Congress and the American public—that Section 330 did not grant it power to regulate tax-return preparers. *See supra* notes 9-12. The IRS then abruptly reversed its position in December 2009 without any explanation for the change. *See* A.R. at 000159; *see also* J.A. 68.

This sudden, unexplained reversal in the agency's century-long interpretation of Section 330, which was issued after the failure of several proposed bills amending Section 330 to give the IRS the same authority, indicates that the IRS is impermissibly engaging in "a wholesale attempt to rewrite the statute and history." *Ry. Labor Execs.' Ass'n*, 29 F.3d at 669.

[35] As explained *supra* in note 19, Plaintiffs presented arguments before the district court under both steps of *Chevron*. This argument is particularly well-presented under *Chevron* step two. An unexplained reversal of an agency's long-held interpretation fails the reasonableness inquiry under *Chevron* step two. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (an agency's change in policy is not invalidating *if* "the agency adequately explains the reasons for a reversal of policy," which the IRS has not done here.).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of May, 2013.

/s/ Scott G. Bullock

/s/ Dan Alban

William H. Mellor
Scott G. Bullock
Dan Alban
Ari S. Bargil
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320, Fax: (703) 682-9321
Email: wmellor@ij.org; sbullock@ij.org;
dalban@ij.org, abargil@ij.org

Counsel for Plaintiffs-Appellees

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Dated: May 17, 2013

/s/ Dan Alban
Counsel for Plaintiffs-Appellees

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I hereby certify that on this 17th day of May, 2013, I caused this Brief of Plaintiffs-Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Richard Farber
Gilbert S. Rothenberg
U.S. DEPARTMENT OF JUSTICE
Post Office Box 502
Washington, DC 20044
(202) 514-29598

Counsel for Appellants

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/s/ Dan Alban
Counsel for Plaintiffs-Appellees

ADDENDUM

ADDENDUM

26. U.S.C. § 6694. Understatement of taxpayer's liability by tax return preparer.

(a) Understatement due to unreasonable positions.

(1) In general. If a tax return preparer--

(A) prepares any return or claim of refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2), and

(B) knew (or reasonably should have known) of the position,
such tax return preparer shall pay a penalty with respect to each such return or claim in an amount equal to the greater of $ 1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Unreasonable position.

(A) In general. Except as otherwise provided in this paragraph, a position is described in this paragraph unless there is or was substantial authority for the position.

(B) Disclosed positions. If the position was disclosed as provided in section 6662(d)(2)(B)(ii)(I) and is not a position to which subparagraph (C) applies, the position is described in this paragraph unless there is a reasonable basis for the position.

(C) Tax shelters and reportable transactions. If the position is with respect to a tax shelter (as defined in section 6662(d)(2)(C)(ii)) or a reportable transaction to which section 6662A applies, the position is described in this paragraph unless it is reasonable to believe that the position would more likely than not be sustained on its merits.

(3) Reasonable cause exception. No penalty shall be imposed under this subsection if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith.

(b) Understatement due to willful or reckless conduct.

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of--

(A) $ 5,000, or

(B) 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Willful or reckless conduct. Conduct described in this paragraph is conduct by the tax return preparer which is--

(A) a willful attempt in any manner to understate the liability for tax on the return or claim, or

(B) a reckless or intentional disregard of rules or regulations.

(3) Reduction in penalty. The amount of any penalty payable by any person by reason of this subsection for any return or claim for refund shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

(c) Extension of period of collection where preparer pays 15 percent of penalty.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is a tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Preparer must bring suit in district court to determine his liability for penalty. If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(d) Abatement of penalty where taxpayer's liability not understated. If at any time there is a final administrative determination or a final judicial decision that there was no understatement of liability in the case of any return or claim for refund with respect to which a penalty under subsection (a) or (b) has been assessed, such assessment shall be abated, and if any portion of such penalty has been paid the amount so paid shall be refunded to the person who made such payment as an overpayment of tax without regard to any period of limitations which, but for this subsection, would apply to the making of such refund.

(e) Understatement of liability defined. For purposes of this section, the term 'understatement of liability' means any understatement of the net amount payable with respect to any tax imposed by this title or any overstatement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d), the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

(f) Cross reference. For definition of tax return preparer, see section 7701(a)(36).

26 U.S.C. § 6695. Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) Failure to furnish copy to taxpayer. Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with section 6107(a) with respect to such return or claim shall pay a penalty of $ 50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $ 25,000.

(b) Failure to sign return. Any person who is a tax return preparer with respect to any return or claim for refund, who is required by regulations prescribed by the Secretary to sign such return or claim, and who fails to comply with such regulations with respect to such return or claim shall pay a penalty of $ 50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $ 25,000.

(c) Failure to furnish identifying number. Any person who is a tax return preparer with respect to any return or claim for refund and who fails to comply with section 6109(a)(4) with respect to such return or claim shall pay a penalty of $ 50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $ 25,000.

(d) Failure to retain copy or list. Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with section 6107(b) with respect to such return or claim shall pay a penalty of $ 50 for each such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to any return period shall not exceed $ 25,000.

(e) Failure to file correct information returns. Any person required to make a return under section 6060 who fails to comply with the requirements of such section shall pay a penalty of $ 50 for--

(1) each failure to file a return as required under such section, and

(2) each failure to set forth an item in the return as required under section,

unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to any return period shall not exceed $ 25,000.

(f) Negotiation of check. Any person who is a tax return preparer who endorses or otherwise negotiates (directly or through an agent) any check made in respect of the taxes imposed by this title which is issued to a taxpayer (other than the tax return preparer) shall pay a penalty of $ 500 with respect to each such check. The preceding sentence shall not apply with respect to the deposit by a bank (within the meaning of section 581) of the full amount of the check in the taxpayer's account in such bank for the benefit of the taxpayer.

(g) Failure to be diligent in determining eligibility for earned income credit. Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by the Secretary by regulations with respect to determining eligibility for, or the amount of, the credit allowable by section 32 shall pay a penalty of $ 500 for each such failure.

26 U.S.C. § 7407. Action to enjoin tax return preparers.

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person who is a tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as a tax return preparer may be commenced at the request of the Secretary. Any action under this section shall be brought in the District Court of the United States for the district in which the tax return preparer resides or has his principal place of business or in which the taxpayer with respect to whose tax return the action is brought resides. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such tax return preparer or any taxpayer.

(b) Adjudication and decrees. In any action under subsection (a), if the court finds--

(1) that a tax return preparer has--

(A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return preparer,

(C) guaranteed the payment of any tax refund or the allowance of any tax credit, or

(D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct. If the court finds that a tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as a tax return preparer.

26 U.S.C. § 7408. Actions to enjoin specified conduct related to tax shelters and reportable transactions.

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree. In any action under subsection (a), if the court finds--

(1) that the person has engaged in any specified conduct, and
(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) Specified conduct. For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is--

(1) subject to penalty under section 6700, 6701, 6707, or 6708, or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

(d) Citizens and residents outside the United States. If any citizen or resident of the United States does not reside in, and does not have his principal place of business in, any United States judicial district, such citizen or resident shall be treated for purposes of this section as residing in the District of Columbia.