IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SABINA LOVING; ELMER KILIAN; and JOHN GAMBINO, Plaintiffs, v. UNITED STATES OF AMERICA; INTERNAL REVENUE SERVICE; and DOUGLAS H. SHULMAN, COMMISSIONER OF INTERNAL REVENUE, Defendants.	)	No. 1:12-cv-00385-JEB

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' Opposition ("Pl. Opp.") fails in that it only reiterates the many and varied arguments previously asserted in Plaintiffs' Opening Memorandum. ("Pl. Mem."). But the Secretary of the Treasury is vested with both inherent and express statutory authority to regulate those who practice before the Treasury, including before the Internal Revenue Service ("Service"). Plaintiffs' Opposition fails to come to grips with the Secretary's inherent authority and also misreads the Secretary's explicit authority to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1); see also 31 U.S.C. § 321; 5 U.S.C. § 301.

Plaintiffs misread 31 U.S.C. § 330(a) because they again claim that the Secretary only has the authority to regulate the "practice" of those who "advise and assist persons in presenting their cases." (Pl. Opp., 1) Plaintiffs 'statutory interpretation is mistaken because they wrongly conflate section 330(a)(1) with section 330(a)(2) while at the same distorting the meaning of section 330(a)(2). All of plaintiffs' mistaken assertions regarding the Secretary's supposed limited authority to regulate "practice," such as that he may only regulate professionals "analogous" to attorneys, stem from these same fundamental interpretative errors. In particular, plaintiffs' improperly limited view of an agency's regulatory authority over "practice" is proven false by *Touche Ross & Co. v. S.E.C.,* 609 F.2d 570 (2d Cir. 1979), that confirmed the S.E.C.'s authority to regulate certified public accountants ("CPAs") who wrongfully audited

companies' financial statements, but who did not appear before the agency in any advocacy capacity. Accordingly, plaintiffs' charge that the Service is attempting "to usurp congressional power" (Pl. Opp., 1) is plainly false.

The practical realities of the tax return preparation industry confirm that the Secretary may regulate registered tax return preparers. Tax law has become increasingly complicated as has accurate and proper completion of tax returns. As a result, the paid tax return preparation industry has grown and is having an increased impact on tax returns filed with the Service and the Service's review of those tax returns. Besides being within the Secretary's inherent and statutory authority, it is entirely appropriate now to regulate unregistered tax return preparers who prepare the bulk of the income tax returns filed with the Service annually.

ARGUMENT

I. An agency has the inherent authority to regulate practice before it

An agency has the inherent authority to regulate individuals and firms who practice before it. This inherent regulatory authority was confirmed by the Supreme Court long ago in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926). Plaintiffs extensively quote *Goldsmith* (see Pl. Opp., 4) but miss the point. In *Goldsmith*, a CPA who had previously been fired for misconduct and who had also provided improper advice to clients, see 270 U.S. at 120, then challenged the Board of Tax Appeals' denial of his application to practice before it. *Id.* at 119. In rejecting the CPA's challenge, the Supreme Court in *Goldsmith*

specifically upheld an agency's inherent authority to regulate practitioners before it. In particular, the Supreme Court **rejected** applicant Goldsmith's argument that the Board of Tax Appeals lacked authority to regulate practice before it because the Board, unlike other executive department agencies and boards, lacked specific express statutory authority to that effect. The Supreme Court turned back this argument explaining:

> In most of the executive departments in which interests of individuals as claimants or taxpayers are to be passed on by executive officers or boards, authority is exercised to limit those who act for them as attorneys to persons of proper character and qualification to do so. Not infrequently, statutory provision is made for requiring a list of enrolled attorneys to which a practitioner must be admitted by the executive officer or tribunal. (citations omitted) In view of these express provisions, it is urged [by applicant Goldsmith] that the absence of such authority in the case of the Board of Tax Appeals should indicate that it was not intended by Congress to give it the power. Our view, on the contrary, is that so necessary is the power and so usual is it that the general words by which the Board is vested with the authority to prescribe the procedures in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys.

Goldsmith, 270 U.S. at 121-22 (emphasis supplied). In short, as the defendants have pointed out (see Defs. Mem., 13) *Goldsmith* thereby explicitly holds that agencies have the inherent authority to regulate practitioners before them.

Plaintiffs then fail to understand the modern appellate authority that follows *Goldsmith.* (Compare Defs. Mem., 13-14; Pl. Opp., 4-5). For example, *Herman v. Dulles,* 205 F.2d 715 (D.C. Cir. 1953), expressly follows *Goldsmith* and holds that the International Claims Commission had the power to regulate practitioners before it under its general statutory authority to "prescribe such

rules and regulations as may be necessary to carry out its functions." *Id.* at 716 quoting 22 U.S.C. § 1622(c) (1953). By basing its opinion on such broad and general statutory language, the Circuit Court for the District of Columbia thereby confirmed *Goldsmith's* holding that agencies have intrinsic authority to regulate practice. Plaintiffs cite the important Second Circuit opinion of *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979), but their reference to "professionals" who appear before the S.E.C. neither supports, nor rebuts, their argument here and is little more than a non sequitor. (See Pl. Opp., 5).

In fact, *Touche Ross* and *Davy v. S.E.C.*, 792 F.2d 1418 (9th Cir. 1986), each of which upholds the S.E.C.'s authority to bar CPAs from practicing before it, strongly supports defendants here. Plaintiffs appear to argue that these precedents limit the term "practice" to a CPA's representation of others before a federal agency in a manner akin to counsel in a case or proceeding before the agency. Plaintiffs are wrong for two reasons. First, their argument misconceives the nature of "practice" before the S.E.C. Practice before the S.E.C. is not limited to the representation of others before it in an adversarial case or proceeding. Second, the cited cases involved the S.E.C.'s exercise of its disciplinary authority under former S.E.C. Rule of Practice 2(e), now Rule 102(e). No statute expressly authorized the S.E.C. to regulate and discipline professionals who appear before the S.E.C.; rather, the S.E.C. issued Rule 2(e) pursuant to its statutory grant of general rulemaking authority. *Touche Ross* illustrates both points.

In *Touche Ross*, the S.E.C. entered an order instituting an administrative disciplinary proceeding against Touche Ross and three of its former partners, pursuant to Rule 2(e). Touche Ross and the three former partners then filed suit for declaratory and injunctive relief, seeking to enjoin the S.E.C. from conducting the Rule 2(e) proceeding. Critically, Touche Ross and its three former partners did not engage in any representation of a party before the SEC in an adversarial proceeding; rather, the alleged wrongdoing arose from Touche Ross's audits of the financial statements of two public companies subject to S.E.C. regulation. *Touche Ross*, 609 F.2d at 573 & n.3. Among other things, and like plaintiffs here, Touche Ross argued "that Rule 2(e) had been promulgated 'without any statutory authority'" and "that the Rule 2(e) administrative proceeding had been instituted against them 'without authority of law.'" *Id*. As to the S.E.C.'s statutory authority to issue Rule 2(e), the Second Circuit stated:

> Section 23(a)(1) of the 1934 Act, 15 U.S.C. § 78w(a)(1) (1976), authorizes the Commission to "make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which (it is) responsible or for the execution of the functions vested in (it) by this title . . . ." Pursuant to this general rulemaking authority, the Commission adopted and subsequently has amended Rule 2(e) of its Rules of Practice, 17 C.F.R. s 201.2(e) (1978).

Touche Ross, 609 F.2d at 577-78. *Touche Ross* then specifically further stated that although "there [was] no express statutory provision authorizing the Commission to discipline professionals appearing before it," *Touche Ross,* 609 F.2d at 582, the Second Circuit nevertheless upheld the validity of Rule 2(e), stating in part:

> Rule 2(e) thus represents an attempt by the SEC essentially to protect the integrity of its own processes. If incompetent or unethical accountants should be permitted to certify financial statements, the reliability of the disclosure process would be impaired.

Touche Ross, 609 F.2d at 581. The parallel between CPAs who issue audit opinions on the financial statements of public companies, and registered tax return preparers who prepare federal tax returns, is compelling. And notably, in reaching its decision, the Second Circuit cited *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926). See *Touche Ross*, 609 F.2d at 582.

Moreover, the S.E.C. continues to sanction attorneys under now Rule 102(e) for misconduct that had nothing to do with representing a party before the S.E.C. in an adversarial case or proceeding. *See, e.g.*, *In the Matter of William J. Reilly, Esq.*, SEC Release No. 34-60890, 2009 WL 3443225 (Oct. 27, 2009) (administrative order sanctioning attorney who provided legal opinion letter that was basis of fraudulent disclosure in Form 8-K filed with SEC). Again, the parallel between a false statement in an S.E.C. filing, and a false statement in a federal tax return, is compelling. No "case" or "proceeding" is required for the exercise of regulatory authority of those who "practice" before the agency.

The statutory grant of general rulemaking authority under section 23(a)(1) of the Securities Exchange Act of 1934 is indistinguishable, in terms of breadth and purpose, from the Treasury's general rulemaking authority. See 31 U.S.C. § 321(b)(1); also see 26 U.S.C. § 7805(a). *Touche Ross* thus implies that, even if 31 U.S.C. § 330 did not exist, the Treasury nonetheless could have issued valid

registered tax return preparer regulations. Moreover, nothing in section 330 suggests a limitation on the Treasury's inherent rulemaking authority, and plaintiffs' crabbed reading of section 330 lacks any support.

II. The new regulations are due significant deference under *Chevron*

A. *Chevron* step one is satisfied

Plaintiffs remarkably argue that "practice" under 31 U.S.C. § 330(a)(1) refers *unambiguously* only to those who "advocate for persons in proceedings" before the Treasury. (Pl. Mem., 6, 15). But the term "practice" is far from univocal, much less unambiguously so.

Defendants do not claim that this court should grant deference to the Treasury Regulations under *Chevron* step one, as plaintiffs appear to suggest. (Pl. Mem., 6). Rather, the analysis under *Chevron* step one is straightforward: has Congress "directly spoken to the precise question at issue"? (Defs. Mem., 11 quoting *United States Postal Service v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1266 (D.C. Cir. 2011). Here the "precise questions" at issue are (1) whether preparing or filing tax returns qualifies as "practice" before the Service; and (2) what requirements the Secretary may impose upon those who "practice" as registered tax return preparers. (Defs. Mem., 12) It is quite clear that Congress has not answered those questions unambiguously under 31 U.S.C. § 330(a)(1). Hence, *Chevron* step one is satisfied.

Plaintiffs must admit that Congress did not provide a specific statutory definition of "practice"; i.e., "practice" is not a defined term under 31 U.S.C. §

330(a)(1). Moreover, the noun "practice" has many definitions and certainly does not unambiguously imply advocacy or even only "professional" services. Plaintiffs claim that defendants give an "unnaturally expansive meaning" to the term "practice," but that term has many meanings, most all of which are broad. See Webster's Third New International Dictionary (Unabridged) (1986) (providing several alternative definitions of "practice" including the "exercise of a profession or occupation").[1] Because 31 U.S.C. §330(a)(1) does not "unambiguously foreclose," *Friends of Blackwater v. Salazar,* --- F.3d ---, 2012 WL 3538236 (D.C. Cir. 2012), inclusion of tax return preparation as "practice," the new regulations pass muster under *Chevron* step one.

Plaintiffs' attempt to distinguish *Mayo Foundation for Medical Education & Research v. United States,* --- U.S. ---, 131 S.Ct. 704 (2011), is unavailing. (See Pl. Opp., 7 n.7). *Mayo Foundation* considered whether doctors who were medical residents working from 50 to 80 hours a week qualified as "students" not subject to Federal Insurance Contributions Act (FICA) tax. In determining whether Congress had "directly addressed the precise question at issue," the Supreme Court considered it important that "[t]he statute does not define the term 'student,'" *Mayo,* 131 S.Ct. at 711, just as 31 U.S.C. § 330(a)(1) does not define

[1] Plaintiffs' analogy to *American Petroleum Institute v. E.P.A.*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (see Pl. Opp., 3), assumes what it seeks to prove because there the Circuit Court for the District of Columbia found that "plain meaning" of the particular provision of the Clean Air Act at issue was "unambiguous," but whether 31 U.S.C. §330(a)(1) is unambiguous is precisely what is at issue here.

"practice," and "does not otherwise attend to the precise question whether medical residents are subject to FICA," *Mayo,* 131 S.Ct. at 711, just as § 330(a)(1) does not otherwise directly address whether "practice" includes the preparing or filing of tax returns. Applying *Mayo's* analysis to section 330(a)(1) leads to the ineluctable conclusion that *Chevron* step one is satisfied here. That conclusion is confirmed by Eleventh Circuit's holding that "Congress expressly delegated authority to the Secretary to promulgate regulations governing who may practice before the IRS," and further affirming those practice regulations under *Chevron* step two. *Wright v. Everson,* 543 F.3d 649, 657 (11th Cir. 2008); *see also Poole v. United States*, 1984 WL 742, 54 A.F.T.R.2d 84-5536 (D.D.C. 1984); *Cooper Technologies Company v. Dudas*, 565 F.3d 1330 (Fed. Cir. 2008); *Bender v. Dudas*, 490 F.3d 1361 (Fed. Cir. 2007).

B. *Chevron* step two is satisfied

The registered tax preparer regulations are entitled to deference under *Chevron* step two. Plaintiffs cannot contest that Congress delegated authority to the Secretary of the Treasury to make rules carrying the force of law and that the new regulations were promulgated in the exercise of that authority. (See Defs. Mem., 16). Plaintiffs must further admit that the registered tax preparer regulations were promulgated only after compliance with Administrative Procedure Act notice-and-comment rulemaking, compliance that strongly indicates that *Chevron* deference is owed. (Id.); *Bensman v. National Park Service,* 806 F.Supp.2d 31, 41 (D.D.C. 2011) ("Where an agency promulgates its

interpretation through notice-and-comment rulemaking, courts typically give the agency's interpretation '*Chevron* deference.'"). Accordingly, this court must uphold the new regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute." (Defs. Mem., 17). But the new regulations are far from arbitrary or capricious. To the contrary, they were adopted only after thorough investigation spanning two years of public input; in fact, only after public comment that overwhelmingly supported greater regulation of unenrolled tax return preparers. (Id., 18-21). The new regulations are entirely reasonable; i.e., requiring paid tax return preparers to pass a competency examination and to fulfill continuing education requirements is an entirely appropriate response to the challenge created by approximately 700,000 unenrolled paid tax return preparers whot, each year, prepare the majority of individual income tax returns filed with the Service; particularly where evidence of inaccurate return preparation had been uncovered by the Secretary. (Id., 5). This court should uphold the new regulations under *Chevron* step two.

III. Plaintiffs' other arguments miss the mark

A. Neither section 330 nor its "context" requires an agency relationship

Although plaintiffs originally weakly asserted that section 330(a)(1) "connotes" an agency relationship, Plaintiffs' Opposition boldly claims that section 330(a) "necessarily" requires such a relationship. (Compare Pl. Mem., 24 & Pl. Opp., 12) Although plaintiffs refer to the 1884 statute, they cannot

overcome its express language that the Secretary may regulate "agents, attorneys, or other persons representing claimants" (Defs. Mem., p. 33) thereby establishing, under standard cannons of statutory construction, that an agency relationship is **not** necessary. Plaintiffs are forced to further admit that *R.W. Hart & Co.* likewise states that "practice before Treasury 'is not restricted to attorneys at law, but also, agents, auditors, accountants or others," once again rebutting any inference that an agency relationship is necessary. (See Pl. Opp., 14).

Plaintiffs further misconstrue the "context" they claim is provided by statutes and case law. (See Pl. Opp., 14-15). Try as they might, plaintiffs cannot dispute that the Eleventh Circuit specifically held that "Congress expressly has granted to the Secretary the right to regulate who practices before the IRS in 31 U.S.C. § 330(a) via an express delegation of authority." *Wright v. Everson,* 543 F.3d 649, 656 (11th Cir. 2008). Nor can they contest that the Eleventh Circuit gave the Secretary deference under *Chevron* step two. *Id.* at 656-57. Plaintiffs assert that tax return preparers, such as themselves, do not "represent" taxpayers nor do they "appear" on their behalf. But the completion of an individual's income tax return is an important function by which the paid tax return preparer does act on the taxpayer's behalf. Moreover, by completing such returns plaintiffs "appear" or "practice" before the Service just as the CPAs "appear" or "practice" before the S.E.C. when they conduct an audit of a company's financial statements (even though not involving any "advocacy," as commonly understood). *E.g., Touche Ross,* 609 F.2d at 572, 582. Finally, Treasury Circular 230 has long

governed opinions in tax shelter offerings as well as the provision of other tax advice and tax return positions that occur outside of any "advocacy" or "cases" before the Service. (See Defs. Mem., 28) This is consistent with the long-standing definition that "[p]ractice comprehends all matters connected with presentation to the Internal Revenue Service." 31 C.F.R. § 10.2. Such regulatory authority has gone unquestioned for decades, another sign that plaintiffs interpret "practice" and "representation" far too narrowly.[2]

The fundamental error in plaintiffs' argument appears in their bold proclamation that the Secretary is **not** authorized to ensure that "tax preparers are 'competent in preparing returns.'" (Pl. Opp., 17) Such a remarkable claim requires proof, but plaintiffs provide none. It is nonsensical that Congress would authorize the Secretary to ensure the competency of those who present "cases" but not those who prepare returns, particularly where only a fraction of prepared returns are audited and thereafter become "cases" upon appeal before the Service.

[2] Leading treatises in the area of tax practice have concluded that tax return preparation constituted practice before the Service even before the latest Circular 230 amendments. *See* Bernard Wolfman and James P. Holden, *Ethical Problems in Federal Tax Practice*, 46 n.4 (2d ed. 1985); Bernard Wolfman, James P. Holden, Kenneth L. Harris, *Standards of Tax Practice* § 105.1.1 (6th ed. 2004).

B. Plaintiffs distort section 330(a)(2)

Plaintiffs continue to attempt to distort the language of section 330 by arguing that it only permits the Secretary to regulate practitioners appearing before the agency in some type of adjudicative proceeding, hearing, or meeting. Specifically, plaintiffs selectively pluck the phrase "presenting their cases" from section 333(a)(2)(D) and assert that it serves to limit the authority of the Secretary's authority to determine what constitutes practice before the Service. Section 330(a)(2)(D), however, in no way limits the Service's authority with respect to whom the Secretary may authorize to "practice" before the agency, and the provision has no bearing on the definition of "practice" or the bounds of activities that may be defined as "practice" before the agency. All section 330(a)(2)(D) says is that the Secretary may require people to show they are competent to advise others and assist others in presenting their cases. [3] The fallacy of plaintiffs' statutory argument regarding section 330(a)(2)(D) is succinctly revealed by the fact that many tax return preparers under the current rules are not required to demonstrate any competency (only tax return preparers who prepare Form 1040 series returns are currently subject to a competency

[3] Although section 330(a)(2)(D) must be read along with the other provisions of section 330(a)(2), even when section 330(a)(2)(D) is read alone the plaintiffs' argument fails. The section permits the Secretary to require practitioners to show competence to "advise" and to "assist" persons in presenting their cases. The reference to advising and assisting belies plaintiffs' stretched argument that the statute only speaks to representation in proceedings before the Service since much advising and assisting certainly occurs outside of those parameters.

examination), yet these tax return preparers are nonetheless subject to Circular 230 because tax return preparation is "practice" before the Service.

Plaintiff also fails to explain the placement and context of the phrase "presenting their cases" when considering the rest of the language in section 330(a)(2). Section 330(a)(2)(C) expressly provides that the Secretary may require a representative to demonstrate "necessary qualifications to enable the representative to provide to persons valuable service", and competency examination and continuing education requirements for unenrolled tax return preparers squarely falls within this authority.

Further, even if plaintiffs' strained argument that the term "presenting their cases" is somehow so limited that it only refers to practitioners representing others in an adjudicative capacity, the Service is nonetheless free under section 330 and its general authority to authorize other individuals it deems competent to "practice" before the Service. Section 330 provides no limit on who the Service may authorize to "practice" other than stating that the Secretary may "regulate the practice of representatives of persons before the Secretary . . . ."

The bottom line is that plaintiffs interpret section 330(a)(2)(D), the part of the section 330 that speaks to a practitioner's qualifications, in manner that renders meaningless the authority given to the Secretary to "regulate the practice" in section 330(a)(1), as well as the rest of section 330(a)(2). Plaintiffs' interpretation also unduly limits the Secretary's authority regulate anything not occurring in a hearing or proceeding with the IRS. However, as the defendants

have previously pointed out, the Service has long regulated conduct not actually occurring in front of it, including the regulation of tax advice. *See* 31 C.F.R. §§ 10.35, 10.37, 10.3(d); *see also* 31 C.F.R. §§ 10.21, 10.22, 10.27, 10.29, 10.34, 10.36.

C. Plaintiffs admit that unenrolled tax return preparers have enjoyed "limited practice" and "limited representation" rights under the prior regulations

The United States is not attempting to "bootstrap" the "limited practice" privilege that tax return preparers enjoyed even before the new regulations. (See Pl. Opp., 18-20). But it is undisputed that tax return preparers enjoyed "limited practice" and "limited representation" rights under the prior regulations. (See Defs. Mem., 24-26 quoting Former 31 C.F.R. § 10.7(c)(1)(viii)). Furthermore, unenrolled tax return preparers' representation rights have not significantly changed under the new regulations. (Defs. Mem., 25). In addition, the Service's authority to prescribe the standards of conduct and scope of authority for such unenrolled tax return preparers has been unquestioned for decades. *E.g.*, Revenue Procedure 81-38, 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR) (setting forth the conditions and circumstances under which an individual tax return preparer may exercise, without enrollment, the privilege of "limited practice"). Unenrolled tax return preparers' long-standing "limited practice" rights prove that neither a "controversy" nor a "proceeding" is required for the Secretary to regulate a tax return preparer's activities. (See Defs. Mem., 24-26; accord Revenue Procedure 81-38, *supra*).

Shockingly, plaintiffs argue that even a preparer 's representation of another during an examination is not a proceeding or controversy that the Service would have the authority to regulate under section 330. Representation during an examination involves the same tasks whether a practitioner representing a taxpayer before exam is a preparer or an attorney, CPA, or enrolled agent. Thus, under plaintiffs' logic, the Service would not have the authority to regulate the practice of any practitioner during the examination function.

D. Plaintiffs' citation to 1884 legislative history and to other statutes does not support their argument

Plaintiffs say that they have shown that Congress in 1884 "never contemplated that Section 330 would be used to license all tax preparers." (Pl. Opp., 21). But that sets a false test as individuals did not file annual income tax returns in 1884, and the federal income tax system did not then yet exist. The Sixteenth Amendment to the United States Constitution that allowed Congress to levy an income tax without apportionment among the States was not ratified until 1913. The paid income tax return preparation industry has developed only in recent decades.

Plaintiffs also refer to a supposed "overall statutory scheme" that purportedly shows that Congress did not grant the Secretary authority to regulate tax return preparers. (See Pl. Opp., 22) But that argument fails just as it did in *Touche Ross.* See *Touche Ross,* 609 F.2d at 579 & nn.14-15 (numerous

statutory provisions creating remedies for violation of securities laws did not establish that the S.E.C. lacked authority to regulate "practice" before it). Specifically, *Touch Ross* directly answers plaintiffs' claim that Treasury Circular 230's power to "suspend or disbar . . . or censure" tax return preparers, "all without approval from an Article III court" (Pl. Opp., 23), renders other statutory remedies surplusage, e.g., 26 U.S.C. § 7407. *Touche Ross,* 609 F.2d at 579 (S.E.C.'s Rule 2(e) disciplinary authority is not negated by other Securities Act statutory remedies). The existence of a statutory remedy does not preclude an agency from addressing a problem in a more effective manner. Equally important, Treasury Circular 230 ensures that those who practice before the Service are competent and ethically fit. The many statutory provisions plaintiffs cite provide remedies for wrongful conduct, an entirely separate legislative purpose. Not one of the statutes plaintiffs cite require paid tax return preparers to prove they are competent to offer their tax preparation services.

E. Unenacted Congressional bills provide no relevant logical inference in support of plaintiffs

The United States has already shown that plaintiffs' citation to eight bills not passed by Congress provides no logical inference in their support because all bills would have required the Secretary to regulate unenrolled tax return preparers. (Defs. Mem., 34-35). Plaintiffs' response that these bills separately authorized regulatory action likewise provides no logical inference for plaintiffs. (See Pl. Opp., 24). Such an inference may have been plausible had any of the

eight bills passed without stating that Congress was simply reconfirming the Secretary's already existing authority; however, since none of the bills passed it is equally logical to infer that a majority of Congress believed no further statutory authorization was required in order that the Secretary regulate the "practice" of unenrolled tax return preparers.

F. The Secretary's new regulations do not run counter to prior agency understanding

The new regulations do not conflict with prior agency understanding of section 330(a)(1). The clearest expression of Treasury recognition that tax return preparers were subject to the Secretary's regulatory authority appears in Former 31 C.F.R. § 10.7(c)(1)(viii) which set forth unenrolled tax return preparers' "limited practice" rights. (See Defs. Mem., 24-25). The Secretary has set forth standards of ethics and conduct for such unenrolled individual preparers of tax returns. Revenue Procedure 81-38, sec. 7, 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR). Plaintiffs' selected ambiguous ad hoc statements by various government officials do not supplant existing regulations and Revenue Procedures. In any event, as a matter of law, even a change in agency interpretation does not undercut the judicial deference that is owed to the agency's new statutory interpretation. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) ("The fact that the agency has from time to time changed its interpretation . . . does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An

initial agency interpretation is not instantly carved in stone."); *Mayo Foundation v. United States,* --- U.S. ---, ---, 131 S.Ct. 704, 712 (2011) ("Under *National Muffler*. . . a court might view an agency's interpretation of a statute with heightened skepticism when it has not been consistent over time . . . . Under *Chevron,* in contrast, . . . [w]e have repeatedly held that 'agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'") quoting *National Cable & Telecom. v. Brand X Internet Services,* 545 U.S. 967, 981 (2005); *Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996).

CONCLUSION

The Secretary has both inherent and express authority to regulate those who "practice" before the Service. Section 330(a)(1) does not "unambiguously foreclose" paid tax return preparation as within such "practice." The new regulations thereby pass *Chevron* step one. They are entitled to substantial deference under *Chevron* step two; they are a reasonable response to the challenge posed by the unenrolled tax return preparation industry; and they are far from arbitrary and capricious. The new regulations thereby satisfy *Chevron*

step two. The Court should grant the United States' motion for summary judgment and deny plaintiffs' cross-motion for summary judgment.

Dated: December 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, I caused to be served via the Court's ECF system the following document:

(1) DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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