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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO SUSPEND INJUNCTION PENDING APPEAL

William H. Mellor (DC Bar No. 462072)
Scott G. Bullock* (DC Bar No. 442379)
Dan Alban (DC Bar No. 978051)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: wmellor@ij.org; sbullock@ij.org; dalban@ij.org

Attorneys for Plaintiffs

*Admitted *pro hac vice*

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INTRODUCTION

The sky is not falling. Despite the dire claims of Defendants (hereinafter "the IRS"), the world of tax administration will not come to an end if this Court's injunction against the IRS's unlawful licensing scheme for tax preparers remains in place while on appeal. In fact, the absence of the registered tax return preparer ("RTRP") licensing regulations will make this income tax season no different from every prior tax season. For the 100-year history of the modern income tax, tax preparers have always been free to assist taxpayers in preparing returns without obtaining a license from the IRS or any other federal agency, and taxpayers have always been free to hire whomever they pleased to prepare their tax return. This Court's timely injunction thus preserved the status quo of the past century.

The IRS's arguments for a stay of the injunction should not be taken at face value. The IRS has neglected to inform this Court of critical information with direct bearing on its claim of irreparable harm, and has repeatedly and materially misrepresented its quantification of alleged harms.

First, the IRS has failed to inform this Court in either its brief or the accompanying declaration that on January 3, 2013, fifteen days *prior* to this Court's ruling, the IRS announced it would delay enforcement of the RTRP continuing education ("CE") requirement for an additional year.[1] Thus, the IRS's argument of irreparable harm is completely undercut by its own actions; the only RTRP requirement that would currently be binding on tax preparers (in the absence of the injunction) has *already been delayed for one year by the IRS itself*. This alone warrants denial of the IRS's motion. On top of that, acting entirely of its own accord, the IRS has taken down its personal tax identification number ("PTIN") registration system and states on

[1] Oddly, this critical change seems to have been announced via the IRS Return Preparer Office's Facebook page, *see infra* Part II(A).

its website that "tax return preparers covered by this [RTRP] program are not currently required to register with the IRS," apparently suspending the PTIN requirement for RTRPs, even though the PTIN requirement was never challenged by Plaintiffs nor enjoined by the Court.[2] Bizarrely, the IRS now apparently blames Plaintiffs for this spontaneous, self-inflicted harm.

Second, the IRS has greatly inflated the harms it claims to quantify by repeatedly conflating persons and regulations unaffected by this Court's ruling with those that are. First, the IRS completely fails to distinguish between the RTRP regulations which were struck down, and the separate PTIN regulations, which were not. For example, looking only to the IRS's monthly revenue derived from the RTRP regulations enjoined by this Court (and not the PTIN regulations, which were not enjoined), the claimed figure of $4 million per month suddenly shrinks to $192,697 per month, about 5% of the amount claimed by the IRS. *Compare* Defs.' Mem. 7, ECF No. 23-1 *with* Campbell Dec. ¶ 10, ECF No. 23-2. Second, the IRS frequently fails to distinguish between *all* PTIN holders and the subset of PTIN holders (actual or prospective RTRPs) directly affected by this Court's decision. For example, while the IRS claims that "[o]ver 700,000 preparers have registered with the Service," Defs.' Mem. 7, it neglects to inform the Court that only about half that number are actually subject to the RTRP regulations—the remainder are attorneys, CPAs, and enrolled agents.[3] This misleading use of inflated figures occurs throughout the IRS's brief and accompanying declaration. In short, the IRS is trying to pull a fast one. Its motion should therefore be denied.

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[2] Internal Revenue Service, PTIN Requirements for Tax Return Preparers, (last updated January 29, 2013) http://www.irs.gov/Tax-Professionals/PTIN-Requirements-for-Tax-Return-Preparers; *accord* Internal Revenue Service, IRS Statement on Court Ruling Related to Return Preparers, (last updated January 29, 2013), http://www.irs.gov/uac/IRS-Statement-on-Court-Ruling-Related-to-Return-Preparers (original version posted on January 22, 2013 containing same quoted language).

[3] *See infra* Part II(B).

But even taken at face value, the IRS's arguments for a stay are truly appalling. The IRS argues that tax preparer regulation is a cash cow that has already generated over $100 million in fees at a cost of only about $50 million, and thus it must be permitted to continue milking $4 million *per month* in fees (about 95% of which are really PTIN fees unaffected by this Court's injunction) from hapless tax preparers despite this Court's ruling that its regulatory scheme is unlawful. Defs.' Mem. 7. It is difficult to imagine a private party arguing with a straight face that, having just had its profit-making scheme declared legally void, it will suffer "irreparable harm" if it is not permitted to continue unlawfully exploiting consumers. But the IRS doesn't stop there—it also claims the injunction should be suspended because preparers who paid these unlawful fees are likely to sue for refunds, possibly in class actions. The IRS then shamelessly asks this Court to suspend the one protection that stands between preparers and these unlawful fees so that it can continue extracting additional fees (and creating even greater potential liability for the government if it loses on appeal). Subjecting tax preparers to millions of dollars in fees each month the stay remains in place is hardly "preventative or protective" and is certainly not merely "maintain[ing] the status quo," as the IRS claims. Defs.' Mem. 2. Moreover, this is completely zero-sum: any gains for the IRS are offset by an equal amount of harm to tax preparers. Enabling this sort of exploitative behavior cannot be in the public interest.

LEGAL STANDARDS

A stay pending appeal is an "extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). A stay is "an intrusion into the ordinary processes of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). This is because "[t]he

parties and the public . . . are also generally entitled to the prompt execution of orders." *Id*. "On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978.

Courts in this jurisdiction consider four factors in reviewing a motion for a stay: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nat'l Ass'n of Mfrs. v. NLRB*, 2012 U.S. Dist. LEXIS 73506, *4-6 (D.D.C. Mar. 7, 2012). The first two factors are the most critical. *Nken*, 556 U.S. at 434. "It is not enough that the chance of success on the merits be 'better than negligible.' . . . '[m]ore than a mere 'possibility' of relief is required.'" *Id.* (internal citations omitted.) Similarly, "simply showing some 'possibility of irreparable injury,' fails to satisfy the second factor." *Id*. at 434-35 (internal citations omitted).

Contrary to the IRS's contention, Defs.' Mem. 3, following the Supreme Court decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008), the D.C. Circuit has indicated, without deciding the matter, that the "sliding scale approach" (which allows a strong showing in one factor to compensate for other) to evaluating these four factors is likely disfavored, and has suggested that motions for extraordinary relief such a stay should face "a more demanding burden" in which each of the four factors is an independent requirement that must be satisfied. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *see also Davis v.*

Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009).[4] The cases cited by the IRS in support of the "sliding scale" approach predate this shift. Defs.' Mem. 3.

ARGUMENT

In this brief, Plaintiffs explain how none of the four factors to be considered in reviewing a motion for a stay weigh in favor of the IRS.[5] The IRS thus fails to justify the Court's exercise of this extraordinary remedy. The IRS also fails to offer any support, such as specific evidence of short-term irreparable harms, for why its alternative request for a 14-day stay would justify extraordinary relief. Accordingly, the IRS's motion should be denied with respect to both its primary and alternative requests for relief.

I. There Is Not a Reasonable Likelihood of the IRS Prevailing on Appeal, and the IRS Fails to Meets Its Burden to Demonstrate That There Is a Reasonable Likelihood.

The IRS claims that it can prevail on this factor if it merely demonstrates "a serious legal question is presented." Defs.' Mem. 4. However, as even the IRS admits, this is only true "if the balance of the other factors favor[] suspending an injunction." *Id.* In fact, "[i]t is only when the other three factors tip sharply in the movant's favor that the standard for success on the merits changes." *In re Special Proceedings*, 840 F. Supp. 2d 370, 372 (D.D.C. 2012); *accord Davis*, 571 F.3d at 1292. Otherwise, a movant must satisfy the standard test, by making a "strong showing that it is likely to prevail on the merits of its appeal." *Washington Metro. Area Transit Comm'n, v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). If a movant fails to demonstrate a likelihood of success on the merits, a court may deny the request for extraordinary relief. *See Wagner v. FEC*, 854 F. Supp. 2d 83, 87 (D.D.C. 2012).

[4] At the very least, the D.C. Circuit has treated the first factor, likelihood of success, as an independent, free-standing requirement that cannot be overcome by a strong showing on other factors. *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dep't. of Agric.*, 573 F.3d 815 (D.C. Cir. 2009); *see also Sherley*, 644 F.3d at 393.

[5] If the IRS fails to meet its burden on *any* of the four factors, it is not entitled to relief.

This Court issued a clear and unequivocal opinion for Plaintiffs. The Court found that this case "boils down to one question: Is [31 U.S.C.] § 330 ambiguous as to whether tax-return preparers are "representatives" who "practice" before the IRS?" Slip Op. 9, ECF No. 22. The Court's answer was a definitive no, and it "conclude[d] that § 330 unambiguously forecloses the IRS's interpretation for three reasons." Slip Op. 10. On the key issue of interpreting the statutory text, the Court found that "'practice' is . . . [when] representatives 'advise and assist persons in presenting their cases.'" Slip Op. 11. Having made this finding, the Court found that the IRS's interpretation of the statutory text completely unraveled:

> This statutory equating of "practice" with advising and assisting the presentation of a case provides the first strike against the IRS's interpretation. **Filing a tax return would never, in normal usage, be described as "presenting a case."** At the time of filing, the taxpayer has no dispute with the IRS; there is no "case" to present. **This definition makes sense only in connection with those who assist taxpayers in the examination and appeals** stages of the process.

Slip Op. 11 (emphasis added). The court quickly debunked the IRS's claim that Congress could not have intended to regulate only those appearing in cases before the IRS while leaving the preparation of tax returns unlicensed, and flatly rejected the IRS's implausible position that different grants of statutory authority within the same section of a statute offer no context for understanding each other. Slip Op. 11-12. The Court then explained how two different aspects of Section 330's statutory scheme confirm that Congress had not intended to allow the IRS the broad authority to regulate all tax preparers under Section 330(b) because to do so would render irrelevant a number of statutes specifically tailored to regulate tax preparers. Slip Op. 13-18. The Court then rejected a number of nontextual arguments raised by the IRS, forecefully declaring, "[i]n the land of statutory interpretation, statutory text is king." Slip Op. 19-20.

Having identified three separate major reasons for rejecting the IRS's interpretation of Section 330, and finding that the IRS offered no persuasive countervailing reasons for accepting

the IRS's interpretation, the Court concluded "that together the statutory text and context unambiguously foreclose the IRS's interpretation of 31 U.S.C. § 330." Slip Op. 19. This was an unwavering opinion that found no merit in any of the IRS's arguments. Even when the Court identified a potential statutory argument that the IRS had failed to make in support of its position, it poked several holes in the argument before setting it aside. Slip Op. 18. The IRS has not identified any clear error or obvious mistake of the sort that might raise questions about the ability of the opinion to withstand appellate review, notwithstanding the assortment of new potential arguments the IRS has managed to brainstorm. Defs.' Mot. 5-6. Given the conclusive nature of the Court's opinion, there is no basis to support the IRS's claim that it is likely to prevail on appeal and the IRS fails to meet its burden of showing that a grant of extraordinary relief is justified.

II. The IRS Will Not Suffer Irreparable Harm If The Injunction Remains in Place, and the IRS Has Not Met Its Burden of Showing That It Will.

The IRS alleges a variety of potential harms, most of which are economic, implausible, self-inflicted, or wildly exaggerated due to inflated numbers. But "the standard for showing irreparable harm in this jurisdiction is strict, and economic harm alone is generally not sufficient." *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 120 (D.D.C. 2012). Moreover, none of these alleged harms is truly *irreparable*. The D.C. Circuit has emphasized that "[t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674, (D.C. Cir. 1985) (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Irreparable harm "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co.*, 758 F.2d 669, 674. "Bare allegations of what is likely to occur are of no value since the court

must decide whether the harm will *in fact* occur." *Id*. Finally, "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Id*. As a movant requesting extraordinary relief, it is the IRS's burden to demonstrate that a stay is justified by irreparable harm to the IRS that would result from leaving the injunction in place. The IRS fails to meet this burden.

A. The IRS has undermined its own claim of harm by suspending the only RTRP requirement that would currently be binding on tax preparers in the absence of an injunction.

Although the IRS claims that it will suffer irreparable injury if a stay is not issued, it has already scuttled its own arguments by postponing the deadline on which its regulations will actually be enforced for an entire year. While the deadline to complete the RTRP exam is not until December 31, 2013, the IRS had warned preparers for nearly a year that there was a firm December 31, 2012 deadline for completing RTRP continuing education (CE) requirements for 2013.[6] But in early January, before this Court's decision, the IRS Return Preparer Office announced on its Facebook page that preparers would be able to "make up" CE hours in 2013 that they did not complete in 2012.[7] This means that preparers can apply for and obtain the

[6] *See* Michael Cohn, *IRS Warns Tax Preparers to Get Continuing Education Soon, Posts List of Providers*, Accounting Today, Feb. 10, 2012, *available at* http://www.accountingtoday.com/news/IRS-Warns-Tax-Preparers-Continuing-Education-Providers-61703-1.html.

[7] The original message was posted on January 3, 2013 at 2:30pm ET but it seems to have been removed from the IRS Return Preparer Office's Facebook page sometime after this Court's ruling, between January 22, 2013, when counsel for Plaintiffs printed a copy of it, and January 26, 2013, when counsel for Plaintiffs attempted to access it again to include the hyperlink in this footnote. *See* Alban Decl. ¶ 7. For a printed version of this message, *see* Alban Decl., Ex. 3; *see also* Joe Kristan, *IRS quietly delays CPE requirement under new preparer regulation scheme*, Tax Update Blog (January 8, 2013), http://rothcpa.com/2013/01/irs-quietly-delays-cpe-requirement-under-new-preparer-regulation-scheme/ (reprinting initial message and describing it as "a quiet admission of failure"). A lengthy follow-up message from the RPO director was posted on January 10, 2013. *See* Carol A. Campbell, *Message from Carol A. Campbell, RPO Director*, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), *available at*

PTINs required for paid tax return preparation in 2013 without showing they have completed their 2012 CE requirements, and they will not have to satisfy those requirements until December 31, 2013, well after the 2013 tax season has ended. Therefore, the IRS's claim of irreparable harm from an injunction against the RTRP regulations rings hollow given that it has already done this supposed "irreparable harm" to itself by suspending the only RTRP requirement that would have been applicable during the 2013 tax season.

This self-imposed delay in enforcement of the RTRP regulations also highlights the lack of urgency in implementing these licensing regulations. For 100 years, there has been no federal government licensure for tax return preparers. Originally announced in June 2009, it took the IRS two years to develop and promulgate the regulations, and even longer to make the required RTRP exam and CE classes a practical reality.[8] The RTRP exam was not made available until late November 2011.[9] Although classes for satisfying the 2012 CE requirement were supposed to be available in January 2012 under IRS Notice 2011-80, the rollout was delayed until the second week of February 2012 because the IRS had not arranged for enough CE providers or classes to fill the anticipated demand.[10] The RTRP requirements have also been rolled into effect gradually, with the deadline for CE requirements originally given as December 31, 2012 (but

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https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100.

[8] *See* News Release, Internal Revenue Service, IRS Marks Third Anniversary of Return Preparer Review; Urges Required Preparers to Take Competency Test as Soon as Possible, June 5, 2012, IR-2012-59, *available at* http://www.irs.gov/uac/IRS-Marks-Third-Anniversary-of-Return-Preparer-Review;-Urges-Required-Preparers-to-Take-Competency-Test-as-Soon-as-Possible.

[9] News Release, Internal Revenue Service, IRS Moves to Next Phase of Return Preparer Initiative; New Competency Test to Begin, Nov. 22, 2011, IR-2011-111, *available at* http://www.irs.gov/uac/IRS-Moves-to-Next-Phase-of-Return-Preparer-Initiative%3B-New-Competency-Test--to-Begin.

[10] *Id*.; Carol A. Campbell, Message from Carol A. Campbell, RPO Director, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), available at https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100.

subsequently postponed until Dec. 31, 2013) and the deadline to pass the RTRP exam claimed to be December 31, 2013, over four and a half years from when the program was announced. Since there has been no urgency in implementing these (unlawful) regulations, the IRS's claims of "irreparable harm" from a delay of implementing the RTRP regulations by another year or so while the case is on appeal are specious and unavailing.

Although the IRS had not yet suspended the December 31, 2013 exam requirement when this Court issued its opinion, there had already been serious doubts in the tax preparer community about whether the IRS would really enforce this deadline.[11] The IRS's latest decision to delay the 2012 CE requirement for an entire year based on purported failures of the IRS Return Preparer Office to communicate the CE requirement casts further doubt on whether the IRS regards any of the RTRP deadlines as firm. [12] Coupled with the IRS's history of delays and deadline extensions in implementing the Return Preparer Initiative, *see infra* Part II(D)(1), it stretches the limits of credibility to believe that the IRS will strictly enforce the December 31, 2013 RTRP exam deadline if the injunction is lifted.

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[11] *See, e.g.*, Robert D. Flach, *Return Preparer Office Statistic Update*, The Tax Professional, January 8, 2013, http://thetaxprofessional.blogspot.com/2013/01/return-preparer-office-statistic-update.html (noting that most tax preparers will not have time to take RTRP exam until after tax season ends, and asking, "[s]o Prometic will need to provide a testing opportunity for 753 individuals per week in each of the 50 states. Is that physically possible?"); *see also* Letter from Francis X. Degen, President, National Association of Enrolled Agents, to David Williams, Director, IRS Return Preparer Office (Aug. 15, 2012), *available at* http://www.naea.org/node/390.

[12] Tellingly, RPO Director Carol Campbell's January 10 Facebook message explicitly left open the possibility that the December 31, 2013 RTRP exam deadline would be postponed, twice referring to it as the "decision[]" about "what will happen if the testing deadline is not met" and "any decision with respect to testing." Carol A. Campbell, *Message from Carol A. Campbell, RPO Director*, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), *available at* https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100. The fact that the head of the Return Preparer Office is already hedging and offering disclaimers nearly a year in advance of the deadline is a strong indicator that the IRS does not genuinely plan to impose a firm deadline.

B. The IRS has exaggerated its claims of harm by inflating its figures to include people and regulations that are unaffected by this Court's ruling.

The IRS seems to think that throwing around a lot of large numbers will impress this Court of the harm it claims to suffer. But most of the key figures it cites are inflated by conflating the separate PTIN regulations with the RTRP regulations, such as including PTIN holders not directly affected by this case (attorneys, CPAs, and enrolled agents) or by including revenue derived from PTIN fees, which were not challenged in this lawsuit.[13] As noted in the introduction, the number of preparers affected by the RTRP regulations is half the number the IRS claims.[14] The IRS's claim of $4 million in monthly income from fees is about twenty times the actual number, since only $192,697 of the monthly fees are derived from RTRP testing. Campbell Decl. ¶ 10. The IRS's total figure of over $105 million in fees also inappropriately includes PTIN fees.[15] Assuming that the $192, 697 monthly figure for RTRP exam fees is an

[13] This case challenged the RTRP regulations contained in Circular 230, 31 C.F.R. part 10, as published in 76 Fed. Reg. 32,286, which purported to have been passed under authority of 31 U.S.C. § 330. The PTIN requirements are based on an entirely separate statute, 26 U.S.C. § 6109, and are contained in a separate set of regulations, 26 C.F.R. § 1.6109-2. Although the challenged RTRP regulations in the August 2011 revision of Circular 230 do require that an RTRP applicant have a PTIN, 31 C.F.R. § 104(c), the Circular 230 regulations are not the source of regulatory authority mandating use of the PTIN and payment of the PTIN fee by all tax preparers. Those requirements are found in the PTIN regulations, 26 C.F.R. § 1.6109-2.

[14] To be clear, 600-700,000 was the IRS's early estimate of the number of unenrolled preparers who would be subject to the RTRP program. *See* 76 Fed. Reg. at 32,299. That estimate has since declined to 350,000. *See* Press Release, Internal Revenue Service, Tax Preparers Must Renew Their PTINs and Those Required to Take the RTRP Test Should Schedule It As Soon As Possible (Dec. 20, 2012), *available at* http://www.irs.gov/uac/Newsroom/Renew-PTINs-for-2013,-Take-the-RTRP-Test-if-Required ("There are currently 739,000 tax preparers with 2012 PTINs. Approximately 350,000 of them are subject to the new [RTRP] testing and CE requirements."). It is unknown whether the difference between the two figures can be attributed solely to an estimation error or is partly a result of preparers leaving the tax preparation business due to the time, cost and administrative burden of complying with the RTRP regulations.

[15] Oddly, IRS Return Preparer Office Director Carol Campbell states that revenue from these fees "**exceeded** $105,810,000" but never provides an exact figure. Campbell Decl. ¶ 10 (emphasis added).

average since the exam was first offered in late November 2011, the total amount of RTRP exam fees collected can only be roughly $2.5 million. In addition, the purported $238,000 cost of notifying tax preparers affected by the injunction of the RTRP regulations is improperly calculated using all PTIN holders. *Compare* Defs.' Mem. 7 *with* Campbell Decl. ¶ 13.

Several unquantified alleged costs included in the IRS's brief and declaration are inappropriate because they are either irrelevant to this case or they fail to distinguish between alleged costs relating to PTINs and alleged costs relating to the RTRP regulations. The unquantified alleged costs from shutting down computer systems for PTIN application & renewal, *compare* Defs.' Mem. 7 *with* Campbell Decl. ¶ 12, are completely irrelevant to the injunction issued in this case, which did not require the IRS to shut down its PTIN computer system. The IRS does not specify what percentage of the work done by the 167 employees in the Return Preparer Office relates to administering PTINs versus administering RTRP requirements, *compare* Defs.' Mem. 7 *with* Campbell Decl. ¶ 10; but the fact that there are 119 user-fee-supported positions, coupled with the fact that the RTRP exam fees make up only about 5% of the total revenue from user fees, indicates that the IRS is again inappropriately conflating PTIN administration with RTRP administration. The IRS never specifies to what extent the alleged costs associated with "modifying or breaching vendor contracts" or "enter[ing] into new contracts" relate to PTIN fees, Defs.' Mem. 7, but the Declaration of Carol A. Campbell seems to indicate that these alleged costs are "[a]s a result" of *both* closing the RTRP testing centers and shutting down the IT systems associated with the PTIN. Campbell Decl. ¶ 12. Given all of the examples above, it seems a pretty safe bet that the IRS didn't suddenly decide to distinguish between PTIN vendors and RTRP vendors on this one issue.

Whatever actual revenue the IRS might collect from the RTRP scheme, it is much lower than any of the figures cited in the IRS motion, and the IRS will suffer little or no harm from having to forego that revenue while the appeal is pending. The same is true of the dramatically inflated costs. Having provided inflated and misleading figures for these alleged harms, the IRS has failed to meet its burden of justifying the use of the extraordinary remedy of a stay.

C. The IRS should not be able to rely on self-inflicted harms and its failure to mitigate foreseeable harms in support of its request for a stay.

Many of the alleged harms the IRS invokes were completely foreseeable and self-inflicted. It is "well-settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012) (*quoting Lee v. Christian Coal. of America, Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001)). The IRS built its RTRP house of cards on the shifting sands of Circular 230 regulations rather than a firm statutory foundation. Given that federal agencies are presumed to have expertise about their own statutes and regulations, the IRS should have been well aware of the precarious position of its new RTRP regulations when it drafted them. Even if not, the IRS was certainly made aware of the *ultra vires* flaw in the regulations nearly a year before they took effect, when counsel for Plaintiffs offered written and spoken comments explaining why the proposed regulations lacked statutory authority under 31 U.S.C. § 330 at an IRS hearing on the matter on October 8, 2010. *See* Alban Decl., Exs. 1, 2. The IRS ignored this clear warning sign that statutory authorization for its proposed RTRP scheme was in question and might very well be challenged as *ultra vires*. Then, on March 13, 2012, the IRS put on notice that it had been sued over the validity of the regulations, and had to have then been aware that the regulations could be struck down, even if it believed such an outcome unlikely. Although it could have taken action to mitigate risks, such as by delaying implementation until the lawsuit was resolved,

or making participation voluntary during the pendency of the lawsuit, the IRS nonetheless continued to take actions that exposed it to further costs and liabilities. Plaintiffs, other tax preparers, and the public should not bear the cost of these self-inflicted harms by having them weighed against their interests in prompt and continued enforcement of this Court's injunction. There are consequences to imposing an unlawful licensing scheme on hundreds of thousands of people, and bearing the cost of one's own self-inflicted harms is certainly one of them.

D. Leaving the injunction in place will not result in substantial disruption to tax administration, but staying the injunction could cause substantial disruption.

The IRS claims that "immediately discontinuing the [RTRP] program would result in a substantial disruption to tax administration." Defs.' Mem. 7. Like many of the IRS's arguments, this is really a belated argument for why it believes the injunction should not have issued on January 18 rather than an argument for why the injunction should be suspended now, particularly given that the RTRP program has *already* been suspended by the IRS.[16] At this point, leaving the injunction in place would preserve the status quo, while suspending the injunction would cause only further disruption if the IRS re-imposes the RTRP licensing scheme on tax preparers that it has just informed are not required to comply with the RTRP regulations. In addition, the reasons offered by the IRS for this purported "disruption" are uncompelling and in fact weigh heavily against issuing a stay. The IRS fails to meet its burden on these issues.

1. Few things could be as disruptive to tax administration as the RTRP scheme itself, and its misadministration by the IRS Return Preparer Office.

As a general matter, it is hard to imagine that anything could be more disruptive to tax administration than the IRS's imposition of the burdensome RTRP regulations on preparers, as

[16] *See* Internal Revenue Service, *IRS Statement on Court Ruling Related to Return Preparers* (last updated Jan. 25, 2013), http://www.irs.gov/uac/IRS-Statement-on-Court-Ruling-Related-to-Return-Preparers.

well as the continuing missteps by the Return Preparer Office in administering this licensing scheme by constantly modifying the application of those regulations, extending deadlines after insisting they will be firmly enforced, prematurely announcing ill-considered policies, backtracking from those ill-considered policies, launching programs before they are fully tested, or failing to launch announced programs altogether. The IRS plays Lucy to hapless tax preparers' Charlie Brown, repeatedly telling them "this time, the deadline is firm, Charlie Brown," and then pulling the football away at the last moment.[17] The most recent example of this is the *post hoc* extension of the 2012 RTRP CE deadline by an entire year.[18] Similarly, the IRS at one point announced plans to fingerprint all tax preparers as part of its Return Preparer Initiative, then abruptly postponed (and later shelved) the plans after tax preparers and professional trade associations expressed outrage.[19] The IRS also prematurely rolled out electronic reporting of CE credits only to have widespread failures to properly register CE credits

[17] This has become so common and problematic that at least one professional trade association has written the IRS a letter asking them to not delay an RTRP deadline that is nearly a year and a half away. Letter from Francis X. Degen, President, National Association of Enrolled Agents, to David Williams, Director, IRS Return Preparer Office (Aug. 15, 2012), *available at* http://www.naea.org/node/390.

[18] For an example of the disruption routinely caused by the IRS's misadministration of the RTRP regulations, *see* Alban Decl., Ex. 3 (the comments from preparers are illustrative and reference previous examples of similar disruptions); *see also* Joe Kristan, *IRS quietly delays CPE requirement under new preparer regulation scheme*, Tax Update Blog (January 8, 2013), http://rothcpa.com/2013/01/irs-quietly-delays-cpe-requirement-under-new-preparer-regulation-scheme/ (describing IRS message as "a quiet admission of failure"). The outrage over the latest deadline extension was so significant that the head of the Return Preparer Office made a follow-up post a week later. *See* Carol A. Campbell, *Message from Carol A. Campbell, RPO Director*, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), *available at* https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100.

[19] Michael Cohn, *IRS Delays Tax Preparer Fingerprinting Requirement*, Accounting Today, Nov. 8, 2011, *available at* http://www.accountingtoday.com/news/IRS-Delays-Tax-Preparer-Fingerprinting-Requirement-60744-1.html.

earned at the six regional IRS tax forums.[20] In a notable failure to promote consumer understanding and engagement, the IRS announced in July 2011 and again in June 2012 that it would be rolling out a public database of tax preparers before the 2013 tax season, but has still not launched the database.[21] And the IRS is apparently still struggling to inform tax preparers of their obligations under the RTRP regulations; IRS Return Preparer Office Director Carol Campbell admitted earlier this month that the December 31, 2012 RTRP CE deadline was extended because, "there was quite a bit of confusion around this one issue."[22] If tax administration can survive these frequent IRS-inflicted disruptions, it can only thrive in their absence. Given that enforcement of the RTRP regulations has *already* been suspended, the Court should leave the injunction in place in order to prevent further IRS-driven disruption and provide stability and clarity for preparers while this case is on appeal.

2. Much of the harm the IRS alleges is imaginary, implausible, nonsensical, unsupported, foreseeable, or self-inflicted.

The IRS alleges a variety of harms resulting from the disruption of tax administration. In addition to not being allegations of irreparable harm, these allegations of harm are simply non-

[20] Jeff Stimpson, *Preparers Report Trouble with CE Credit from IRS Forums*, Accounting Today, Sept. 10, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/Preparers-Report-Trouble-with-CE-Credit-from-IRS-Forums63936-1.html.

[21] *See infra* Part III(D)(3). In 2012, the IRS was beaten to the punch by online marketers who used FOIA requests to obtain information on some 700,000 PTIN preparers and build online databases for advertising or possibly "phishing" purposes. *See* Tennessee Society of CPAs, *Several PTIN Sites Go Live; Be Wary of Providing Profile Information*, TSCPA Hotwire (October 2012), http://www.tscpa.com/Content/Files/Publications/Hotwire/2012/OctHotwire_ptin.asp.

[22] Carol A. Campbell, *Message from Carol A. Campbell, RPO Director*, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), *available at* https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100.

credible or self-inflicted. The IRS fails to meet its burden of showing that extraordinary relief is warranted on these alleged harms.

a. Staying the injunction will not prevent refund lawsuits from being filed, but will substantially increase the government's potential liability for refunds.

The issuance of a stay will actually cause far greater disruption to the tax preparation community, and create more liability for the federal government, than leaving the injunction in place. The IRS expresses concern that tax preparers may file lawsuits, including class actions, in order to obtain refunds of fees they've paid. Defs.' Mem. 7. But suspending the injunction will do nothing to prevent tax preparers from filing suits for refund, and will actually make the situation far worse by adding to the government's liability if the IRS loses on appeal. If this Court's decision is affirmed on appeal, tax preparers who paid fees to obtain the RTRP certification will have wasted their time and money to comply with an unlawful regulatory scheme and may have claims for a refund. But if this Court's injunction is suspended, even *more* preparers will have to pay even *more* fees, and the government's potential liability will only continue to increase the longer an appeal is pending. Not only is the IRS's position a *non sequitur*, but it also fails to explain how these refund lawsuits are an "irreparable" harm. The IRS fails to meet its burden on this issue. This is a red herring.

b. Contacting those affected by the ruling is not as costly as the IRS claims, and it is the responsible thing to do.

The IRS objects that notifying all of the tax preparers affected by this ruling would cost $238,000.[23] This is completely implausible.[24] If contacting the PTIN holders it regulates and

[23] Relatedly, the IRS also claims it will "incur [unspecified] costs associated with modifying and updating numerous websites that provide information regarding the [RTRP] program." Campbell Decl. ¶ 12. Any such costs would be trivial at best, are economic and not irreparable, and may have already been incurred, as the IRS has posted notices on both its main webpage and

with whom it regularly interacts is as costly and burdensome as the IRS claims, it is a marvel that the IRS can even continue to function.[25] Moreover, the IRS does not need to contact "every tax return preparer with a PTIN", Campbell Decl. ¶ 13, which would include approximately 390,000 attorneys, CPAs, and enrolled agents unaffected by this ruling, but only the roughly 350,000 tax preparers subject to the RTRP regulations. The IRS has failed to meet its burden with respect to this alleged harm.

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the webpage for tax preparers. *See* Internal Revenue Service, IRS Statement on Court Ruling Related to Return Preparers, (last updated January 25, 2013), http://www.irs.gov/uac/IRS-Statement-on-Court-Ruling-Related-to-Return-Preparers; Internal Revenue Service, for Tax Pros, (last updated January 25, 2013), http://www.irs.gov/for-Tax-Pros.

[24] In a world where the vast majority of people have an email address and where most tax preparers contact and get news from the IRS via email and the IRS website (including the e-file system), there is no excuse for these sort of costs, particularly when the IRS apparently regards posting notices on its Facebook page as sufficient to notify preparers of a major change to CE requirements, *see supra*. The entire point of the PTIN system is for the IRS to have a registry of all preparers, including their contact information. In fact, Form W-12, the PTIN application and renewal form, contains a field for preparers to provide their email address. *See* Internal Revenue Service, Form W-12, Line 4 (Sept. 2012), *available at* http://www.irs.gov/pub/irs-pdf/fw12.pdf. The email addresses (and other contact information) of some 700,000 PTIN holders were among the items of personal information disclosed to online marketers under a FOIA request in 2012. *See* Tennessee Society of CPAs, *Several PTIN Sites Go Live; Be Wary of Providing Profile Information*, TSCPA Hotwire (October 2012), http://www.tscpa.com/Content/Files/Publications/Hotwire/2012/OctHotwire_ptin.asp. It may be true that not all PTIN applicants have an email address or that some have left the field blank, but the IRS could contact the vast majority of tax preparers affected by the injunction electronically while mailing notices to those for whom it has no email address. The IRS also has a number of e-News subscription lists, including several specifically for tax preparers, to which it can freely send notices. *See* Internal Revenue Service, e-News Subscriptions, http://www.irs.gov/uac/e-News-Subscriptions-2 (last visited January 27, 2013). And, of course, the IRS can also prominently display notices about the ruling on various relevant pages of its website, which it has already done, as noted *supra*.

[25] It speaks volumes that the IRS thinks nothing of imposing substantially greater (sometimes business-closing) costs on tax preparers in the form of the unlawful RTRP requirements and fees when those costs are diffused amongst hundreds of thousands of preparers, but objects when the far more minor cost of *merely contacting* all of these people is concentrated on the IRS.

Even if the IRS's cost figure was accurate (which it is not), $238,000 is only about .001983 percent of the IRS's roughly $12,000,000,000 budget.[26] Having unlawfully imposed this burdensome licensing scheme on hundreds of thousands of preparers, simply notifying them that enforcement of the regulations has been suspended at the cost of what amounts to a rounding error from its budget is the least the IRS could do to prevent these preparers from wasting further time, money, and effort to comply. That the IRS objects to taking even this minimal level of responsibility to limit the further harm it inflicts on tax preparers is mind-boggling.

c. The costs of modifying or breaching vendor contracts are insufficiently supported and were foreseeable and self-inflicted by the IRS's failure to mitigate risk.

The IRS claims it will incur unspecified "costs associated with modifying or breaching vendor contracts" as a result of complying with the injunction, without offering any further explanation of how or why these contracts would need to be modified or what costs it expects to incur. Defs.' Mem. 7; Campbell Decl. ¶ 12. As noted *supra*, these alleged costs appear to be at least partly attributable to irrelevant costs associated with PTIN vendors. The lack of specificity on this claim of harm cuts sharply against the IRS, which has the burden of establishing what these harms are and that they will be irreparable. The IRS offers no reason to believe that the contracts could not be changed conditionally, or that new or renegotiated contracts could not be made with vendors if the IRS wins on appeal. They were also, as noted *supra*, completely foreseeable and self-inflicted by the IRS's failure to mitigate risk.

[26] *See* Internal Revenue Service, IRS FY 2013 Budget Proposal Summary (February 2012), http://www.irs.gov/uac/IRS-FY-2013-Budget-Proposal-Summary (noting a FY2013 budget of "$12.8 billion, a $944.5 million increase . . . over the FY 2012 enacted level").

d. Shutting down computer systems is not a harm, let alone an irreparable harm.

The IRS claims that "shutting down computer systems" is an irreparable harm. Defs.' Mem. 7. This barely merits a response, but for the sake of completeness, it should be noted that turning off a computer, or even a network or system of computers, is not widely considered a harm, let alone an irreparable harm. Typically, the "remedy" for such a "harm" would be to turn the computer system back on again when it is needed.[27]

e. Reassigning employees to other areas should not be problematic given how understaffed the IRS claims to be.

The IRS claims that it will incur unspecified "costs associated with . . . finding other positions for the 167 Service employees currently working on the return preparer project." Defs.' Mem. 7. This claim is difficult to swallow given that the ink is barely dry on the IRS's statement of January 15, 2013, blaming its poor performance in a recent Government Accountability Office (GAO) Report on understaffing:

> Another factor behind the FY 2012 numbers reflected changes in agency staffing and budget resources. After a nearly flat budget in FY 2011, the IRS' FY 2012 budget was reduced by $305 million. This reduction affected the level of staffing available to deliver service and enforcement programs. Overall full-time staffing has declined by more than 8% over the last two years, and staffing for key enforcement occupations fell nearly 6% in the past year.[28]

[27] Moreover, this claim is yet another example of the IRS inflating its alleged harms with irrelevant and untrue claims about the impact of the injunction on the PTIN system. The IRS claims that, in order to comply with the injunction, it will be "forced to completely shutdown [sic] the IT systems associated with the PTIN application and renewal program." Campbell Decl. ¶ 12. Again, as explained *supra* in Part II(B), this lawsuit did not challenge the PTIN requirement, which is authorized by an entirely different statute, and which is governed by two different sets of regulations that are not part of the Circular 230 regulations challenged here.

[28] Internal Revenue Service, Statement on IRS FY 2012 Performance Results (last updated January 15, 2013), http://www.irs.gov/uac/Newsroom/Statement-on-IRS-FY-2012-Performance-Results.

Thus, it would seem there are many potential openings for the displaced staff, and, if the GAO report is any indication, much for them to do.[29] To the extent the IRS incurs additional administrative and training costs, these are not irreparable harms. They are also self-inflicted harm, for the reasons given *supra*. If the IRS wins on appeal, the employees can always be transferred back to the Return Preparer Office.

E. Most of the harms alleged by the IRS are minor economic harms that will have little effect on the agency, and are not irreparable harms.

Much of the alleged harm the IRS claims it will suffer is in the nature of minor lost revenue (as compared to the agency's budget) or unspecified (but presumably minor) costs incurred, which is known as "economic harm." Although economic harms may be sometimes serious enough to create other harms, particularly for individuals or small businesses, the D.C. Circuit has held that "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co.*, 758 F.2d at 674. Generally, in order to constitute irreparable harm, economic harm must be truly substantial, such as by threatening a person's livelihood or threatening to force a company out of business. *See id*. But whatever financial losses or other misfortunes may befall the IRS, there is no doubt that the IRS is not going to be put "out of business," nor is its existence the least bit threatened. Thus, the IRS fails to meet its burden of showing irreparable harm with respect to its claims of lost revenue or costs.

[29] Among other findings, the GAO report found that average IRS telephone-call response times had risen to a five-year high of 17 minutes, and only 68 percent of callers even got through to an IRS representative. The agency also failed to respond to 40 percent of the correspondence it received within 45 days. Government Accountability Office, *IRS Faces Challenges Providing Service to Taxpayers and Could Collect Balances Due More Effectively*, GAO-13-156, Dec. 18, 2012, *available at* http://www.gao.gov/products/GAO-13-156.

III. Plaintiffs and Other Tax Preparers Will Be Substantially Harmed If the Injunction Is Lifted, and the IRS Has Not Met Its Burden of Showing They Will Not Be Substantially Harmed.

Although the IRS has announced that the RTRP regulations have been suspended due to the Court's injunction and had previously announced that the deadline for 2012 CE credits has been postponed until December 31, 2013, if the injunction is removed, there will be nothing to legally prevent the IRS from reversing those decisions and reimposing the RTRP requirements on tax preparers. This creates tremendous uncertainty for Plaintiffs (and other similarly situated tax preparers), which limits their ability to make plans for their businesses or inform their customers about whether they will be able to provide tax preparation services for them during this and future tax seasons.

If the RTRP regulations were re-imposed, preparers would have to complete 15 hours of CE credits in 2013 (as well as "make up" any credits from 2012) and pass the RTRP exam in 2013; this will impose the same harms on Plaintiffs (and other similarly situated tax preparers) as were alleged in Plaintiffs' Complaint and in the declarations accompanying Plaintiffs' Motion for Summary Judgment. Sabina Loving would incur compliance costs for herself and the other preparers she employs, which would force her to raise her prices, making her less competitive. Loving Decl. ¶¶ 8-17, ECF No. 12-2. The cost and opportunity cost of compliance with these regulations would force Elmer Kilian and John Gambino to close their tax preparation businesses. *See* Kilian Decl. ¶¶ 10-16, ECF No. 12-3; Gambino Decl. ¶¶ 11-17, ECF No. 12-4. This meets the standard for "irreparable harm" in the D.C. Circuit, s*ee Wisconsin Gas Co.*, 758 F.2d at 674, and the Court has already found that this would constitute an irreparable injury. Slip Op. 22. The Court has also already weighed the interests of the IRS and Plaintiffs: "With an

invalid regulatory regime on the IRS's side of the scale and a threat to Plaintiffs' livelihood on the other, the balance of hardships tips strongly in favor of Plaintiffs." Slip Op. 22.

Moreover, even if Plaintiffs ultimately prevail on appeal, the threat of the regulations being even temporarily re-imposed on Plaintiffs (and other similarly situated tax preparers) if the injunction is lifted during the pendency of the appeal presents a serious risk of irreparable harm. If Mr. Kilian and Mr. Gambino (and other similarly situated tax preparers) are forced to close their tax preparation businesses for even one tax season, they will likely lose a substantial number of their customers in future tax seasons, as their customers will have to seek out new tax preparers in the interim, and may not return. Even if the regulations were ultimately struck down on appeal, and their businesses allowed to reopen, Mr. Kilian and Mr. Gambino (and other similarly situated tax preparers) would find themselves opening a business with no carryover customers from the year before, and would be starting from scratch to build a new customer base. Such an outcome would be devastating, particularly for veteran preparers like 80-year-old Elmer Kilian, who are unlikely to build a new book of clients in their twilight years. Forcing a business such as tax preparation to close for an entire tax season and send all of its business to competitors is thus an "irreparable harm."

A. Plaintiffs Will Be Substantially Harmed If the Injunction Is Lifted.

Sabina Loving will be harmed if the RTRP regulations are no longer enjoined. She has already diligently complied with the 2012 CE requirement for herself, and thus has already suffered harm from the cost of complying with the regulations. Ms. Loving will suffer further harm if the injunction is lifted, because she will be required to pay wages and CE course fees for the seasonal employees who assist her so that they comply with the CE requirements, or she will have to restrict them to purely administrative tasks. *See* Loving Decl. ¶¶ 8, 9, 16. She will also

have to continue complying with the 2013 CE requirements, as well as take and pass the RTRP exam before the end of 2013 (assuming the IRS doesn't further extend the deadlines, as it has extended past deadlines). All of these requirements impose costs on her business that will force her to raise her prices, making her less competitive. *See* Loving Decl. ¶¶ 10-14, 17

Plaintiffs Elmer Kilian and John Gambino have not completed any RTRP CE credits, nor satisfied the 2012 CE requirement, and thus are not in compliance with the RTRP regulations.[30] Alban Decl. ¶ 10. If the injunction is lifted, Mr. Kilian and Mr. Gambino are very likely to be harmed, as they will be forced out of business whenever the IRS decides to enforce the regulations against them.[31] *See* Kilian Decl. ¶¶ 10-16; Gambino Decl. ¶¶ 11-17. Even if they are permitted to operate this tax season, their businesses would be forced to close before next tax season under the December 31, 2013 deadlines for RTRP exam and CE compliance that existed at the time the injunction was issued. Due to the unpredictable nature of the IRS Return Preparer Office, Mr. Kilian and Mr. Gambino simply have no way of knowing when or if the IRS will

[30] The IRS leaps to the false conclusion, based on a news article stating that all three plaintiffs had merely *applied* for PTINs, that Mr. Kilian and Mr. Gambino have completed their CE requirements, which they have not. Defs.' Mem. 8; Alban Decl. ¶ 10. Then, outrageously, it wrongly suggests that Mr. Kilian and Mr. Gambino have perjured themselves in their declarations. Defs.' Mem. 8; Alban Decl. ¶ 10. This confusion could have been avoided if the agency had examined the Form W-12 PTIN applications that Mr. Gambino and Mr. Kilian submitted, which clearly indicate that they have not completed the CE requirement, and explain that they have not done so because they are plaintiffs in this lawsuit, which challenges the validity of the unlawful regulations, including the CE requirement, and ask the IRS to direct any correspondence to counsel. Alban Decl. ¶ 11. Alternatively, the IRS could have checked its own CE records for preparers with registered PTINs to learn that neither Mr. Kilian nor Mr. Gambino has completed any CE credits.

[31] Optimistic that they would prevail in this case, and not wanting to lose longtime customers, Mr. Kilian and Mr. Gambino wanted to have PTIN applications pending in the event of a favorable ruling. Alban Decl. ¶ 9. Indeed, both have already stated in declarations that they planned to continue operating as tax return preparers if the RTRP regulations were struck down. *See* Kilian Decl. ¶ 17; Gambino Decl. ¶ 18. They planned to continue preparing returns in 2013 so long as their respective PTIN applications were pending, unless and until notified by the IRS that they were no longer permitted to prepare returns. The IRS has not contacted counsel for plaintiffs about either Mr. Kilian's or Mr. Gambino's PTIN application. Alban Decl. ¶ 12.

demand that they satisfy the RTRP requirements in order to continue preparing tax returns for compensation. This creates great uncertainty for them and for their customers, both of whom need to know if they will be able to continue preparing returns this season and while the IRS's appeal is pending. Removing the injunction would remove the one assurance they have that they will be able to continue to operate their tax return preparation businesses.

B. Other Tax Preparers Will Be Substantially Harmed if the Injunction is Lifted.

For the same reason that Plaintiffs will be harmed by lifting the stay, all similarly situated preparers will be harmed by lifting the stay. Estimates put the number of tax preparers who will be force out of the tax preparation business by the RTRP regulations in the tens of thousands, or as many as 10 to 20 percent of return preparers.[32] The National Association of Tax Professionals says that some of its members will retire rather than seek the RTRP designation.[33] *The Economist* has also noted that the RTRP regulations "threaten to crush . . . small, local" tax preparers and are "likely to push mom and pop into another line of work."[34] The comments sections of articles about the RTRP regulations in industry publications such as *Accounting Today* are littered with preparers stating that they personally, or preparers they personally know,

[32] *See* Eric Kroh, *Shortage of Tax Return Preparers Feared in Face of New Requirements*, Tax Analysts, Dec. 2012, (attached as Ex. 4 to Alban Decl.); Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, Sept. 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html.

[33] Eric Kroh, *Shortage of Tax Return Preparers Feared in Face of New Requirements*, Tax Analysts, Dec. 2012, (attached as Ex. 4 to Alban Decl.); *see also* Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, Sept. 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html ("A high percentage of the industry's most experienced tax preparers, are elderly" explained tax industry expert Chuck McCabe, "[r]ather than take the exam, many will retire.").

[34] *Guides Through the Swamp: A Big Shake-up for America's Tax-preparation Industry*, The Economist, Mar. 24, 2012, *available at* http://www.economist.com/node/21551052

will be or have been put out of business or otherwise harmed by the time, costs, and administrative burden of compliance with these regulations.[35]

1. A stay would not preserve the status quo—it would only enable the IRS to further exploit tax preparers under this unlawful scheme.

The IRS claims that granting the stay would help preserve the status quo. But the IRS certainly does not intend to freeze the situation in place as of the day before this Court's ruling. Rather, the IRS seeks a stay while the appeal is pending so that it can continue extracting fees from preparers—some $200,000 per month in RTRP exam fees—under regulations that have already been declared *ultra vires* and invalid. This is exploitative of tax preparers, who are being asked to underwrite the IRS's unlawful licensing scheme for the sole purpose of adding to the IRS's revenue, all the while accruing further refund claims against the government, the recovery of which will be costly to both them and the government, and burdensome on the courts.

[35] *See, e.g.*, *Tax Preparers React to Court Decision*, Accounting Today, Jan. 22, 2013, *available at* http://www.accountingtoday.com/news/Tax-Preparers-React-to-Court-Decision-65412-1.html (comments of rajendra, sfaubert, foxy44, tomm1015 on intrusiveness of, and burden imposed by, the RTRP regulations); Michael Cohn, *Court Rules IRS Doesn't Have the Authority to Regulate Tax Preparers*, Accounting Today, Jan. 18, 2013, *available at* http://www.accountingtoday.com/news/IRS-Loses-Lawsuit-Challenging-Authority-Regulate-Tax-Preparers-65408-1.html (comments of taxpro2, kannecat, Nanci T., Mast_48, olivertax discussing threat to their business posed by RTRP regulations); Jeff Stimpson, *Tax Pros Speak Out on RTRP Regime*, Accounting Today, May 29, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/Tax-Preparer-RTRP-requirements-exam-NSA62790-1.html?ET=webcpa:e2551:283576a:&st=email&utm_source=editorial&utm_medium=email&utm_campaign=tpt_052912&taxpro (article mentions a "preparer of long experience [who] is leaving the profession due to an anxiety condition about the test," see also comments of hisexcellency, catkimball, MDEMCISAK, and jgreenhow discussing threat to their business posed by RTRP regulations); Jeff Stimpson, *IRS's Williams: It's Test-Taking Time*, Accounting Today, May 14, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/IRS-Internal-Revenue-Service-David-Williams-RTRP-Registered-Tax-Return-Exam62643-1.html?taxpro (see comments of taxprof2003, KATHETAX, and sundayp/S.Pavlok discussing threat to their business posed by RTRP regulations).

2. Any revenue gains claimed by the IRS are offset by losses to tax preparers, who are burdened more heavily than the IRS by the same amounts.

To the extent that any of the losses in revenue claimed by the IRS are accurate, they are completely offset by the gains to tax preparers in reduced costs, and vice-versa. If the IRS is bringing in $200,000 per month from RTRP exam fees, tax preparers are necessarily being made to pay $200,000 per month in RTRP exam fees. The IRS cannot claim any advantage on this issue because it is zero-sum. Moreover, no tax return preparer has a $12 billion annual budget to cushion the blow. Thus, due to diminishing marginal utility of money (the first dollar one owns is of much greater personal utility than the billionth), the fees paid into this scheme impose a far greater burden on these individuals than they do on the IRS. The IRS thus fails to meet its burden of justifying the extraordinary remedy it asks this Court to exercise.

IV. Suspension of the Injunction Would Not Serve the Public Interest, and the IRS Has Not Met Its Burden of Showing That It Would Serve the Public Interest.

This Court has already found that "the public interest would be served by a permanent injunction because the IRS's new Rule is *ultra vires*." Slip Op. 22. In addition, public interest is not served by a stay because the public is "generally entitled to the prompt execution of orders." *Nken*, 556 U.S. at 427. Here, the public interest in stability weighs in favor of leaving the injunction in place, because the true status quo of tax administration in the United States is that there has never been a federal licensing scheme for tax preparers in the 100-year history of the modern income tax. The public interest in equity and justice also strongly weigh against the exercise of an extraordinary remedy simply to enable the IRS to continue using unlawful tax preparer fees as a revenue stream.

Contrary to the IRS's claims, there is nothing approaching "overwhelming public support" for these regulations and most consumers are largely unaware of them. Defs.' Mem. 9

In fact, consumers will actually be harmed more than helped by these regulations due to reduced choice and autonomy over their personal finances, less competition in the tax preparation market, increased costs of tax preparation, and the negative unintended consequences flowing from increased costs: consumers will have a greater incentive to attempt to prepare their own returns (and most are less qualified to do so than tax preparers, resulting in *more* tax errors), and a black market in unsigned tax returns. The ugly truth is that these regulations are largely backed by industry insiders who stand to profit from pushing out their mom-and-pop competitors, as the IRS tacitly concedes by citing a press release from Intuit (makers of TurboTax,) stating it is "disappointed" in this Court's ruling. Defs.' Mem. 9 n.5. Notably, the RTRP regulations do not apply to TurboTax, but do impose substantial costs on most of its competitors.[36]

A. The sky is not falling—tax season has always proceeded without federally licensed preparers.

As noted in the introduction, there has never been a federal government license for tax preparers in the 100-year history of the modern income tax.[37] Taxpayers, the tax industry, and the IRS have all functioned in this environment for decades. This is the true status quo that consumers and the tax industry are accustomed to dealing with, and there should be no significant disruptions arising from the fact that the IRS is unable to *change* the historical status quo by imposing the RTRP licensing scheme. As noted *supra*, if the RTRP regulations are enforced, as many as 10 to 20 percent of tax preparers may go out of business, which would greatly disrupt tax administration and force tens of millions of consumers to find a new tax

[36] *See, e.g.*, News Release, H&R Block, H&R Block Supports Uniform Requirements in Tax Preparation Industry, Jan. 24, 2013, *available at* http://www.marketwire.com/press-release/h-r-block-supports-uniform-requirements-in-tax-preparation-industry-nyse-hrb-1749573.htm (noting that, "[i]t's easy for software providers like TurboTax to say they support these regulations when they, themselves, are not directly impacted.").

[37] *See* Internal Revenue Service, Return Preparer Review at 1, 6-8, Pub. 4832, Dec. 2009, *available at* http://www.irs.gov/pub/irs-pdf/p4832.pdf.

preparer, or go without one altogether. There will be far less disruption this tax season if the Court's injunction is allowed to remain in place and thus preserve the historical status quo while this case is on appeal.

B. It is not in the public interest to allow the IRS to use unlawful regulations to extract millions of dollars from tax preparers.

Forcing people to pay fees that have already been declared unlawful in order to generate revenue for federal agencies is simply not in the public interest. The IRS's attempt to argue that this Court should confer extraordinary relief so that the IRS will not be deprived of revenue (using inflated, misleading figures) extracted from the nation's tax preparers is offensive to the public interest in promoting equity and justice. Tax preparers are not simply an instrumental revenue stream for the IRS—they are individual businesspeople and entrepreneurs trying to earn an honest living by providing a valuable service to taxpayers. Their rights not to pay unlawful fees deserve respect, particularly when the only justification offered is filling the IRS's coffers.

C. Consumers would be harmed by the RTRP regulations.

Although frequently labeled a consumer-protection measure, the RTRP regulations would actually harm consumers by limiting consumers' choices and autonomy over their personal finances, reducing competition in the tax industry, raising prices for tax return preparation, and have negative unintended consequences: the RTRP regulations actually encourage unwarranted confidence in the honesty of RTRP designees, they push unqualified taxpayers to attempt to prepare their own returns, and they create a black market for unsigned tax return preparation.

1. The RTRP regulations would reduce consumer choices and autonomy over their personal finances.

The RTRP regulations let the IRS—instead of consumers—choose who is eligible to prepare tax returns. This harms consumers by reducing consumer choice and autonomy over

managing their finances. Rather than allow consumers to make their own decisions about who is best qualified to prepare their tax return, the RTRP scheme reduces consumer choice, preventing consumers from hiring someone to prepare their taxes if he or she is not an RTRP (or attorney, CPA, or enrolled agent), even if they have been satisfied with that person preparing their taxes for many years prior. Many taxpayers—including the 80-100 customers of Mr. Kilian and the 50 or so customers of Mr. Gambino—would be forced to find a new preparer (or begin preparing their own taxes) if their tax preparer closes their business rather than comply with the RTRP licensing scheme. Kilian Decl. ¶ 4; Gambino Decl. ¶ 6. As with Kilian and Gambino, each preparer going out of business because of the RTRP regulations leads to harm for anywhere from dozens to several hundred consumers, and as noted *supra*, the RTRP program is projected to cause tens of thousands of preparers to close their doors. Many of the preparers who will be forced out of business are elderly preparers who have been preparing taxes for many years; these veteran preparers are more likely to have longtime clients who have used the same tax preparer for decades, perhaps even their entire adult lives.[38] This is a substantial disruption to the millions of satisfied customers of these preparers, and should carry substantial weight given the infringement on their personal autonomy, as well as the inconvenience, lost time, and costs associated with finding a new preparer and transferring tax records.

2. The RTRP regulations would reduce competition in the tax industry and increase the cost of tax preparation services.

The RTRP regulations were expected to dramatically reduce the number of independent tax preparers, causing an estimated tens of thousands, or as many as 10 to 20 percent of return

[38] *See* Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, September 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html ("A high percentage of the industry's most experienced tax preparers, are elderly" explained tax industry expert Chuck McCabe, "[r]ather than take the exam, many will retire.").

preparers to exit the industry.[39] As industry expert Chuck McCabe of the Income Tax School explained: "The new requirements will cause an exodus of tax preparers, who will stop practicing rather than take the test and complete annual education . . . The result will be a shortage of qualified tax preparers and, consequently, a bidding war."[40] As a result of the shortage, prices are widely expected to increase; in fact, the fees charged for tax preparation services have already begun to climb.[41] Industry expert McCabe "expects that the shortage of preparers may also drive up compensation for preparers, resulting in higher prices for tax preparation services."[42]

3. The RTRP regulations would be counterproductive and would have negative unintended consequences that harm consumers.

The RTRP regulations are counterproductive because they encourage consumers to rely too heavily on a single factor in choosing a tax preparer rather than by conducting their own research, such as by seeking recommendations, reading reviews, and obtaining references. The RTRP designation may give consumers a false sense of confidence that someone with a RTRP has an IRS "stamp of approval" with respect to honesty, even though the RTRP regulations do nothing to prevent fraud. The IRS frequently suggests that concerns about fraud, such as identity

[39] *See* Eric Kroh, *Shortage of Tax Return Preparers Feared in Face of New Requirements*, Tax Analysts, Dec. 2012, (attached as Ex. 2 to Alban Decl.); Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, Sept. 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html.

[40] *See* Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, Sept. 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html.

[41] Jonnelle Marte, *Tax Prep Gets Pricier*, Wall St. J. MarketWatch, Jan. 25, 2013, http://articles.marketwatch.com/2013-01-25/finance/36538398_1_tax-preparer-melissa-labant-tax-return (noting 6% increase in prices from last year, stating that "experts expect those costs to keep rising this tax season" and observing that "[t]ax preparers may also charge more for their services if they face higher costs").

[42] *See* Roger Russell, *Tax Preparer Shortage on the Way*, Accounting Today, Sept. 7, 2012, *available at* http://www.accountingtoday.com/news/tax-preparer-shortage-63903-1.html (also describing the result of the regulations as creating a "bidding war" for tax preparation services).

theft, are justifications for the RTRP regulations, *see* Campbell Decl. ¶ 17, but this confuses the PTIN regulations with the RTRP requirements. Using the PTIN unique identification number, the IRS can track all of the returns prepared by any preparer, identify suspicious patterns indicating a likelihood of fraud, and find perpetrators quickly. The RTRP regulations do nothing to contribute to the PTIN in this respect.

In addition, the RTRP regulations would have negative unintended consequences, such as pushing unqualified taxpayers to attempt to prepare their own returns.[43] The RTRP regulations are also likely to create a black market for unsigned tax return preparation, which would undermine enforcement efforts.

D. The RTRP regulations are not in the public interest and do not have public support, but they are supported by powerful industry insiders.

The IRS claims that the RTRP regulations have "overwhelming public support." Defs.' Mem. 9. This would be news to the vast majority of the public, who don't even know about the regulations, much less support them.[44] The IRS's implicit claim that public support can be evaluated by participation in administrative proceedings dominated by industry insiders who have strong, concentrated financial interests in the outcome (as compared to the dispersed costs on the general public) is unserious. *See* Defs.' Mem. 9. The nation's many affected consumers cannot be expected to attend every federal agency hearing or submit written comments in response to every proposed agency action that may negatively impact their interests, nor can

[43] *See, e.g.*, Joe Kristan, *Tax Roundup, 12/24/2012: The Coming Preparer Crash*, Tax Update Blog, Dec. 24, 2012, http://rothcpa.com/2012/12/tax-roundup-12242012-the-coming-preparer-crash-also-a-modest-fiscal-cliff-proposal/ (noting that the regulations "will cause some taxpayers on the margin to prepare their own returns, and some to stop filing altogether.")

[44] *See, e.g.*, Jeff Stimpson, *Taking the RTRP to Market, Pt. 2*, Accounting Today, July 4, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/IRS-RTRP-Tax-Return-Preparer-NATP-EA-marketing-credential-designation63205-1.html (noting that the IRS has not begun educating the public about RTRPs, and quoting a 20-year veteran preparer and RTRP, who says the general public "doesn't understand what [the designation] is, or particularly care").

small businesses and entrepreneurs. But there is no question that the large industry players and trade associations will be overrepresented as they try to influence an agency's actions to benefit themselves or their members, often at the expense of the interest of consumers and small businesses. Moreover, the reliance on the opinions of panels cited in the IRS Return Preparer Review only serves to highlight industry insider dominance of the entire regulatory process. Even the "Independent Tax Return Preparer Panel" was a hand-selected group that included an H&R Block executive, an H&R Block franchisee, and a Jackson-Hewitt franchisee.[45] Deputy Commissioner Mark Ernst, the former CEO of H&R Block, who oversaw the drafting of the RTRP regulations, served as the moderator of most of these panels, or offered concluding remarks.[46]

Revealingly, the IRS seeks to bring the Court's attention to the fact that "concerns have already been voiced about the impact of the Court's injunction," citing an Intuit press release. Defs.' Mem. 9 n.5. As the maker of TurboTax, a leading tax preparation software program for consumers that is not subject to the RTRP regulations, Intuit certainly has a strong interest in keeping these regulations in place on its competitors, so it is hardly a surprise to learn that the company is "disappointed" by this Court's decision. This only serves to highlight the true beneficiaries of these regulations: large tax preparation firms and professional trade associations.

1. The RTRP regulations were lobbied for and primarily benefit industry insiders: large tax firms and professional trade associations.

The RTRP regulations were strongly supported and lobbied for by the nation's largest tax preparation companies and tax industry professional trade associations, who continue to be the

[45] *See* Internal Revenue Service, Return Preparer Review at 29, Pub. 4832, Dec. 2009, *available at* http://www.irs.gov/pub/irs-pdf/p4832.pdf.
[46] *Id*. at 49-52; Timothy P. Carney, *Revolving Door Spins at Obama's IRS*, The Washington Examiner, Jan.15, 2010, *available at* http://washingtonexaminer.com/timothy-p.-carney-revolving-door-spins-at-obamas-irs/article/33018.

most outspoken advocates of the regulations.[47] As *The Wall Street Journal* explained: "Cheering the new regulations are big tax preparers like H&R Block, who are only too happy to see the feds swoop in to put their mom-and-pop seasonal competitors out of business."[48] Kathryn Fulton, senior vice president for government relations at H&R Block, explained the company's support for the regulations: H&R Block "won't be competing against people who aren't regulated and don't have the same standards as we do."[49] The American Institute of CPAs was even able to successfully lobby for an exemption from the RTRP regulations for "supervised preparers" who are overseen by a CPA, attorney, or enrolled agent at a CPA firm or law firm.[50]

These large tax preparation firms and the members of these trade associations stand to benefit from the regulations because they create a barrier to market entry and impose costs that force smaller competitors out of the market. As *The Economist* explained, the RTRP regulations "threaten to crush . . . small, local" tax preparers and are "likely to push mom and pop into another line of work."[51] Swiss investment bank UBS found that the RTRP regulations "would aid H&R Block (and by implication others) by adding 'barriers to entry (or continuation) for

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[47] *See, e.g.*, David Brunori, *Government Power, Cronyism, and the IRS Running Amok*, Tax Analysts (undated, but published Mar. 2012), http://www.taxanalysts.com/www/features.nsf/Articles/CADF227864A5BC36852579D6005EC440?OpenDocument.

[48] *H&R Blockheads: the IRS Wants to Save You From Your Rogue Tax Accountant*, Wall St. J., Jan. 7, 2010, *available at* http://online.wsj.com/article/SB10001424052748703436504574640572196836150.html.

[49] *Id*. (originally reported in David S. Hilzenrath, *IRS to Regulate Paid Preparers of Tax Returns to Reduce Errors*, Wash. Post, Jan. 5, 2010 at A1 (available via Lexis)).

[50] *CPA-Supervised Nonsigning Preparers Exempted From Exam, Continuing Education*, J. of Accountancy, Mar. 2011, http://www.journalofaccountancy.com/Issues/2011/Mar/NonsigningPreparers.htm (noting that "[i]n Notice 2011-6, the IRS carved out an AICPA-advocated exception" from the RTRP regulatory requirements); *see also* Internal Revenue Service, Notice 2011-6, *available at* http://www.irs.gov/pub/irs-drop/n-11-06.pdf.

[51] *Guides Through the Swamp: A Big Shake-up for America's Tax-preparation Industry*, The Economist, Mar. 24, 2012, *available at* http://www.economist.com/node/21551052

small preparers.'"[52] More recently, a different investment analyst explained that this Court's ruling "could hurt institutional tax-preparation providers such as H&R Block and Jackson Hewitt by reopening the market to small competitors that the IRS program had been expected to squeeze out."[53] In other words, industry insiders are "harmed" by having to compete with independent, mom-and-pop preparers like Plaintiffs, and unsuccessfully sought to regulate them out of existence. The Court should not give them a second opportunity to do so by suspending the injunction.

2. The justifications offered by the IRS in its Return Preparer Review for the RTRP regulations are based on shoddy, incomplete "studies."

The Declaration of Carol A. Campbell claims that "[t]he results of the Return Preparer Review demonstrated the necessity to address the problem of inaccurate returns prepared by tax return preparers." Campbell Decl. ¶ 16 (cited in Defs.' Mem. at 7). The IRS Return Preparer Review was a study released by the IRS in December 2009 purporting to show the need for the licensing of all tax preparers, and it formed the basis of the IRS's justifications for the RTRP regulations.[54] However, the studies of purported tax preparer errors cited in the Return Preparer Review to support its conclusions are very limited, non-representative, and statistically insignificant.[55] In addition, the studies failed to put the purported error rates in context by comparing them to the error rates of other preparers, such as attorneys or CPAs, and to the IRS itself. Because the Return Preparer Review relies on such shoddy justifications to support its

[52] A. Barton Hinkle, *Just What America Needs: More Red Tape*, Richmond Times-Dispatch, Mar. 20, 2012, *available at* http://www.timesdispatch.com/news/hinkle-just-what-america-needs-more-red-tape/article_7ce8f616-013a-522f-8c87-de86a6fc50d6.html.
[53] Patrick Temple-West & Kim Dixon, *IRS Rescinds Rules, Puts Tax Preparers in Disarray*, Reuters, Jan. 22, 2013, *available at* http://www.reuters.com/article/2013/01/22/us-usa-tax-preparer-idUSBRE90L15W20130122.
[54] Internal Revenue Service, Return Preparer Review, Pub. 4832, Dec. 2009, *available at* http://www.irs.gov/pub/irs-pdf/p4832.pdf.
[55] *Id*. at 13-14.

conclusion, the Court should not give credence to it as evidence that the RTRP regulations are in the public interest.

i. The studies cited in the Return Preparer Review are flawed and non-representative.

To justify the licensing of paid tax preparers, the Return Preparer Review inappropriately relies on two on studies that simply cite error rates on tax returns without any frame of reference. The report points to two "shopping visit" studies done, respectively, by the GAO and the Treasury Inspector General for Tax Administration (TIGTA) which purportedly show a high error rate among paid tax preparers.[56] But the report admits that the small and non-representative sample of preparers studied—just 19 and 28 preparers, respectively—prevents them from drawing any generalized conclusions.[57] The GAO study involved only large commercial tax preparation chains, and did not include any independent preparers such as Plaintiffs.[58] These very limited studies also failed to include a control sample of tax returns prepared by attorneys and CPAs, who are exempt from the RTRP licensing regulations.

ii. Error rates among IRS volunteers and workers are much higher than paid tax preparers.

Putting these "shopping visit" studies of tax preparers in context, a recent study by TIGTA found a 61 percent error rate in a sample of tax returns prepared by the IRS Volunteer Program.[59] In an earlier study, a Treasury Department study of IRS employees answering tax questions at IRS tax help centers for about 500,000 taxpayers found that only 45 percent of

[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] Treasury Inspector General for Tax Administration, Accuracy of Tax Returns, the Quality Assurance Processes, and Security of Taxpayer Information Remain Problems for the Volunteer Program, *available at* http://www.treasury.gov/tigta/auditreports/2011reports/201140094fr.pdf.

questions were correctly and completely answered.[60] More recently, a TIGTA investigation found varying error rates depending on how taxpayers contacted the IRS; questions emailed to the IRS were only answered correctly 64 percent of the time, visiting a help center resulted in 67 percent correct answers, and calling the IRS help line resulted in 86 percent correct answers.[61] These latter two studies are notable in that they only consider whether *individual questions* were answered correctly, and not the full set of tax questions presented in preparing an entire tax return. If even the IRS itself makes frequent errors in interpreting the complex federal tax code, it can hardly blame the competence of tax preparers for this problem, or suggest that an IRS-imposed licensing scheme is the solution. The conclusions of the Return Preparer Review are faulty and inadequate, and thus fail to support the IRS's claim that the RTRP regulations are in the public interest.

3. The public is largely unaware of the RTRP designation.

The vast majority of the taxpaying public is totally unaware of the RTRP designation.[62] In fact, as IRS Return Preparer Office Director Carol Campbell admitted on January 10, 2013, even those who are subject to the RTRP regulations have not been made fully aware of the CE requirements: "our efforts to get this information [about the 2012 CE requirement] out seem to

[60] Mary Dalrymple, *IRS Employees Steer Taxpayers Wrong on Tax Law, Study Finds*, Associated Press, Sept. 3, 2003, *available at* http://accounting.smartpros.com/x40453.xml.
[61] Kevin Cork, *Audit Finds Poor Service at the IRS*, NBC News, Apr. 13, 2005, *available at* http://www.msnbc.msn.com/id/7492730/ns/nightly_news/t/audit-finds-poor-service-irs/.
[62] *See, e.g.*, Jeff Stimpson, *Taking the RTRP to Market, Pt. 2*, *Accounting Today*, July 4, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/IRS-RTRP-Tax-Return-Preparer-NATP-EA-marketing-credential-designation63205-1.html (noting that the IRS has not begun educating the public about RTRPs, and quoting a 20-year veteran preparer and RTRP, who says the general public "doesn't understand what [the designation] is, or particularly care."); *see also* Jason T. Dinesen, *6 Tax Predictions for 2012 — How Did I Do?*, Dinesin Tax Blog (Dec. 31, 2012) http://dinesentax.com/3210/6-tax-predictions-for-2012-how-did-i-do (observing "I have heard NOTHING about the RTRP designation from the public at large. Nothing at all." And asking, "The IRS was supposed to launch a public relations campaign about the new licensing/registration requirements. Where has that campaign been?").

have fallen short."[63] If the IRS is still, in January 2013, unable to even adequately inform preparers of their CE obligations under the RTRP licensing scheme, it seems highly unlikely that it has made any headway in informing the public about the RTRP designation.

Indeed, public education has not yet begun in earnest and promotional efforts by the IRS seem to have been delayed or cancelled. In July 2012, *Accounting Today* reported that "[t]he IRS is still educating preparers about [the] need to take the test; public education is yet to come, with the IRS preparing to launch a database soon for consumers to research the qualifications of their tax preparers."[64] The public database was announced in a Congressional hearing in July 2011, by then-Director of the Return Preparer Office, David Williams, who said it "may be available as soon as 2013."[65] At that hearing, House Ways and Means Committee's oversight subcommittee chairman Rep. Charles Boustany expressed concern that the IRS was not doing enough to publicize its efforts.[66] His concerns seem to have been justified. In June 2012, then-RPO Director Williams renewed his pledge to preparers that the IRS would "launch a searchable database before next filing season so taxpayers can verify your standing and your credentials."[67] Tax filing season was delayed by one week this year, but the database has still not launched, nor

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[63] *See* Carol A. Campbell, *Message from Carol A. Campbell, RPO Director*, IRS Return Preparer Office Facebook Page (January 10, 2013, 8:42 AM), *available at* https://www.facebook.com/notes/irs-return-preparer-office/message-from-carol-a-campbell-rpo-director/394688837284100.

[64] Jeff Stimpson, *Taking the RTRP to Market, Pt. 2*, *Accounting Today*, July 4, 2012, *available at* http://www.accountingtoday.com/taxprotoday/news/IRS-RTRP-Tax-Return-Preparer-NATP-EA-marketing-credential-designation63205-1.html.

[65] Andrew Zajac, *IRS to Build Database of Regulated Tax Preparers for Public Use*, Bloomberg, July 28, 2011, *available at* http://www.bloomberg.com/news/2011-07-28/irs-to-build-database-of-regulated-tax-preparers-for-public-use.html.

[66] *Id*.

[67] David R. Williams, *David Williams Marks Date; Urges Taxpros to Take RTRP Test Soon*, IRS Return Preparer Office Facebook Page, (June 4, 2012, 11:39 AM) https://www.facebook.com/notes/irs-return-preparer-office/david-williams-marks-date-urges-taxpros-to-take-rtrp-test-soon/309829452436706.

does its launch seem to be imminent. Thus, since the public was never widely aware of the RTRP program in the first place, the public is unlikely to be particularly confused by its absence.

V. The IRS's Alternative Request For a 14-Day Stay Is Unsupported and Risks Causing Even More Turmoil Than a Stay Pending Appeal.

The IRS offers no facts in support of its alternative request for a 14-day stay while the IRS seeks a stay from the Court of Appeals, including no plausible allegations of any particular short-term harm the IRS is likely to experience that would be remedied by such a stay. Given that an injunction has already issued, it is not clear what advantage the IRS seeks from being able to temporarily reimpose the regulations for a 14-day period now rather than wait until the issue of the stay is resolved by the Court of Appeals.

From a practical standpoint, a 14-day stay of the injunction creates risk of substantial turmoil and mass confusion from multiple back-and-forth policy changes with respect to enforcement of the RTRP regulations in a matter of weeks. The IRS suspended enforcement of the regulations on January 22, 2013 as a result of the Court's January 18, 2013 injunction. If the Court declines to stay the injunction during the pendency of the appeal, but grants the alternate requested relief of a 14-day stay of the injunction while the IRS pursues an injunction from the Court of Appeals, the IRS may then reimpose the RTRP regulations during that two-week period—a second reversal of policy in roughly as many weeks. If the Court of Appeals declines to grant a stay pending appeal or does not decide the stay motion within 14 days, then the IRS would have to once again suspend enforcement of the RTRP regulations—the *third* policy reversal in under a month. This would create a high potential for confusion.

Having already suspended its enforcement of the RTRP regulations in compliance with the Court's injunction, the IRS has offered no particular reason why it needs to be able to reimpose the RTRP regulations for a two-week period. The potential downside of multiple

policy reversals on enforcement of the RTRP regulations within such a short period of time is far greater than any potential benefit.

CONCLUSION

The IRS has failed to meet its burden of justifying the Court's exercise of the extraordinary remedy of a stay of the injunction. For the reasons stated above, the IRS's motion should be denied with respect to both the primary and alternative relief requested and no stay of any kind should be issued against the permanent injunction entered by this Court on January 18, 2013.

RESPECTFULLY SUBMITTED this 29th day of January, 2013.

/s/ Dan Alban
William H. Mellor (DC Bar No. 462072)
Scott G. Bullock* (DC Bar No. 442379)
Dan Alban (DC Bar No. 978051)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: wmellor@ij.org; sbullock@ij.org; dalban@ij.org

Attorneys for Plaintiffs

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically transmitted the attached **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO SUSPEND INJUNCTION PENDING APPEAL** and the accompanying Proposed Order, Declaration of Dan Alban in Support of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Suspend Injunction Pending Appeal, and exhibits 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/ECF registrants:

GEOFFREY J. KLIMAS
JOSEPH E. HUNSADER
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 514-0472
Facsimile: (202) 514-6866
Email: joseph.e.hunsader@usdoj.gov
Email: Geoffrey.j.klimas@usdoj.gov

Attorneys for Defendants

/s/ Dan Alban
Dan Alban (DC Bar No. 978051)
INSTITUTE FOR JUSTICE