UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SABINA LOVING, et al.	)	
Plaintiffs,	)	
v.	)	Civil Case No. 1:12-cv-00385-JEB
INTERNAL REVENUE SERVICE, et al.	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules for Civil Procedure, as modified by the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, Plaintiffs Sabina Loving, Elmer Kilian, and John Gambino, by and through counsel, hereby move the Court for summary judgment in their favor.

Plaintiffs bring an *ultra vires* challenge to Defendants' August 2011 revision to Treasury Department Circular No. 230 ("Circular 230"), 31 C.F.R. pt. 10, which imposes a "registered tax return preparer" licensing scheme on all previously unlicensed tax return preparers. Under the APA standard of review for *ultra vires* actions, Plaintiffs are entitled to judgment that the challenged regulations are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), as explained in the accompanying Memorandum of Points and Authorities, and supporting exhibits attached thereto.

Therefore, Plaintiffs respectfully request the following relief:

A. A declaratory judgment that Defendants are without statutory authority to enact, promulgate, or enforce the licensing scheme for "registered tax return preparers" as described in Circular 230 (Rev. 8-2011), 31 C.F.R. pt. 10, specifically the amendments to 31 C.F.R. pt. 10 that became effective on August 2, 2011.

B. A permanent injunction prohibiting Defendants and their agents from enforcing the IRS licensing scheme for "registered tax return preparers" as described in Circular 230 (Rev. 8-2011), 31 C.F.R. pt. 10, specifically the amendments to 31 C.F.R. pt. 10 that became effective on August 2, 2011.

C. An award of attorneys' fees, costs, and expenses in this action; and

D. Any other legal or equitable relief to which the Plaintiffs may show themselves to be justly entitled.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case presents an *ultra vires* challenge to the authority of the Internal Revenue Service ("IRS") to unilaterally impose a sweeping new licensing scheme on several hundred thousand tax return preparers across the country without any congressional authorization. The IRS claims that a statute passed in 1884—nearly thirty years before the IRS or the income tax even existed in their modern forms—gives the IRS the unprecedented authority to control who may earn their livelihood as a tax return preparer. This licensing scheme imposes a new regulatory burden on as many as 700,000 tax return preparers, and also limits the choices of roughly 100 million taxpayers who rely on paid preparers each year to prepare their taxes.

Although Congress has considered at least eight separate bills from 2005 to the present that would amend the relevant statute to grant the IRS the authority to regulate tax return preparers, none have been passed into law. Instead, the IRS has now acted unilaterally to reinterpret 31 U.S.C. § 330—rejecting the way it had interpreted the statute for nearly 100 years—by revising the regulations found in Treasury Department Circular No. 230 ("Circular 230"), 31 C.F.R. pt. 10, to enact and impose the "registered tax return preparer" ("RTRP") licensing scheme on previously unlicensed tax preparers. But Congress has never given the IRS the authority to impose licensing regulations on tax return preparers, and the IRS cannot give itself that authority. Indeed, until it began considering these regulations, the IRS had never taken the position that it had the authority to license tax return preparers, and has even recently told Congress that it had no such regulatory authority.

Plaintiffs Sabina Loving, Elmer Kilian, and John Gambino are three independent tax preparers who will be subjected to, and harmed by, this new licensing scheme. All three (along with hundreds of thousands of other tax preparers) will be required to obtain permission from the

IRS in order to continue preparing tax returns for compensation by taking an exam and paying fees to become an RTRP. In order to maintain this status, they will have to continue paying fees and taking CE courses on an indefinite basis. This will harm all three, impairing Plaintiff Loving's ability to compete with larger tax preparation firms, while putting Plaintiffs Kilian and Gambino (and many other independent preparers) out of the tax preparation business altogether.

STATEMENT OF FACTS

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

The IRS is a bureau of the Department of the Treasury ("Treasury") under the immediate direction of the Commissioner of Internal Revenue. 26 C.F.R. § 601.101.[1] 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."[2]

Collection involves the 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 return which shows the facts upon which tax liability may be determined and assessed. *Id*. Tax liability or penalty assessments are conducted in an "*ex parte*, non-adversarial manner" where there is no role for a representative.[3] *See* 26 C.F.R. § 601.104(c).

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[1] Citations to the Code of Federal Regulations are to the 2012 edition, unless otherwise indicated.
[2] *See, e.g.*, *West's Tax Law Dictionary* 1054 (Robert Sellers Smith ed., 2009 ed.) (Alban Decl. Ex. 1) (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 a 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.").
[3] *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

After tax returns are filed and processed by the IRS, some returns are selected for examination (audit). 26 C.F.R. §§ 601.103(b), 601.105(a). Examinations may be conducted by correspondence or by "taxpayer interview" at an IRS office.[4] 26 C.F.R. § 601.105(b)(2); *see also* 26 U.S.C. § 7521(procedures for "taxpayer interviews"). During an examination, a taxpayer may be represented before the examiner by an attorney, certified public accountant ("CPA"), or other representative. 26 C.F.R. § 601.105(b)(1). A taxpayer may also consult with an attorney, CPA, or other authorized representative during a "taxpayer interview." 26 U.S.C. § 7521(b)(2).

If a taxpayer disagrees with adjustments proposed by the IRS during an examination, he or 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 represent themselves or designate a qualified representative to act for them. 26 C.F.R. § 601.106(c).

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

A. In 1884, Congress authorized the Secretary of the Treasury 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 military pensioners, persons with claims for lost horses, and others with claims for compensation from the federal government, Congress passed a

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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)).

[4] There are also "field examinations," which involve an examination of the taxpayer's books and records on the taxpayer's premises. 26 C.F.R. § 601.105(b)(3). Examinations may also include one or more "conferences" in the National Office. 26 C.F.R. § 601.105 (b)(5)(v).

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. . . .

Act of July 7, 1884, ch. 334, sec. 3, 23 Stat. 258 (Alban Decl. Ex. 2) [hereinafter "23 Stat. 258"]; *see also* 48 Cong. Rec. H5219–22 (daily ed. June 16, 1884) (Alban Dec. Ex. 3) (esp. statements of Rep. Townshend); George M. Morris, *Growth and Regulation of Treasury Bar*, 8 A.B.A. J. 742, 743 (1922) (Alban Decl. Ex. 4) [hereinafter "Morris"].

After a purely stylistic revision in 1982, and several amendments adding and revising additional provisions, that same law is currently codified at 31 U.S.C. § 330 ("Section 330"). Section 330 governs "practice" before Treasury and authorizes the Secretary of the Treasury (the "Secretary") to "regulate the practice of representatives of persons before the Department of the Treasury" who "advise and assist persons in presenting their cases." 31 U.S.C. § 330(a). 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.

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

Under the authority of Section 330, in 1921 the IRS began regulating "practice" of representatives before the IRS under a set of regulations contained in Treasury Department Circular No. 230 ("Circular 230"), 31 C.F.R. pt. 10.[5] Administrative Record ("A.R.") at 000128,

[5] The IRS is a bureau of Treasury, often acting under congressional grants of authority to Treasury, and it must promulgate regulations via Treasury. References to actions by the IRS in

001220; Morris at 743; *Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351, at *4 (D.D.C. June 29, 1984) (giving date as 1922). In addition to regulating the "practice" of CPAs and attorneys before the IRS, the IRS offers special categories of licensure under Circular 230—enrolled agents, enrolled retirement plan agents, and enrolled actuaries—that enable those who are not attorneys or CPAs to be enrolled to "practice" before the IRS by representing taxpayers in IRS proceedings, as their qualifications permit. A.R. at 000143–44; 31 C.F.R. §§ 10.3–10.6

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

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 of the United States Code]." 26 U.S.C. § 7701(a)(36)(A).[6]

B. For over a century prior to the recent regulatory change, the IRS had not interpreted Section 330 as authorizing it to license all tax return preparers.

From when the statute was first passed in 1884, through when the IRS first issued Circular 230 in 1921, up until the December 2009 publication of the *Return Preparer Review*, the IRS has not taken the position that it was authorized to license all "tax return preparers" under Section 330. *See* A.R. at 000127, 000143, 001220. For the nearly 100-year history of the modern income tax (prior to the recent regulatory change), the IRS did not view "tax return preparers" to be "representatives" of taxpayers, and has specifically rejected that interpretation.[7]

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this brief should be understood to include Treasury, where action by Treasury is or was necessary to effect the relevant action.

[6] 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.

[7] *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

Nor did the IRS consider the preparation of a tax return for compensation to constitute "practice" before the IRS.[8] 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 the various types of enrolled agents or enrolled actuaries who actually represent taxpayers in proceedings before the IRS. A.R. at 000127, 000143, 001220. Thus, 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. A.R. at 000127, 000143, 001220; Defs.' Answer ¶ 12.[9]

C. Congress developed a statutory scheme for limited regulation of tax preparers.

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

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Representatives, (July 20, 2005) [hereinafter "2005 IRS Congressional Testimony"]), *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 (explaining that, during a tax examination, a tax return preparer who prepared the return in question is a factual witness, and not a representative).

[8] *See, e.g.*, Internal Revenue Service, IRS Publication 947, *Practice Before the IRS and Power of Attorney* at 2 (Rev. April 2009) [hereinafter "IRS Publication 947"], *available at* http://www.irs.gov/pub/irs-utl/publication_947_practice_before_the_irs_and_poas_rev_4_09.pdf ("Just preparing a tax return . . . is not practice before the IRS. These acts can be performed by anyone.") (quote appears under the heading "What Is Practice Before the IRS?"); 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, that the IRS only regulates the "representational activity" of "practice before the IRS," and that Congress has recognized the rights of states and localities to regulate tax preparers independent of the federal government).

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

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. *See, e.g.*, 26 U.S.C §§ 7201, 7206, 7207, 7213. Paid tax preparers are still 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 preparing further returns. *See* 26 U.S.C. § 7407.

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

From 2005 to the present, Congress has also considered at least eight bills that would amend Section 330(a)(1) to specifically grant authority to Treasury (and thus, the IRS) to regulate "tax return preparers." *See* A.R. at 000151; *see also* 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). To date, none of these bills has ever been passed.

E. IRS's PTIN regulations go into effect in 2011.

Effective January 1, 2011, under the authority of 26 U.S.C. § 6109(a)(4), all tax return preparers were required to obtain a Preparer Tax Identification Number ("PTIN") from the IRS to include on all tax returns they prepared. *See* A.R. at 000022–35; 26 C.F.R. § 1.6109-2. Obtaining a PTIN did not require any competency examination or completion of continuing education ("CE"); it merely required the completion of a basic form application and the payment of a PTIN user fee (currently $64.25). Defs.' Answer ¶ 15; A.R. at 000051. Annual PTIN renewal required payment of a renewal fee (currently $63), but did not require completion of any CE credits. Defs.' Answer ¶ 15. Except for those who were disqualified by felony convictions or discrepancies with their federal tax obligations, PTINs or provisional PTINs were issued to all tax return preparers who completed the form and paid the PTIN user fee. *Id.* ¶ 16.

IV. The August 2011 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. *See* A.R. 001220–1246. The IRS estimates that 600 to 700,000 tax preparers will be subject to this RTRP licensing scheme. A.R. at 001231, 1233. In 2007, about 87 million federal tax returns were prepared by paid preparers. *See* A.R. at 000133–135.

The new RTRP licensing regulations were published in the Federal Register on or about June 3, 2011 and became effective on August 2, 2011. *See* A.R. at 001220. These regulations amended 31 C.F.R. pt. 10, Circular 230, the current version of which is Circular No. 230 (Rev. 8-2011). *Id*. Under the newly revised Circular 230, the IRS now purports to regulate the preparation of tax returns (and claims for refund) by all "tax return preparers" under the authority of Section 330 because it defines "Practice before the Internal Revenue Service" as including "preparing documents; filing documents." 31 C.F.R. § 10.2(a)(4); *see* A.R. at 000159, 001222.

Under this new licensing scheme, "tax return preparers" who are not attorneys, CPAs, or any type of enrolled agent or enrolled actuary must 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 must pass a written examination administered by the IRS (or under IRS oversight), possess a valid PTIN, and satisfy standards relating to character and fitness. 31 C.F.R. § 10.4(c). To renew one's status as an RTRP, one must 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, must be completed during each registration year. 31 C.F.R. § 10.6(e)(3).

Tax return preparers who are now required to become RTRPs in order to continue preparing taxes for compensation must pass the RTRP competency exam by December 31, 2013. Defs.' Answer ¶ 38. Until then, they may prepare taxes using provisional PTINs. *Id*. RTRPs (and those who prepare returns under provisional PTINs) are required to obtain 15 hours of CE credits during 2012 and each subsequent year. *Id*. ¶ 39. Except as provided in IRS guidance, only attorneys, CPAs, enrolled agents, and RTRPs may obtain a PTIN. 31 C.F.R. § 10.8(a).

The nonrefundable fee for the competency exam for RTRPs is $116. Defs.' Answer ¶ 44. This is in addition to the $64.25 PTIN user fee (or the annual PTIN renewal fee, which is currently $63), the costs of taking 15 hours of CE courses, the costs of taking an exam preparation course, and any expenses of travel, lodging, and meals incurred in order to attend 15 hours of CE courses and an exam preparation course. *Id*. ¶ 44, 76.

The IRS offers seminars that qualify for CE credit through the IRS Nationwide Tax Forums Online; depending on the seminar, the cost for one credit hour is either $45.00 or $67.50. *Id*. ¶ 45. If an RTRP obtained all 15 required CE credits from these online IRS Forums, the annual cost of complying with the continuing CE would range from $675 to $1,012.50. *Id*. ¶ 46.

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

Plaintiffs are three independent tax return preparers who have been and will be harmed by the RTRP licensing scheme. Loving Decl. ¶¶ 9–17, September 18, 2012; Kilian Decl. ¶¶ 10–17, September 19, 2012; Gambino Decl. ¶¶ 11–18, September 18, 2012. In order to continue preparing tax returns for compensation, each Plaintiff would be forced to comply with the

various licensing requirements to become an RTRP or face fines or other sanctions. Loving Decl. ¶ 6; Kilian Decl. ¶ 7; Gambino Decl. ¶ 10; *see, e.g.*, 31 C.F.R. § 10.50.

In order to obtain and maintain RTRP status, Plaintiffs would be forced to pay a substantial amount of money in application fees, exam fees, and CE course fees, as well as potential travel costs, lodging, and meals related to taking the exam and CE courses. Loving Decl. ¶ 11; Kilian Decl. ¶ 11; Gambino Decl. ¶ 12; Defs.' Answer ¶ 87. Plaintiffs would also be forced to spend a substantial amount of time filling out the appropriate forms, studying for the competency exam, taking the exam, attending CE courses, and travelling to and from the exam and CE courses. Loving Decl. ¶ 12; Kilian Decl. ¶ 12; Gambino Decl. ¶ 13; Defs.' Answer ¶ 88. The monetary costs of compliance with the RTRP regulations, as well as the substantial opportunity cost of the time spent on compliance, will force one Plaintiff to charge higher prices in order to remain profitable, and will force the other two Plaintiffs to close their tax preparation businesses. Loving Decl. ¶ 13; Kilian Decl. ¶¶ 13–16; Gambino Decl. ¶¶ 16–17.

Plaintiff Sabina Loving owns Loving Tax Services, Inc., a 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 in at least the past dozen years, and serves the residents of its community, many of whom are low-income. *Id.* ¶ 7. Prior to starting Loving Tax Services, 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 three years. *Id.* She prepared approximately 100 tax returns in 2012. *Id.*

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 will be costly, forcing her to increase the fees she charges her customers, which will make her less competitive with large tax preparation firms, particularly those exempted from the regulations. *Id.* ¶¶ 13–14. In addition, Loving would like to hire and supervise "supervised preparers" during tax season to assist her in preparing taxes using professional tax preparation software, but she is unable to do so because under the new licensing regime, only CPAs, attorneys and enrolled agents may supervise "supervised preparers." *Id.* ¶¶ 9, 16; A.R. at 001223. 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; A.R. at 001223. Formerly, an unenrolled signing preparer could supervise other preparers. *See, e.g.*, 26 C.F.R. § 301.7701-15(b).

Plaintiff Elmer Kilian is an 80-year-old retired Korean War veteran living in the small village of Eagle, Wisconsin, where he has a wooden shingle hanging 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 individuals and small businesses in his local community, many of them longtime customers. *Id.* ¶¶ 4, 8, 9.

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

longtime 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, N.J., 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 on Wall Street from 2001 to 2003 as an equity analyst for a hedge fund. *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.*

Gambino objects on principle to the RTRP licensing regulations; he believes they are an unconstitutional infringement on his economic liberty to earn an honest living free from unreasonable and irrational 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 licensing regulations will make it no longer profitable for him to continue preparing tax returns. *Id.* ¶ 16. He has stopped taking new tax clients and plans to close his tax preparation business if the RTRP licensing regime is not struck down. *Id.* ¶¶ 17, 18.

STANDARD OF REVIEW

Normally, summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(a) (formerly Fed. R. Civ. P. 56(c)). However, "[i]n a case involving review of a final agency action under the Administrative Procedure Act [("APA")] . . . the standard set forth in Rule 56[(a)] does not apply." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006). Instead "[s]ummary judgment [] serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Nat'l Auto. Dealers Ass'n v. FTC*, No. 11-1711, 2012 U.S. Dist. LEXIS 70831, at *12 (D.D.C. May 22, 2012).

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); *see also Nat'l Shooting Sports Found., Inc. v. Jones*, 840 F. Supp. 2d 310, 317 (D.D.C. 2012) ("[a]gency actions beyond delegated authority are *ultra vires* and should be invalidated").[10] When an *ultra vires* challenge is brought under the APA, as it is here, a reviewing court "must engage in the two-step inquiry required by *Chevron*." *Nat'l Mining Ass'n v. Jackson*, No. 10-1220, 2012 U.S. Dist. LEXIS 106057, at *45 (D.D.C. July 31, 2012).

To apply the two-step *Chevron* inquiry, a reviewing court must first determine whether "the intent of Congress is clear[.]" *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation omitted). A court does so to determine "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 agency, or by granting the agency a range of interpretive discretion that the agency has clearly exceeded." *Id.* (internal quotation omitted). No deference is owed to the agency during this first step of the *Chevron* inquiry. *See*

[10] "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). This is because "[a]n agency's power is not greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

id. at 660. "[I]f the agency has either violated Congress's precise instructions or exceeded the statute's clear boundaries then . . . that is the end of the matter—the agency's interpretation is unlawful." *Id*. (internal quotation omitted). But if Congress's intent is ambiguous, a court turns to *Chevron* step two, and asks, "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 (U.S. 1984)

Under *Chevron*, for regulations to be upheld as valid, "they must be consistent with the statute under which they were promulgated" and "the [C]ongressional purposes underlying the authorizing statute." *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 40 (D.D.C. 2011) (internal quotations omitted). Regulations cannot be sustained unless the "reviewing court [is] reasonably able to conclude that the grant of authority contemplates the regulations issued." *Planned Parenthood Fed., Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983) (internal quotation omitted). "It is thus '[a]n essential function of the reviewing court . . . to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority.'" *Bensman*, 806 F. Supp. 2d at 40 (quoting *Heckler*, 712 F.2d at 655).

ARGUMENT

This lawsuit is an *ultra vires* challenge under 5 U.S.C. § 706(2)(C) to the absence of statutory authority for the RTRP licensing regulations contained in the August 2011 revision of Circular 230. 31 C.F.R. pt. 10. The IRS has exceeded the clear boundaries of the statutes it ostensibly relies upon for regulatory authority.[11] As demonstrated below, the relevant statutes

[11] In addition to Section 330, the authority citation for 31 C.F.R. pt. 10 (Circular 230) lists several sections of the APA as well as general enabling statutes. A.R. at 001234 (listing, e.g., 31 U.S.C. § 321, describing the Secretary's general authority, and 5 U.S.C. § 301, the federal "housekeeping" statute, which permits no substantive rulemaking). These statutes do not grant Treasury any additional authority to regulate tax return preparers and cannot be the source of statutory authority for such a tremendous expansion of IRS regulatory power.

"simply will not bear the meaning the [agency] has adopted." *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988). The RTRP regulations should thus be struck down as *ultra vires*.

At its core, 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). Section 330(b) later refers to the disciplinary process described in Section 330(b) as "disbarment."

The IRS incorrectly interprets this statute as authorizing Treasury to impose a licensing scheme on all tax return preparers by defining tax return preparers as "representatives" and defining the mere preparation of a tax return as "practice" before the IRS. But below, Plaintiffs demonstrate how this statutory language, interpreted in the context of its legislative history and overall statutory scheme, unambiguously indicates congressional intent to authorize Treasury to regulate only the "practice" of those who actually represent and advocate for persons in proceedings before Treasury, and not anyone who merely prepares tax returns for compensation.

To determine whether Section 330 will bear the meaning adopted by the IRS, this Court must examine the statute under step one of *Chevron*.[12] 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 quotations omitted). The traditional tools of statutory construction include an examination of (1) the statute's text and structure, viewed in context, (2) the statute's legislative history and purpose, and, (3) the place of the statute in its statutory scheme. *See id*. at 1047, 1049.

As shown in Part I, the plain meaning of the text of Section 330 simply does not support the interpretation imposed upon it by the IRS. In Part II, Plaintiffs demonstrate that the legislative history indicates that Congress did not, in 1884 when it passed the statute that was later codified as Section 330, nor in any subsequent minor revision of the statute, even contemplate—let alone authorize—the imposition of a licensing scheme on all tax return preparers by Treasury or the IRS. Finally, as shown in Part III, the broader statutory scheme that Congress has enacted—and *declined* to enact—to regulate tax return preparation and practice before Treasury demonstrates that the IRS interpretation of Section 330 is inconsistent with congressional intent.

I. The Plain Meaning of the Text of Section 330 Is Clear and Unambiguous, and Simply Will Not Bear the Meaning the IRS Has Adopted.

In determining the intent of Congress under step one of *Chevron*, a reviewing court "start[s] with the plain meaning of the text, looking to the 'language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Blackman v.*

[12] In the alternative, if the Court finds that the statute is ambiguous, 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]." *Chevron*, 467 U.S. at 843. Because Plaintiffs bring solely an *ultra vires* claim against the RTRP regulations, the arguments made in support are essentially the same under either step of *Chevron*.

District of Columbia, 456 F.3d 167, 176 (D.C. Cir. 2006) (internal quotations omitted). "If the language has a plain and unambiguous meaning, our inquiry ends so long as the resulting statutory scheme is coherent and consistent." *Id*. (internal quotations omitted).

In evaluating whether a statute's meaning is ambiguous, a reviewing court must bear in mind that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007) (internal quotations omitted). The fact that a term is not statutorily defined does not render it ambiguous if its meaning can be determined from context. *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006). "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) (internal quotations omitted.)

First, Plaintiffs examine the plain and unambiguous meanings of the terms "practice," "disbar," "disbarment," "competency to advise and assist persons in presenting their cases," and "representative" in the context of the statute. Second, Plaintiffs review how related statutes and case law provide additional context for understanding the plain and unambiguous meaning of "practice." Third, Plaintiffs analyze the IRS's flawed interpretation of Section 330 to show how it is foreclosed by the unambiguous meaning of the statute.

A. The text and ordinary definitions of the words used in Section 330 indicate Congress's unambiguous intent to regulate the "practice" of professionals who advocate in adversarial proceedings, and not all tax return preparers.

Section 330 authorizes the regulation of those who "practice" as "representatives of persons" "before" Treasury, and who "advise and assist persons in presenting their cases." Section 330(a). The Secretary may "disbar" representatives who engage in misconduct. Section 330(b). The plain meaning and use of each of these terms indicates that Congress unambiguously intended to permit Treasury to regulate the practice of professionals who

engaged in the representation of individuals through advocacy in adversarial proceedings before Treasury, and not merely anyone who prepared tax returns for compensation.

1. "Practice" refers to the professional representation of taxpayers in adversarial proceedings, analogous to the practice of law.

Section 330 consistently uses the term "practice" to refer to the conduct of those who may be regulated. "Practice" connotes the conduct of trained professionals such as attorneys. Indeed, the term "practice" is ordinarily defined as "[e]xercise of an occupation or profession: the practice of law." *The American Heritage Dictionary of the English Language*, http://www.ahdictionary.com/word/search.html?q=practice (last visited September 13, 2012); *see also Black's Law Dictionary* 1210–11 (8th ed. 2004) (defining "practice" as "PRACTICE OF LAW" and defining "practitioner" as "[a] person engaged in the practice of a profession, esp. law or medicine.") [13]

This understanding that the nature of the "practice" that may be regulated under Section 330 is analogous to the practice of law is strongly reinforced by the context of the statute, particularly the list of requirements that the representative must demonstrate in order to be admitted to practice. Like the standards for admission to the bar of a court, Section 330 requires that a "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." 31 U.S.C. § 330(a)(2).

Indeed, consistent with this understanding of Section 330 practitioners as analogous to those who practice law, the federal courts have sometimes referred to those admitted to practice

[13] "[P]ractice of law" is defined as "[t]he professional work of a duly licensed lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate planning documents, and advising clients on legal questions." *Black's Law Dictionary* 1210.

before the IRS as being members of the "tax bar." *See, e.g.*, *Pope v. United States*, 599 F.2d 1383, 1386 (5th Cir. 1979) ("The enforcement of these standards bears significantly on the IRS's efforts to maintain the traditionally high quality and integrity of the tax bar."); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1309–1310 (D.D.C. 1973) (using "tax bar" interchangeably with "tax practitioners"). Indeed, at least as far back as 1922, the attorneys and other "agents" admitted to practice before Treasury were commonly called the "Treasury Bar." Morris at 742 (". . . that unusual institution commonly miscalled 'The Treasury Bar'"); *see also Alker v. Humphrey*, 247 F.2d 22, 23 (D.C. Cir. 1957) ("Alker was . . . a member of the Treasury Department bar."). The U.S. Supreme Court has even described such practitioners as acting "as attorneys" for claimants or taxpayers. *See Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 121–122 (1926) (citing 23 Stat. 258, the statute later codified as Section 330).

As recently as 2005, even the IRS acknowledged the distinction between professionals regulated under Circular 230 (which implements Section 330) and "tax return preparers":

> First, let me explain that those regulated under Circular 230 are not necessarily return preparers. What the Service seeks to do under Circular 230 is [regulate] those professionals—attorneys, Enrolled Agents (EA), Certified Public Accountants (CPA), appraisers, et cetera—who wish to represent clients before the IRS. We have an interest, of course, a strong interest in ensuring that that professional community who is representing clients before the IRS adheres to a certain standard of professionalism. Tax return preparers are not deemed as individuals who represent individuals before the IRS, so there is a slightly different distinction there.

2005 IRS Congressional Testimony. Current IRS regulations still reflect this: "A person may be a tax return preparer without regard to educational qualifications and professional status requirements." 26 C.F.R. § 301.7701-15(d). Thus, even the IRS does not view tax

return preparation as analogous to professional practice such as the practice of law.[14]

2. The use of the terms "disbar" and "disbarment" in Section 330(b) indicates that the nature of "practice" in Section 330 is akin to the practice of law.

Section 330(b) describes the process for losing the privilege of "practice" before Treasury as "disbarment" and notes that, "the Secretary may suspend or disbar from practice before the Department, or censure, a representative[.]" 31 U.S.C. § 330(b). The ordinary meaning of disbar is to "to expel from the bar or the legal profession: deprive (an attorney) of legal status and privileges[.]" *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/disbar (last visited September 21, 2012); *see also Black's Law Dictionary* 495 (8th ed. 2004) (defining "disbarment" as "[t]he action of expelling a lawyer from the bar or from the practice of law, usu. because of some disciplinary violation").

Following the language of Section 330(b), federal courts commonly refer to the process of stripping a practitioner of the privilege to practice before Treasury as "disbarment" or "disbarment proceedings." *See, e.g.*, *Banister v. U.S. Dep't of the Treasury*, 2011 U.S. Dist. LEXIS 152803, No. 10-02764, at *14–15 (N.D. Cal. Mar. 10, 2011). The Second Circuit has even treated Section 330 disbarment proceedings as the equivalent of disbarment from a court or state bar association, applying the law of such cases to reject a disbarred IRS practitioner's claim that his disbarment should be overturned because of his acquittal on the criminal charges that gave rise to his disbarment. *See Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977). There is thus a clear connotation from the use of the term "disbar" and "disbarment" that the nature of the "practice" contemplated in Section 330 is analogous to the practice of law.

[14] In addition, in the Preamble to the 2011version of 31 C.F.R. pt. 10, the IRS addressed public comments concerned that the public may misperceive the RTRP term "because it implies a high level of professional capability," by explaining that the RTRP initiative simply "institute[s] standards for minimum competence," thus justifying the term "registered." A.R. at 001222.

3. The Section 330(a)(2)(D) requirement that representatives demonstrate "competency to advise and assist persons in presenting their cases" indicates that "practice" involves offering counsel and engaging in advocacy in adversarial proceedings before an adjudicative or quasi-judicial body.

The requirement of Section 330(a)(2)(D) is particularly telling for understanding the meaning of "practice," as it indicates that the type of "practice" being contemplated in Section 330 is one which involves the representative "advis[ing]" and "assist[ing]" clients relating to the "present[ation]" of their "cases." Notably, this is the only provision of Section 330 that describes how "representatives of persons before the Department" actually "practice"—the other requirements of Section 330(a)(2) are simply important qualities that a representative must demonstrate. The terms used in Section 330(a)(2)(D) describe activity that sounds very much like the practice of law, directly analogous to offering legal counsel and engaging in advocacy.

The use of the word "case" strongly connotes an adversarial proceeding of some kind, or the arguments made in such a proceeding.[15] It also indicates that the representative will be appearing before Treasury (or the IRS) in its adjudicative or quasi-judicial role (what is known in the tax field as "controversy") rather than its normal tax collection role (what is known in the tax field as "compliance").[16] Indeed, while the IRS normally assesses taxes and penalties in an "*ex parte*, non-adversarial manner" (where there would be no role for a representative engaging in advocacy), statutory terms such as "'action[], suit[], or proceeding[]' . . . implicate some adversarial adjudication, be it administrative or judicial." *3M Co.*, 17 F.3d at 1459 n.11 (quoting

[15] The term "case" is ordinarily defined as "a suit or action in law or equity" or "(1): the evidence supporting a conclusion or judgment (2): argument; *especially*: a convincing argument[.]" *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/case (last visited September 13, 2012); *see also The American Heritage Dictionary of the English Language*, http://www.ahdictionary.com/word/search.html?q=case (last visited September 13, 2012) (defining "case" as "[a] set of reasons or supporting facts; an argument," or in the context of law as "[a]n action or a suit or just grounds for an action" or "[t]he facts or evidence offered in support of a claim").

[16] *See, e.g.*, *West's Tax Law Dictionary*, *supra* note 2, at 1054.

Capozzi, 980 F.2d at 874). In a legal context, "case" is defined as "[a] civil or criminal proceeding, action, suit or controversy at law or in equity" or "an argument." *Black's Law Dictionary* 228 (8th ed. 2004). Since it is clear from context that the term "case" in Section 330(a)(2)(d) refers not to appearance in a court, but before Treasury, the term "case" is perhaps better understood in this context as an "administrative proceeding, action, suit or controversy" or an argument made in such a proceeding. In other words, Section 330 is not about regulating those who prepare documents for the IRS in its common role as tax collector ("compliance"), but about those who appear before the IRS in its adjudicative or quasi-judicial role ("controversy").

Coupled with the term "presenting" in the phrase "presenting their cases," Section 330 is unambiguously referring to the regulation of those who represent others through advocacy in an adversarial proceeding before Treasury in its adjudicative or quasi-judicial capacity.[17] A noted treatise in the field concurs with this understanding of "practice," explaining that "practice occurs where a person makes an advocate's presentation of a client-taxpayer's rights, privileges or liabilities under IRS-administered laws or regulations."[18] Certainly, the four requirements of Section 330(a)(2) would make little sense if they applied to anyone who merely prepared a tax return. As a court in this District has found, Section 330 "permitted the Treasury to judge the character, reputation, and competence of those who practiced before it, *in order to ensure that cases were well presented*." *Poole*, 1984 U.S. Dist. LEXIS 15351, at *4 (emphasis added).

Indeed, the IRS itself recognizes that advocacy is a fundamental component of "practice." In the current version of the *Internal Revenue Manual*, the IRS states:

[17] Since IRS assessments of taxes and penalties are *ex parte*, there would be no role for a representative to make any presentation of a taxpayer's case until the adjudicative stage. *See 3M Co.*, 17 F.3d at 1459 n.11.

[18] Michael I. Saltzman, *IRS Practice and Procedure* ¶ 1.08[2] (Rev. 2d ed. 1991 & Supp. 2009) (Alban Decl. Ex. 5) (under heading, "What Constitutes 'Practice' Before the Service").

> Individuals who are not practitioners may appear before the IRS as a witness or communicate to the IRS on a taxpayer's behalf, and appear as a witness—but they may not advocate. In general terms, these individuals are merely assisting with the exchange of information and are not themselves advocating on the taxpayer's behalf.[19]

Similarly, in defining the limits between a witness and a taxpayer representative at an IRS hearing, the IRS has stated that, "unless properly authorized to represent the taxpayer and qualified to practice before the Internal Revenue Service an individual may not be heard as the taxpayer's representative in advocating a particular position on issues or controversies arising during a tax examination." Rev. Proc. 68-29, 1968-2 C.B. 913, § 2.01.[20] The IRS further explained the difference between a factual witness and a taxpayer's representative:

> [t]he difference may be summarized by distinguishing activities in the capacity of witness—or one who assists in the factual development of a case—and activities in the capacity of advocate—or one who acts in behalf of the taxpayer in urging particular determinations with respect to issues or controversies.

Id. This is precisely the difference between a tax return preparer and a genuine practitioner before the IRS—a tax return preparer merely assists in calculating and reporting factual information such as a taxpayer's earnings, eligibility for various deductions or credits, and tax liability, while a practitioner advocates for the taxpayer, "urging particular determinations with respect to issues or controversies." *Id*. The IRS even indicates that a return preparer is a factual witness, not a representative. *See id*. ("[A]n accountant who has . . . prepared his tax returns may be a proper person to supply information and assist in the factual development of the case.").

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[19] Internal Revenue Service, *Internal Revenue Manual*, pt. 1, ch. 25, § 1, "Practice Before the IRS Overview" (last revised June 1, 2010), *available at* http://www.irs.gov/irm/part1/irm_01-025-001.html.

[20] Although effective August 12, 1968, Rev. Proc. 68-29 is the IRS's current statement on this subject, and the IRS has recently cited it as an authority. *See, e.g.*, Office of Professional Responsibility, IRS, *Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service*, Aug. 2011, *available at* http://www.irs.gov/pub/irs-utl/guidance_on_restrictions_during_suspension_or_disbarment_--_august_2011.pdf.

4. The term "representative" indicates an agency relationship not normally present in mere tax return preparation.

Section 330 authorizes the Secretary to "regulate the practice of *representatives of persons* before the Department of the Treasury." But a "tax return preparer" is no more a "representative" than an outside bookkeeper who is hired annually to organize one's accounts. The term representative connotes an agency relationship, where the representative acts as an agent for the person represented. Indeed, 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 September 13, 2012); *see also Black's Law Dictionary* 1328 (8th ed. 2004) ("[o]ne who stands for or acts on behalf of another . . . See AGENT"). In fact, the original 1884 text of the statute later codified as Section 330 (before it was revised in 1982 for stylistic purposes) was even more explicit about the connection between representation and the legal concept of agency, describing those regulated under the statute as "agents, attorneys, or other persons representing claimants before [the Secretary's] department" and as "representatives of claimants." 23 Stat. 258.[21]

But the term "representative" in Section 330 excludes people who merely prepare tax returns, because 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.[22] Under the Internal Revenue Code, "'tax return preparer' means any person who prepares for compensation, or who employs one or more persons to prepare for compensation,

[21] This change was made simply "to eliminate unnecessary words." Historical and Revision Notes, 31 U.S.C. § 330. The revision was intended to be "without substantive change." Pub. L. No. 97-258, 96 Stat. 877 (1982).

[22] For example, under 26 C.F.R. § 601.504(a), "[r]epresentation" of a taxpayer requires obtaining that taxpayer's power of attorney. However, obtaining power of attorney has never been required for the mere preparation of a tax return, because preparing a tax return is not "representation." *See, e.g.*, Defs.' Answer ¶¶ 37, 57.

any return of tax . . . or any claim for refund of tax[.]" 26 U.S.C. § 7701(a)(36)(A). As a general matter, "tax return preparers" are independent contractors, not agents.[23] Merely preparing a tax return (or claim for refund) for a paying customer is simply not an act of representation.[24] Therefore, a "tax return preparer" is no more the "representative" of a taxpayer whose tax return he or she has prepared than a mechanic who repairs a car is the "representative" of the car owner.

B. The context provided by other statutes and case law indicates Congress's unambiguous intent to regulate the "practice" of professionals who advocated in adversarial proceedings, and not mere tax preparers.

The Internal Revenue Code itself also treats "practice before the Internal Revenue Service" as analogous to the practice of law. For example, 26 U.S.C. § 6304, which governs fair tax collection practices, does not typically permit the Secretary to contact a taxpayer regarding unpaid taxes "if the Secretary knows the taxpayer is represented by any person authorized to practice before the Internal Revenue Service with respect to such unpaid tax[.]" 26 U.S.C. § 6304(a)(2). Likewise, under 26 U.S.C. § 7525, "federally authorized practitioners" receive the same confidentiality protections as attorneys with respect to tax advice.

Under 26 U.S.C. § 7407, the Secretary has authority to seek an injunction against a tax preparer who has misrepresented his eligibility to "practice" before the IRS. 26 U.S.C. § 7407(b)(1)(B). In applying Section 7407, federal courts have recognized that there is a clear distinction between preparing tax returns and "practice" before the IRS. For example, in *United States v. Cruz*, the federal government brought suit under Section 7407 (and other

[23] Employees who prepare tax returns or claims for refund for their regular employers (or officers or employees of their employer), and those who prepare returns as a fiduciary are excluded from this statutory definition. *See* 26 U.S.C. § 7701(a)(36)(B)(ii)–(iii).

[24] It should be noted that even when prepared by a professional preparer, a taxpayer normally must sign his or her own tax return, absent a specifically authorized power of attorney. *See* 26 U.S.C. § 6065 (verification of returns under penalty of perjury required); 26 C.F.R. § 1.6012-1(a)(5) (returns made by agents); 26 C.F.R. § 601.504(a)(6) (specifically authorized power of attorney to sign tax returns).

statutes) to permanently enjoin two defendant tax return preparers from preparing or assisting in the preparation of tax returns after they had repeatedly prepared tax returns based on fraudulent deductions and credits, and misrepresented their eligibility to "practice" before the IRS. 618 F. Supp. 2d 1372, 1374 (S.D. Fla. 2008), *aff'd in part, rev'd in part on other grounds*, 611 F.3d 880 (11th Cir. 2010). One defendant had previously practiced before the IRS, but had been barred from practice before the IRS since 1998, after which he continued preparing tax returns. *Id*. at 1389. The other defendant tax preparer was "not a 'practitioner' with full rights to practice before the IRS." *Id*. But it was not illegal for either defendant to merely prepare tax returns—instead, the lawsuit was based on the fraudulent deductions and credits in their prepared tax returns, and the fact that "both misrepresented to taxpayer clients their authority to represent those taxpayer clients before the Internal Revenue Service." *Id*. However, recognizing that both defendants had made a good faith effort to correct their unlawful behavior and prevent future errors, the court declined to enjoin them from tax return preparation altogether, which it described as a "business death penalty[.]" *Id*. at 1392. This specific holding was upheld by the Eleventh Circuit in an opinion written by retired Justice O'Connor (sitting by designation). *United States v. Cruz*, 611 F.3d 880, 887 (11th Cir. 2010). Such a ruling would not be possible if the preparation of tax returns was itself a form of "practice" before the IRS, nor would it even be possible for the defendant who had lost all practice privileges to remain in business as a tax return preparer if return preparation was a form of "practice" before the IRS.

Similarly, prior to the 2011 revisions to Circular 230, the Eleventh Circuit found that, under Section 330, the IRS could exclude an "unenrolled" tax return preparer from practice before the IRS (but not from tax preparation). *Wright v. Everson*, 543 F.3d 649, 657 (11th Cir. 2008). The court found that the IRS could prevent Wright from representing clients in "taxpayer

interviews" and other matters before the IRS because "Congress expressly delegated authority to the Secretary to promulgate regulations governing who may practice before the IRS[.]" *Id.*

In 1946, a somewhat similar factual scenario was presented in *Tinkoff v. Campbell*, where a disbarred attorney who prepared tax returns "as a layman" sued for an injunction so that he would also be permitted "to represent taxpayers in explaining adjustments and computations in their returns or to accompany them upon interviews necessitated by such returns." 158 F.2d 855, 856 (7th Cir. 1946). As in *Wright*, the court upheld the IRS's refusal to allow Tinkoff to practice under Circular 230, but did not suggest that would prevent him from preparing tax returns. *Id.*

Finally, prior to the recent regulatory change, even the IRS acknowledged the difference between "practice" before the IRS and tax return preparation. *See* 2005 IRS Congressional Testimony (". . . the Office of Professional Responsibility has the authority to impose sanctions of all sorts, including disbarring or essentially disallowing professionals under their jurisdiction from practicing before the IRS. That does not prevent those individuals from filing returns.").

C. The IRS's interpretation is foreclosed by the plain language of Section 330.

Having examined the plain language of Section 330 to understand the meaning of "practice," Plaintiffs now turn to reviewing how the IRS's interpretation of the statute is foreclosed by Section 330's plain meaning. The IRS purports to regulate the preparation of tax returns (and claims for refund) by all "tax return preparers" under the authority of Section 330 because it claims their conduct constitutes "the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1). In the 2011 version of Circular 230, the IRS defines "Practice before the Internal Revenue Service" as including "preparing documents; filing documents[.]" 31 C.F.R. § 10.2(a)(4). Because tax return preparers, by definition, "prepar[e]" tax returns, and may sometimes "fil[e]" tax returns, the IRS concludes that they are

engaged in "practice" under Section 330. But, as discussed *supra*, the statute only authorizes the regulation of the "practice of *representatives* of persons before the Department" who "advise and assist persons in *presenting their cases*." 31 U.S.C. § 330(a) (emphasis added).

Below, Plaintiffs demonstrate (1) how the IRS's overbroad application of its definition of "Practice before the Internal Revenue Service" to Section 330 fails to give meaning to much of Section 330(a)(2)(D), and (2) how the IRS fails to give ordinary meaning to the term "representative(s)," because even the IRS recognizes that "tax return preparers" are not "representatives." Thus, the "statute . . . clearly forecloses the course that the agency has taken[.]" *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 361 (D.C. Cir. 1989).

1. The IRS's interpretation treats Section 330(a)(2)(D) as surplusage.

It is a basic canon of statutory construction that interpretations of a statute that render statutory language superfluous are strongly disfavored. *See Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "[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.[25] Specifically, the IRS's interpretation of the requirement that a representative demonstrate "competency to advise and assist persons in presenting their cases" effectively ignores the words "advise" and "in presenting their cases" when applying this provision to all tax return preparers. This is because those words indicate a role for the representative that goes well

[25] The IRS's interpretation also renders a separate statute surplusage. *See infra* Part III(B).

beyond the role of a tax return preparer as defined by statute.[26] Preparing a tax return (or claim for refund) for compensation is nothing like presenting a "case." A tax return simply reports a person or entity's financial information, such as income, as well as one's tax payments (if any) and anticipated tax liability. It is informational and non-adversarial, unlike a "case" (*see* discussion *supra* at Part I(A)(3)). Indeed, even the assessment of penalties and taxes by the IRS is non-adversarial and *ex parte*, so there is no role for any taxpayer representative. *See, e.g.*, *3M Co.*, 17 F.3d at 1459 n.11. Therefore, the IRS's interpretation of the statute fails to give meaning to much of the language of Section 330(a)(2)(D) when applying Section 330 to all tax return preparers. The IRS's interpretation of Section 330 is thus foreclosed by the plain meaning of the statute when one properly assigns meaning to each provision, including Section 330(a)(2)(D).

2. The IRS's interpretation of Section 330 fails to assign an ordinary meaning to the term "representative(s)" because even the IRS recognizes that "tax return preparers" are not "representatives."

Although the IRS interprets Section 330 as authorizing the licensing of "tax return preparers," Section 330 does not mention or refer to "tax return preparers" and only describes those who may be regulated as "representatives." In fact, the term "representative(s)" appears eight times in Section 330, but is tellingly left undefined by the regulations contained in Circular 230, which purport to implement that statute.[27] This is because assigning an ordinary meaning to

[26] *See* 26 U.S.C. § 7701(a)(36)(A) (defining a "tax return preparer," 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").

[27] "Representation" is defined elsewhere rather tautologically by the IRS as "[a]cts performed *on behalf of* a taxpayer *by a representative in practice* before the Internal Revenue Service." 26 C.F.R. § 601.501(b)(13) (emphasis added). This regulation makes no reference to Section 330 as a source of authority and is not directly referenced in Circular 230 itself, but it is quoted in the Preamble to the August 2011 Revision of 31 C.F.R. pt. 10 in a brief attempt to justify the new regulations as authorized under Section 330. *See* A.R. at 001222. But this definition merely begs the question of whether or not someone is, in fact, a "representative" who is "in practice"

the term "representative" would defeat the IRS's ability to apply Section 330 to license all "tax return preparers." *See* Part I(A)(4) *supra*.

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, e.g.*, 2005 IRS Congressional Testimony ("Tax return preparers are not deemed as individuals who represent individuals before the IRS . . . ."); *see also* Rev. Proc. 68-29, 1968-2 C.B. 913, § 2.01 (explaining that, during a tax examination, a tax return preparer who prepared the return in question is a factual witness, not a representative).

IRS regulations also recognize a clear distinction between representation and tax return preparation. For example, 26 C.F.R. § 601.504 governs the situations when a power of attorney is required. Under 26 C.F.R. § 601.504(a), "[r]epresentation" of a taxpayer requires obtaining that taxpayer's power of attorney (which is generally done by completing IRS Form 2848). But preparing and filing tax returns or claims for refund for a taxpayer does not require, and has never required, a preparer to obtain the power of attorney for that taxpayer. *See, e.g.*, Defs.' Answer ¶ 37 ("[N]o practitioner is required to obtain a power of attorney or complete a Form 2848 in order to prepare and file tax returns or claims for refund for taxpayers as a compensated tax return preparer."); *see also id*. at ¶ 57. Thus, tax return preparation is not "representation" under the IRS's own definition of the term in its regulations governing taxpayer representatives.

Similarly, the IRS allows representatives—but not mere "tax return preparers"—to consult with, or represent, taxpayers during an IRS proceeding called a "taxpayer interview"

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before the IRS. And applying this definition to tax return preparation confuses acts done "on behalf of" a taxpayer with acts done *for* a taxpayer.

under 26 U.S.C. § 7521.[28] Prior to the 2011 revision of Circular 230, the Eleventh Circuit upheld the IRS's authority under Section 7521 and Section 330 to prevent unenrolled tax return preparers from acting as representatives in taxpayer interviews. *See Wright*, 543 F.3d at 657.

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 Legislative History Shows That Congress Did Not Contemplate—Let Alone Authorize—the IRS Imposing a Licensing Scheme on All Tax Return Preparers.

The legislative history and purpose of Section 330 also foreclose the IRS's errant interpretation of Section 330, revealing that Congress could have never even contemplated empowering the IRS to regulate tax return preparers when it originally passed the statute in 1884, and has not 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 interpreting a statute, a reviewing court "may look to the statute's overall purpose and its legislative history to discern Congress's intent." *Hays v. Leavitt*, 583 F. Supp. 2d 62, 68 (D.D.C. 2008) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Chevron*, 467 U.S. at 845–54)). A reviewing court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (citing examples). For example, in *MCI Telecomms. Corp. v. AT&T Co.*, the Supreme Court struck down agency action that effectively resulted in "a fundamental revision of the statute," even though the statute in that case actually permitted the agency to "modify" any requirement imposed by the statute. 512 U.S.

[28] Further underscoring the real difference between RTRPs and others regulated under Circular 230, the IRS has determined that the 26 U.S.C. § 7525 confidentiality privilege for "federally authorized practitioners" will not generally 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." A.R. at 001222.

218, 231–232 (U.S. 1994). The Court found it objectionable that the agency's policy was "effectively the introduction of a whole new regime of regulation . . . which may well be a better regime but is not the one that Congress established." *Id.* at 234. The Court also noted that the new regulatory regime "may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id*. at 232. "[R]egulations can be sustained only if th[e] reviewing court [is] reasonably able to conclude that the grant of authority contemplates the regulations [at] issue." *Bensman*, 806 F. Supp. 2d at 40 (internal quotations omitted).

Here, placing the statute in its context by examining its legislative history and purpose forecloses the interpretation assigned by the IRS. This examination reveals that the statute 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, as neither the IRS nor the income tax existed in their modern forms. In 1884, Congress unambiguously expressed its intent that the Secretary may only regulate the practice of "agents, attorneys, or other persons representing claimants before his Department" who "advise and assist such claimants in the presentation of their cases" before Treasury. That intent has been unchanged by the stylistic modifications and other amendments to the statute since that time.

After the Civil War, the federal government found itself with a large number of claims made on its treasury by soldiers and others for pensions, back pay, and various damages. Morris at 742. Along with these claimants came a large number of attorneys and other agents who competed to solicit claimants, and even the rights to their claims, sometimes in less-than-scrupulous ways. *Id.* Dealing with the disputes between the claimants and their agents, as well as between agents over who represented a claimant, became increasingly burdensome on the federal departments. *Id*. On May 7, 1884, the Secretary of the Interior submitted a report to

Congress entitled "Irregular Practices of Certain Attorneys" detailing scandalous practices of claims agents and stating that he had been forced to disbar over three hundred agents operating before the Pension Office. *Id*. at 743. In response, Congress passed the Act of July 4, 1884 giving the Secretary of Interior the specific power to regulate, recognize, and disqualify agents, attorneys, and others representing claimants before his Department. *Id.*; ch. 181, sec. 5, 23 Stat. 101 (now codified at 43 U.S.C. § 1464). Three days later, Congress passed the Act of July 7, 1884 giving the Secretary of the Treasury the same powers over claimants before his Department. Morris at 743; 23 Stat. 258.

As passed in 1884, the relevant provision read:

> . . . 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. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

23 Stat. 258–59 . This provision was actually inserted into a War Department appropriations bill as a proviso to an appropriation for "horses and other property lost in the military service." *Id.*

Rep. Richard Townshend of Illinois explained the purpose of the bill in the floor debate:

> . . . [G]reat wrongs have been practiced upon persons presenting claims for lost horses; many soldiers have been victimized by very disreputable claims agents in Washington. While there are some very reputable gentlemen engaged in the business, who charge reasonable fees, there are many who are very disreputable, and who have been guilty of bad practices, and have victimized many a poor soldier who was unable to take care of himself. . . . The object of this proviso is to protect soldiers against such practices.

48 Cong. Rec. H5219 (daily ed. June 16, 1884). (The proviso originally had price controls limiting the fees of claims agents.) Later in the floor debate, Rep. Townshend mentioned the connection between the Treasury provision and the Interior provision:

> But I tell you to-day many a poor soldier is being victimized to the extent of one-half his claim because he is unable to be here in person to attend to it or to get an attorney in his own neighborhood who can attend to it. The other day we passed a similar provision in regard to pension claims. If it was right to protect applicants for pensions, why is it not right to protect in the same way applicants for lost horses?

48 Cong. Rec. H5222 (daily ed. June 16, 1884).[29]

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*, 1984 U.S. Dist. LEXIS 15351, at *5 (citing H.R. Rep. No. 651, 97th Cong., 2d Sess. 19 (1982)). Among the 1982 changes, "the words 'representatives of persons' [were] substituted for 'agents, attorneys, or other persons representing claimants before his department' to eliminate unnecessary words." Historical and Revision Notes, 31 U.S.C. § 330.[30]

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

[29] Notably, there was no discussion of the income tax or the IRS, let alone tax return preparation, because the Act predated the modern income tax by nearly 30 years. The Sixteenth Amendment was ratified in 1913, clearing the way for the modern income tax, initially passed under the Revenue Act of 1913, ch. 16, 38 Stat. 114. The first Form 1040 was introduced in 1913. *See* Internal Revenue Service, *Brief History of the IRS*, http://www.irs.gov/uac/Brief-History-of-IRS (last visited September 27, 2012). Also in 1913, the Personal Income Tax Division was established in the Bureau of Internal Revenue. *See* Tax Analysts, *Tax History Museum: 1901-1932, The Income Tax Arrives*, http://www.taxhistory.org/www/website.nsf/Web/THM1901?OpenDocument (last visited September 27, 2012).

[30] Since the 1982 recodification, the statute has been amended three more times: in 1984 (adding subsection (c)), 2004 (adding subsection (d) and making other changes), and 2006 (amending subsection (c)). Historical and Revision Notes, 31 U.S.C. § 330. None of these subsequent changes have expanded the scope of Treasury authority over more than "the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1).

under Section 330. The legislative history evinces a clear congressional intent to permit Treasury to regulate those attorneys or other agents who represent claimants (and later, taxpayers) in proceedings before it, in order to prevent such representatives from taking advantage of their clients. But there is no indication that Congress ever contemplated, much less authorized, the IRS to impose a sweeping new licensing scheme on all tax return preparers.

III. The IRS's New Interpretation of Section 330 Is Inconsistent With the Overall Statutory Scheme Congress Has Enacted—And Declined to Enact—Relating to Tax Return Preparation.

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. *See Brown & Williamson*, 529 U.S. at 133. "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). 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.*

Examining Section 330 in the context of the statutory scheme implemented by Congress to regulate tax return preparation makes clear that Congress has never bestowed on Treasury or the IRS the plenary authority to regulate "tax return preparers" or tax return preparation. First, a review of the statutory scheme shows that Congress has passed specific and limited grants of authority when it has wished to empower the IRS to regulate in this field, and Congress has never assumed that the IRS has plenary authority to regulate. Second, the IRS's interpretation of Section 330 would circumvent 26 U.S.C. § 7407, effectively rendering it surplusage, indicating that the IRS's interpretation is fatally at odds with Congress's intent to regulate in this area. Third, the fact that Congress has not passed any of eight recent bills that would amend Section

330 to explicitly authorize the IRS to regulate tax return preparers demonstrates that Congress does not believe it has granted the IRS such authority and is not willing to grant such authority. Fourth, the IRS's new interpretation of Section 330 runs counter to nearly a century of the IRS's own interpretation of the statute, undercutting the IRS's claim of authority.

A. Rather than grant the IRS plenary authority to regulate all tax return preparers, Congress has passed specific and limited grants of authority.

Congress has not granted plenary authority to the IRS to regulate all tax preparers under Section 330 or any other statute. Instead, Congress has passed specific statutes delegating authority to the IRS to regulate tax preparers in specific, and limited, circumstances. Most recently, 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. *See* 26 U.S.C. 6011(e)(3); Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, § 17, 123 Stat. 2996. Congress also found it necessary to give specific statutory authorization to the Secretary to require the use of PTINs by tax preparers. *See* 26 U.S.C. § 6109(a)(4); IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3710(a), 112 Stat. 685. And in order to authorize the IRS to regulate the provision of tax shelter advice, Congress specifically amended Section 330, adding subpart (d), which clarified the authority of the Secretary to impose standards on written advice of a type which the Secretary determines as having a potential for tax avoidance or evasion. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 822(b), 118 Stat. 1586, 1587. If Congress thought that it had already given the IRS plenary power to regulate tax preparers, it would not have needed to pass these specific statutory provisions.

Moreover, Congress has already regulated the conduct of tax return preparers under a number of civil and criminal statutes governing tax return preparation that prohibit actions 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. The penalties for violating these statutes include fines of up to $100,000 per occurrence and even felony conviction and imprisonment of up to three years. Tax return preparers who demonstrate a pattern of misconduct may also be enjoined from preparing further returns. *See* 26 U.S.C. § 7407. These statutes, all passed subsequent to the 1884 statute codified as Section 330, and all more specific on the subject of regulating tax return preparation, serve to clarify the meaning of Section 330. *See Brown & Williamson*, 529 U.S. at 133.

In stark contrast to the provisions above, Congress has granted plenary licensing authority to Treasury over those collecting foreign payment of interest or dividends:

> All persons undertaking as a matter of business or for profit the collection of foreign payments of interest or dividends by means of coupons, checks, or bills of exchange shall obtain a license from the Secretary and shall be subject to such regulations enabling the Government to obtain the information required under subtitle A [26 USCS §§ 1 et seq.] (relating to income taxes) as the Secretary shall prescribe.

26 U.S.C. § 7001. This statute demonstrates that Congress knows how to clearly delegate licensing authority to Treasury, and what such a delegation of licensing authority looks like. Thus, the statutory scheme for tax return preparation, in contrast to a statute granting licensing authority, indicates that Congress sought to regulate tax return preparation through criminal and civil penalties for misconduct rather than through a regulatory scheme administered by the IRS.

In fact, in the Tax Reform Act of 1976, Congress explicitly recognized that any regulation of tax return preparers was done at the state or local level. A statute passed under that Act, 26 U.S.C. § 6103, regulates the confidentiality and disclosure of tax returns and tax return information. It contains a provision entitled "State agencies regulating tax return preparers" that discusses how information about tax return preparers, including any penalties assessed against

them under three federal tax statutes, "may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of tax return preparers." 26 U.S.C. § 6103(k)(5). The provision notes that, "[i]nformation may be furnished [to] and used [by such local or state agencies] under this paragraph only for purposes of the licensing, registration, or regulation of tax return preparers." *Id.* This further shows that Congress did not contemplate giving licensing authority of tax return preparers to Treasury or the IRS, but recognized that any regulation of preparers was properly done at the state or local level.

B. The IRS's new interpretation of Section 330 would circumvent the operation of 26 U.S.C. § 7407, effectively rendering it surplusage.

The exercise of the IRS's self-granted authority under the RTRP licensing scheme in the 2011 version of Circular 230 circumvents 26 U.S.C. § 7407, a federal statute permitting the IRS to seek injunctions against unethical tax preparers, effectively rendering it surplusage. This 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.

"[A]ll words in a statute are to be assigned meaning, and . . . nothing therein is to be construed as surplusage." *Hawke*, 211 F.3d at 644 (rejecting a broad reading of a statute because it "would render at least two other related statutes meaningless") (quoting *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)).

Section 7407 was enacted as part of the Tax Reform Act of 1976. "It, and other contemporaneous provisions regulating the activities of tax preparers, reflect[ed] congressional concern over various abuses by preparers in the reporting of clients' income tax liabilities." *United States v. Ernst & Whinney*, 735 F.2d 1296, 1302 (11th Cir. 1984).

Under Section 7407, the Secretary may file a civil action in federal district court to "enjoin any person who is a tax return preparer from further engaging in any [of several

categories of illegal, deceptive, or fraudulent] conduct . . . or from further acting as a tax return preparer." 26 U.S.C. § 7407(a). If a court finds that a preparer has engaged in the prohibited conduct, it may enjoin such conduct, or:

> [i]f the court finds that a tax return preparer has continually or repeatedly engaged in [such] conduct . . . 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. § 7407(b). Notably, enforcement under this provision is dependent on the government persuading an Article III court that the specified misconduct has occurred, and that the injunction sought is the proper remedy for addressing the misconduct. *See, e.g.*, *Cruz*, 611 F.3d at 885–87.

This stands in contrast to the new Circular 230 powers over "tax return preparers" that the IRS has given itself, purportedly under the authority of Section 330. Under its current powers, the IRS need not bother seeking the blessing of a court before it sanctions a tax preparer. While it still must provide "notice and opportunity for a proceeding," the Secretary may directly "suspend or disbar . . . or censure" tax return preparers, and may impose monetary penalties for incompetence, disreputability, and specified malfeasance. 31 U.S.C. § 330(b). This provides far more discretion to the Secretary in controlling a wider range of conduct than Section 7407.

This begs the question: why would Congress have bothered to pass Section 7407 if Treasury already had greater powers under Section 330, a statute that had been on the books for nearly one hundred years prior? There would seem to be no good reason, and therein lies the problem. The IRS's interpretation of Section 330 would render Section 7407 a surplusage, and thus runs against the established canon of statutory interpretation. Such an outcome indicates that the IRS's interpretation of Section 330 is foreclosed by congressional intent, as indicated by the statutory scheme that Congress has put in place to regulate the field of tax return preparation.

C. At least eight recent bills to amend Section 330 indicate that Congress does not believe it has already granted the IRS the authority to license tax preparers, and indicate the manner in which Congress would grant such authority.

Since 2005, Congress has considered the following eight bills that would amend Section 330 in order to grant the IRS the authority to regulate "tax return preparers" under that statute.[31] None have passed.

- Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. § 4 (2005), *available at* http://www.govtrack.us/congress/bills/109/s832
    - Status: Died (Reported by Committee)

- Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act, S. 1321, 109th Cong. § 203 (2006), *available at* http://www.govtrack.us/congress/bills/109/s1321
    - Status: Died (Reported by Committee)

- Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 4 (2007), *available at* http://www.govtrack.us/congress/bills/110/s1219
    - Status: Died (Introduced)

- Taxpayer Bill of Rights Act of 2008, H.R. 5716, 110th Cong. § 4 (2008), *available at* http://www.govtrack.us/congress/bills/110/hr5716
    - Status: Died (Referred to Committee)

- Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong. § 202 (2010), *available at* http://www.govtrack.us/congress/bills/111/hr5047
    - Status: Died (Referred to Committee)

- Taxpayer Bill of Rights Act of 2010, S. 3215, 111th Cong. § 202 (2010), *available at* http://www.govtrack.us/congress/bills/111/s3215
    - Status: Died (Referred to Committee)

- Taxpayer Bill of Rights Act of 2012, H.R. 6050, 112th Cong. § 202 (2012), *available at* http://www.govtrack.us/congress/bills/112/hr6050
    - Status: Referred to Committee

- Taxpayer Bill of Rights Act of 2012, S. 3355, 112th Cong. § 202 (2012), *available at* http://www.govtrack.us/congress/bills/112/s3355
    - Status: Referred to Committee

[31] The IRS was well aware of the various failed legislative proposals that would have given it the authority to license all tax return preparers. *See, e.g.*, December 2009 *Return Preparer Review*, A.R. at 000151(two heavily footnoted paragraphs discussing numerous legislative proposals).

The language below 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'.

S. 1219, 110th Cong. § 4 (2007). Notably, Section 4(a) refers to the amendment to Section 330 as an "[a]uthorization," indicating that Congress hadn't previously authorized Treasury or the IRS to regulate tax return preparers under Section 330. Several of these bills have also included language explicitly requiring the registration and regulation of tax return preparers, including the imposition of testing and other requirements. *See, e.g.*, *id*.

1. These proposed amendments to Section 330 indicate Congress does not believe it has already granted the IRS the authority to license tax return preparers.

These proposed amendments would hardly be necessary if Congress believed it had already authorized the IRS to regulate all tax return preparers under the existing language of Section 330. After all, "Congress cannot be presumed to do a futile thing." *Halverson v. Slater*, 327 U.S. App. D.C. 97, 129 F.3d 180, 185 (D.C. Cir. 1997)); *see also Hawke*, 211 F.3d at 644 (rejecting interpretation where it indicated that Congress's subsequent passage of another statute "would have been completely useless"). Rather, the existence of these bills indicates that Congress does not believe it has granted such regulatory authority to the IRS.

2. These proposed amendments illustrate the likely manner in which Congress would grant this sort of regulatory authority.

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 (citing *MCI Telecomms. Corp.*, 512 U.S. at 231). In *MCI Telecomms.*, the Court rejected an agency action that effectively introduced a whole new regime

of regulation not contemplated by the statute, noting that the new regulatory regime "may be a good idea, but it was not the idea Congress enacted into law in 1934." 512 U.S. at 232. Later, in *Brown & Williamson*, the Court rejected the FDA's attempt to regulate tobacco products under the Food, Drug, and Cosmetic Act because it required a strained interpretation of "safety" and ignored the plain implication of subsequent tobacco-specific legislation, noting that, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160.

The repeated proposal of such direct and literal amendments to Section 330 suggests that if Congress were to delegate the authority to the IRS to regulate hundreds of thousands of tax return preparers, it would not likely do so "in so cryptic a fashion," waiting quietly for over one hundred years for the IRS to finally "realize" it had been granted the power all along. *Id*. Instead, Congress could quite simply and directly add a few key words to Section 330 clarifying that it now intends the term "representatives" to include "tax return preparers." That Congress has not done so despite numerous recent bills indicates that it has not reached any consensus to grant such authority; the IRS thus has no congressional authorization to regulate in this manner.

D. The IRS's new interpretation of Section 330 runs counter to a century of agency understanding of the authority conveyed by the statute.

The IRS's actions for the past century or so (since the beginning of the modern income tax and the advent of the first Form 1040 in 1913) are persuasive evidence that Section 330 does not empower the IRS to license tax return preparers. *See Fin. Planning Ass'n*, 482 F.3d at 490-491 (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 v. Nat'l Mediation Bd.*, 29 F.3d 655, 669 (D.C. Cir. 1994) ("We 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; they are a wholesale attempt to rewrite the statute and history."). 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.

From when the statute was passed in 1884, through when the IRS first issued Circular 230 in 1921, up until the December 2009 publication of the *Return Preparer Review*, the IRS had never taken the position that it was entitled to license all tax return preparers under Section 330. Indeed, as recently as April 2009, the IRS admitted that, "[j]ust preparing a tax return . . . is not practice before the IRS. These acts can be performed by anyone." IRS Publication 947.[32]

The IRS also told Congress in both 2003 and 2005 that it lacked the authority to regulate "tax return preparers" as "representatives" under Section 330.[33] *See* 2005 IRS Congressional Testimony ("Tax return preparers are not deemed as individuals who represent individuals before the IRS . . . ."). The official IRS Response to the National Taxpayer Advocate's 2002 legislative proposals indicated that the IRS did not believe it had the power to license tax return preparers:

> Historically, licensing of professionals has been within the purview of state government. Currently, the IRS regulates *practice before the IRS, a representational activity* that is relevant to Federal oversight. The Tax Reform

[32] Current IRS regulations still reflect this: "A person may be a tax return preparer without regard to educational qualifications and professional status requirements." 26 C.F.R. § 301.7701-15(d).

[33] Also indicative are the admissions of the IRS's National Taxpayer Advocate to the same effect. "*[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 . . .").

> Act of 1976 established the definition of and penalties on "income tax preparers" but *explicitly recognized the rights of states and localities to regulate them independent of the Federal government*.

2003 Report to Congress at 297 (emphasis added). Indeed, this reflects the language of 26 U.S.C. 6103(k)(5), discussed *supra*, Part III(A).

After repeatedly admitting it did not have the power to regulate "tax return preparers" under Section 330, the IRS then changed its position in December 2009 without any explanation of the change. 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. In lieu of an explanation, the IRS offered one conclusory sentence: ". . . the IRS considers the preparation of a tax return for compensation as a form of representation before the agency." *Id*. In June 2011, when the new Circular 230 regulations were first published in the Federal Register, the IRS still offered no further explanation, announcing in the preamble that, "practice before the IRS includes preparing or filing tax returns and other documents with the IRS. Thus, preparation of a tax return is practice before the IRS." A.R. at 001222.

This lack of explanation for the IRS's sudden change in position is quite troubling, particularly when it affects the livelihoods of hundreds of thousands of tax return preparers and nearly one hundred million taxpayers who rely on paid preparers to prepare their tax returns each year. It seems telling that the IRS's new interpretation of Section 330 was issued just as several proposed bills amending Section 330 to give the IRS the same authority stalled in Congress. This sudden, unexplained change in interpretation, after such a long history of interpreting the statute in the opposite manner, 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.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment, declare that the IRS's RTRP licensing scheme is *ultra vires*, and enjoin Defendants from enforcing the RTRP regulations imposed by the 2011 revisions to Circular 230.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I electronically transmitted the attached Plaintiffs' Motion for Summary Judgment, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs' Proposed Order, Declarations in Support of Plaintiffs' Motion for Summary Judgment, and exhibits attached thereto, to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECD registrants:

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