

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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SABINA LOVING, et al.		)	
		)	
		)	
	Plaintiffs,	)	
	v.	)	Civil Case No. 1:12-cv-00385-JEB
		)	
INTERNAL REVENUE SERVICE, et al.		)	
		)	
		)	
Defendants.		)	
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**PLAINTIFFS’ CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND IN  
REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION FOR  
SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs believe that Congress is the only entity empowered under the U.S. Constitution to enact federal laws; Defendants (hereinafter “the IRS”) apparently disagree. In its brief in support of its Motion for Summary Judgment and in opposition to Plaintiffs’ Motion for Summary Judgment (“Defs.’ Mem.”), the IRS argues that it effectively has plenary authority to regulate *anyone* who prepares or files any document with the IRS—whether or not it is done as part of any case or proceeding before the agency—and that it has had this authority since at least 1884, so it needed no new congressional authorization to impose a sweeping licensing scheme on hundreds of thousands of tax return preparers, likely driving many of them out of business. This is nothing less than an attempt to usurp congressional power by rewriting both history and the relevant statute. The IRS adopts a tortured reading of 31 U.S.C. § 330, ignoring its text and context; the legislative history of the original 1884 statute; the overall statutory scheme that Congress has enacted—and not enacted—to regulate tax return preparation; and even the IRS’s own century-long interpretation of Section 330, under which the IRS repeatedly made official statements, to Congress and the American public, that it had no authority to license tax preparers.

But the IRS cannot get around the fact that it is only authorized to regulate the “practice of representatives of persons” who “advise and assist persons in presenting their cases” before the IRS under 31 U.S.C. § 330. Tax return preparers simply do not meet these statutory criteria.

The IRS wrongly claims that Section 330 is ambiguous because Congress did not define its terms, and that this Court should defer to the IRS’s new reading of Section 330. But D.C. Circuit case law rejects the idea that the absence of definitions renders a statute ambiguous. And courts owe no deference to agencies on the issue of statutory ambiguity under *Chevron* step one.

In its memorandum, the IRS also sidesteps or ignores a number of arguments raised in

Plaintiffs' original brief. Most notably, it fails to respond to the multiple examples presented by Plaintiffs in which the IRS previously stated in official documents or statements, often to Congress, that it does not have statutory authority to license tax return preparers.

In this brief, Plaintiffs first discuss why the IRS does not have plenary authority to regulate under any statute or inherent agency authority. Second, Plaintiffs explain how the text and context of Section 330 provide it with a clear and unambiguous meaning. Third, Plaintiffs discuss how the IRS's new Circular 230 regulations are foreclosed by Section 330's clear and unambiguous meaning. Fourth, Plaintiffs show that the IRS's new interpretation conflicts with the legislative history and purpose of Section 330, which never contemplated or authorized IRS licensure of all tax return preparers. Finally, Plaintiffs detail how the IRS's new interpretation of Section 330 is inconsistent with the overall statutory scheme that Congress has enacted—and not enacted—relating to tax return preparation. For these reasons, Plaintiffs' Motion for Summary Judgment should be granted and Defendants' Motion for Summary Judgment should be denied.

**I. The IRS Does Not Possess Plenary Authority to Regulate Under Any Statute or Under Any Inherent Agency Authority.**

The IRS's brief gives the impression that its power to regulate anyone connected to the tax industry is virtually limitless.<sup>1</sup> But the Supreme Court has noted that “[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

**A. The IRS does not have plenary authority to regulate simply because it has some statutory authority to regulate.**

The IRS repeatedly claims that it has broad authority to act under Section 330 and other

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<sup>1</sup> The IRS cites Oregon's licensure program for tax preparers as a model for these regulations. Defs.' Mem. 4-5. But unlike these new IRS regulations, Oregon's program is based in a specific grant of statutory authority by the Oregon Legislative Assembly. *See* Or. Rev. Stat. §§ 673.605-673.740 (specifically authorizing the State Board of Tax Practitioners to license tax preparers).

statutes. *See* Defs.’ Mem. 2, 14, 15, 34. However, the D.C. Circuit has categorically rejected the “suggestion that [an agency] possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.” *Ry. Labor Execs.’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (emphasis in original). And it is “[a]n essential function of the reviewing court . . . to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority.” *Bensman v. Nat’l Park Serv.*, 806 F. Supp. 2d 31, 40 (D.D.C. 2011). For example, in *MCI Telecommunications Corp. v. AT&T Co.*, the Supreme Court rejected an agency’s policy because it was “effectively the introduction of a whole new regime of regulation . . . which may well be a better regime but is not the one that Congress established.” 512 U.S. 218, 234 (1994). Instead of granting plenary authority to the IRS to regulate tax preparers, Congress passed specific and limited grants of authority. Pls.’ Mem. Supp. Mot. Summ. J. 35-38; *see also* Part V(A) *infra*.

**B. Inherent agency authority to regulate those appearing before it is limited and does not give the IRS the authority to regulate mere tax return preparers.**

The IRS emphasizes that federal agencies often have inherent authority to regulate those who appear before them. *See* Defs.’ Mem. 12-14. However, any inherent authority the IRS has extends no further than the explicit grant of authority to regulate “practice” under Section 330. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (“[An agency] cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area.”).

Moreover, the cases cited by the IRS indicate that an agency’s inherent authority is limited to regulating those who actually appear and represent others before the agency. Defs.’ Mem. 13-14. Mere tax return preparers do not meet these criteria. Notably, all five cases cited by the IRS involved the professional practice of attorneys or CPAs in a representative capacity

before an agency. This is consistent with Plaintiffs' position on the meaning of "practice."

In *Goldsmith v. U.S. Board of Tax Appeals*, a CPA brought suit against the U.S. Board of Tax Appeals (which later became the United States Tax Court), "to compel the Board to **enroll him as an attorney** with the right to **practice before it**." 270 U.S. 117, 119 (1926) (emphasis added). The primary issue was "whether the Board of Tax Appeals has power to adopt rules of practice before it by which it may limit **those who appear before it to represent the interest of tax-payers**." *Id.* at 120 (emphasis added). The Supreme Court found that it did, noting in particular that "the quasi judicial nature" of the Board made it important that "those who **represent the tax-payers in the hearings** should be persons whose qualities as lawyers or accountants will secure proper service to their clients." *Id.* at 121 (emphasis added). The Court further observed, that "[i]n most of the Executive departments in which interests of individuals as claimants or tax-payers are to be passed on by executive officers or boards, authority is exercised to limit **those who act for them as attorneys** to persons of proper character and qualification to do so." *Id.* (emphasis added). The Court noted in particular that the IRS (acting under Section 330) had "a list of **attorneys enrolled for practice** in the **very cases** which are to be appealed to the Board." *Id.* at 122 (emphasis added). The Court leaves little doubt about the nature of "practice" that an agency may regulate: practitioners acting "as attorneys" who represent taxpayers in "hearings" or "cases," just as Plaintiffs explained in their opening brief. Pls.' Mem. 17-27. The Court's description of practice under Section 330 as "attorneys enrolled for practice in . . . cases" is also consistent with Plaintiffs' interpretation. 270 U.S. at 122.

In *Herman v. Dulles*, the D.C. Circuit found that an agency could revoke an attorney's right to appear before it for violating its practice rules. 205 F.2d 715, 716 (D.C. Cir. 1953). In so ruling, the court addressed a provision of the Administrative Procedure Act (APA),

5 U.S.C. § 1005(a) (now codified at 5 U.S.C. § 555(b)), which “provides that persons compelled to appear before an agency may be accompanied and represented by ‘counsel.’” *Id.* at 717. The court noted that the legislative history indicated that the provision “does not deal with, or in any way qualify, the present power of an agency to regulate **practice at its bar.**” *Id.* (emphasis added). Thus, once again, the type of “practice” that the court permitted the agency to regulate was “practice at its bar” by “counsel” who represented persons before the agency.<sup>2</sup>

In *Touche Ross & Co. v. SEC*, the Second Circuit upheld the ability of the SEC to discipline three CPAs and their firm. 609 F.2d 570, 572. (2d Cir. 1979).<sup>3</sup> The court noted that the SEC was “preserv[ing] the integrity of its own procedures, by assuring the fitness of those **professionals who represent others before the Commission.**” *Id.* at 579 (emphasis added).<sup>4</sup>

These cases reveal that the nature of “practice” which an agency may regulate under its inherent authority is limited to those who act as “attorneys” to represent the interests of others before the agency, particularly in “hearings” and “cases.” And *Goldsmith* indicates that the nature of “practice” before the IRS contemplated by Section 330 is very similar, if not identical, permitting the IRS to regulate those acting as “attorneys enrolled for practice in . . . cases” representing taxpayers before the IRS. 270 U.S. at 222. Importantly, tax return preparers do not act “as attorneys” or “representatives” of others in “cases,” absent special authorization.

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<sup>2</sup> Similarly, *Koden v. United States* involved the challenge of an attorney to his suspension from “representation before” the INS and the Board of Immigration Appeals. 564 F.2d 228, 229-30 (7th Cir. 1977). Noting the holdings of *Goldsmith* and *Herman*, the Seventh Circuit found that “any court or administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct.” *Id.* at 233..

<sup>3</sup> Likewise, in *Davy v. SEC*, the Ninth Circuit upheld the SEC’s ability to bar a CPA from practice before the SEC, citing *Touche Ross*. 792 F.2d 1418, 1419, 1421 (9th Cir. 1986).

<sup>4</sup> In responding to an argument raised under 5 U.S.C. § 500 (the statute referenced in Section 330(a)(1)), the court observed that the statute “was intended to ensure that persons appearing before agencies be represented by attorneys of their choice.” *Id.* at 578. As the court noted, the statute explicitly states that it does not “authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.” 5 U.S.C. § 500(d)(2).

## **II. The Text and Context of Section 330 Make Its Meaning Clear and Unambiguous.**

The plain meaning of the terms used in Section 330 is clear and unambiguous. Both text and context indicate Congress's intent to regulate only the "practice" of those who actually represent and advocate for persons in proceedings before Treasury, and not anyone who merely prepares tax returns for compensation. Below, Plaintiffs explain how the IRS has offered the wrong legal standards for determining whether a statute is ambiguous, discuss how the plain meaning of the terms used in the statute make its meaning clear, and explain how the context provided by other statutes and case law reinforces its clear and unambiguous meaning.

### **A. The IRS misstates the legal standards for determining statutory ambiguity under step one of *Chevron*.**

The IRS misstates the applicable legal standards for determining statutory ambiguity in its brief. Below, Plaintiffs explain the correct standards to be used: (1) courts do not defer to agencies under *Chevron* step one, (2) authority is not delegated to the IRS simply by virtue of the absence of an express withholding of authority, (3) determining a statute's clear and unambiguous meaning does not require statutory definitions, but an examination of context and the ordinary meanings of the terms used, and (4) courts commonly refer to dictionary definitions in order to determine whether a statute has a clear and unambiguous meaning under *Chevron*.

#### **1. There is no deference to an agency under step one of *Chevron*.**

The IRS urges that "[t]his Court should grant substantial deference under the two-step *Chevron* analysis." Defs.' Mem. 2. However, courts do not grant deference to agencies under *Chevron* step one.<sup>5</sup> "Whether statutory ambiguity exists is for the Court to decide, and the Court

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<sup>5</sup> Since Plaintiffs' opening brief was filed, the Supreme Court has granted certiorari in a Fifth Circuit case on the related question of whether *Chevron* deference even applies when reviewing an agency's determination of its own jurisdiction. *See City of Arlington v. FCC*, 668 F.3d 229, 247-48 (5th Cir. 2012), *cert. granted* 184 L.Ed.2d 252 (U.S. Oct. 5, 2012) (No. 11-1545).

owe[s] the agency no deference on the existence of ambiguity.” *Nat’l Mining Ass’n v. Jackson*, No. 10-1220, 2012 U.S. Dist. LEXIS 106057, at \*45 (D.D.C. July 31, 2012) (quotation omitted).

**2. Delegation of authority to the IRS may not be presumed simply because there is no express withholding of such authority.**

The IRS argues that it prevails under *Chevron* step one because Section 330 does not expressly forbid the IRS from reinterpreting terms like “practice” in order to impose a licensing scheme on tax return preparers. Defs.’ Mem 12, 15-16. But the D.C. Circuit has flatly rejected the suggestion “that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in ‘thou shalt not’ terms).” *Ry. Labor. Execs. Ass’n*, 29 F.3d at 671 (noting also that “[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony”). Therefore, the IRS may not claim that its new interpretation of Section 330 is owed deference simply because Section 330 “does not expressly *negate*” the IRS’s claimed authority to license tax return preparers. *Id.*

**3. Statutes do not have to define their terms because an unambiguous meaning can be determined by the context and ordinary definitions of the terms used.**

The IRS incorrectly claims that “[t]he challenged regulations pass step 1 [of *Chevron*] because Congress did not unambiguously define the term ‘practice’ before the Department of the Treasury.” Defs.’ Mem. 15.<sup>6</sup> The IRS also argues that one of two key facts undermining Plaintiffs’ argument is that, “Congress did not define ‘practice’ in 31 U.S.C. 330(a).” *Id.* at 21.<sup>7</sup>

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<sup>6</sup> The IRS offers *Bender v. Dudas*, 490 F.3d 1361, 1362 (Fed. Cir. 2007), as an example of how regulations governing practice before an agency should be interpreted in the absence of a statutory definition. Defs.’ Mem. 17-18, 23. But as Plaintiffs discuss *infra* in Part II(B)(2), the court in *Bender* looked to the rest of the statute for context in determining its purpose.

<sup>7</sup> On this point, the IRS also cites *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), in which the Supreme Court was unable to discern whether Congress intended for an exclusion from FICA taxes for “students” to include medical residents.

However, whether or not a statute explicitly defines a term is not the relevant legal standard for determining statutory ambiguity under *Chevron* step one. “The lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous, just as the presence of a definition does not necessarily make the meaning clear.” *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006).<sup>8</sup> Instead, the D.C. Circuit has held that “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Courts must look to the context in which the terms are used in order to determine whether their meaning is ambiguous. “The plainness or ambiguity of statutory language ‘is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *Hays v. Leavitt*, 583 F. Supp. 2d 62, 68 (D.D.C. 2008) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). As the D.C. Circuit has noted, “[i]f Congress employs a term susceptible of several meanings, as many terms are, it **scarcely follows that Congress has authorized an agency to choose any one of those meanings**. As always, the words of the statute should be read in context, the statute’s place in the overall statutory scheme should be considered, and the problem Congress sought to solve

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Defs.’ Mem. 16, 22. However, contrary to the IRS’s assertions, the *Mayo* court did not simply find that “student” was ambiguous because it lacked a definition; instead, it looked to other subsections of the statute for context. *Mayo Foundation*, 131 S. Ct. at 711 (citing two other subsections). Ultimately, however, the Court simply found that it was not “possible to glean so much from the little that § 3121 provides” on the meaning of the term. *Id.* The difficulty of discerning congressional intent in *Mayo* is unsurprising given that the term at issue was part of a somewhat obscure and comparatively minor statutory exclusion in a *much* larger statutory scheme. Here, in contrast, the core meaning and purpose of Section 330 is at issue, so there is much more context to be gleaned from the statute and the legislative history.

<sup>8</sup> Indeed, although the IRS cites *Mayo Foundation* in support of its argument that statutory terms are ambiguous unless expressly defined by Congress, the ambiguity that arose in that case was actually from a term used in the “definitions” provision of the statutory scheme at issue. 131 S. Ct. at 709; see 26 U.S.C. § 3121 (entitled “Definitions”).



should be taken into account to determine whether Congress has foreclosed the agency's interpretation." *Goldstein*, 451 F.3d at 878 (citations and quotations omitted) (emphasis added.)

**4. Courts commonly refer to dictionary definitions to establish the ordinary meaning of terms when interpreting statutes under *Chevron*.**

Curiously, the IRS also claims that "plaintiff's resort to a dictionary definition, if anything, shows that the statute is ambiguous." Defs.' Mem. 22. But this is a standard method for determining the ordinary meaning of undefined statutory terms. "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Courts frequently reference dictionary definitions for this purpose. *See, e.g., Fin. Planning Ass'n*, 482 F.3d at 489. For example, in *Pittston Coal Group v. Sebben*, the Supreme Court cited a dictionary definition to reject an agency's attempt to give a term "unnaturally limited meaning" finding that "the statute simply will not bear the meaning the Secretary has adopted." 488 U.S. 105, 113, 116 (1988). Here, the IRS is giving an unnaturally expansive meaning to the terms "practice" and "representative" and it is appropriate for the court to look to dictionary definitions for the ordinary meanings of those terms.

**B. The text and context of the words used in Section 330 make the meaning of the terms "practice" and "representative" clear and unambiguous.**

Plaintiffs explained in their opening brief that the plain meaning of the text of Section 330, aided by context, is clear and unambiguous. Pls.' Mem. 17-27. Below, Plaintiffs respond to the IRS's arguments to the contrary, explaining that (1) the meaning of "practice" is clear and unambiguous, (2) the remainder of Section 330 gives context for understanding the statute's meaning regardless of whether it consists of "separate grants of authority," and (3) the plain meaning of "representative" indicates an agency relationship.

**1. The ordinary meaning of terms in Section 330, as well as the context in which they are used, provides a clear and unambiguous meaning of “practice.”**

As Plaintiffs explained in their opening brief, the ordinary meaning of the terms used in Section 330, and the context in which they are used, indicate that Congress unambiguously intended to permit Treasury to regulate the “practice” of professionals who engaged in the representation of persons through advocacy in adversarial proceedings before Treasury, and not merely anyone who prepares tax returns for compensation. Pls.’ Mem. 17-25. Briefly, Section 330 only authorizes the regulation of those who “practice” as “representatives of persons” before Treasury, in order to “advise and assist persons in presenting their cases.” 31 U.S.C. § 330(a). The Secretary may “disbar” representatives who engage in misconduct. 31 U.S.C. § 330(b). With respect to “practice,” Plaintiffs offered dictionary definitions that fit the statutory context in which the term is used, discussed how its interactions with other statutory terms informed its meaning, explained how “practice” is analogous to the practice of law (noting, for example, that practitioners have historically been understood to “practice” as part of the “tax bar” or “Treasury bar”), pointed out that even the IRS itself has recognized the distinction between “practitioners” and mere tax return preparers, as well as the fact that advocacy is a fundamental component of “practice.” Pls.’ Mem. 18-23. The IRS largely fails to address these textual and contextual arguments—bizarrely claiming that the only statutory context for the delegation of authority in Section 330 is 5 U.S.C. § 500, rather than the rest of Section 330 itself. Defs.’ Mem. 27. The IRS does not even offer an alternative definition of practice that would make sense in the statutory context, instead only noting that it “is a term with many meanings.” Defs.’ Mem. 22.

**2. Whether or not Section 330 consists of “separate grants of authority” is irrelevant to whether its language provides context for understanding its terms.**

The IRS also insists, irrelevantly, that each subsection of Section 330 is a “separate grant

of authority,” specifically claiming that Section 330(a)(2) is a separate grant of authority from Section 330(a)(1), as is Section 330(b). Defs.’ Mem. 27-28 & n.6. But the IRS gives no reason whatsoever—and there is none—why these subsections of the very same statute, passed at the same time, and originally drafted as two adjacent sentences, are not the best source of statutory context for understanding Section 330(a)(1). Although Section 330(a)(2) and Section 330(b) do not explicitly limit the Secretary’s authority under Section 330(a)(1), they certainly give additional context for understanding the meaning of the terms used in Section 330(a)(1).<sup>9</sup> And, as the D.C. Circuit has noted, “[an agency] cannot uncouple the first sentence of [a statutory section] from the rest of the section in order to expand its authority beyond the aims and limits of the section as a whole.” *Am. Petroleum Inst.*, 52 F.3d at 1119-20. Indeed, in both *Bender* and *Mayo Foundation*, cited by the IRS as exemplars of statutory interpretation, the courts looked to nearby statutory provisions for context to interpret a term. 131 S. Ct. at 711; 490 F.3d at 1368.

In *Bender*, the court actually looked to statutory language that parallels Section 330(a)(2)(D) in order to determine the purpose of the statute. Examining two related statutes, the court found that “[t]he language of those statutes indicates that they are broadly directed to service, advice, and assistance in the prosecution or prospective prosecution of applications.” 490 F.3d at 1368. The language that the *Bender* court cites and quotes from 35 U.S.C. § 2(b)(2)(D) to determine the purpose of that statute (ensuring representatives “render to applicants or other persons valuable service, **advice, and assistance in the presentation or prosecution of their applications** or other business before the Office”) corresponds directly to the language of

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<sup>9</sup> As originally passed in 1884, the language that would later be codified (with revisions) as Section 330(a) was all a single sentence, while the language that would later be codified (with revisions) as Section 330(b) was the immediately following sentence. Rather than viewing each clause as a “separate grant[] of authority,” the legislative history shows that Congress viewed all of these provisions as working together. *See, e.g.*, 48 Cong. Rec. H5222 (daily ed. June 16, 1884) (statements of Rep. Townshend).

Section 330(a)(2)(D) (ensuring representatives demonstrate “competency to **advise and assist persons in presenting their cases.**”) (emphasis added).<sup>10</sup> Remarkably, this is the very language that Plaintiffs maintain shows the purpose of Section 330, but which the IRS says this Court should ignore when interpreting Section 330(a)(1), because it is a “separate grant of authority to the Secretary regarding admissions standards for practitioners.” Defs.’ Mem. 27. The IRS would have this Court pretend that Section 330(a)(1) exists in a vacuum, rather than look to the rest of the section for context. That would not only be absurd, but contrary to the guidance of case law on statutory interpretation.

**3. The term “representative” in Section 330 indicates an agency relationship not normally present in mere tax return preparation.**

Section 330 regulates only the practice of “representatives of persons” before Treasury. Although the IRS apparently believes otherwise, there is necessarily an agency relationship between a person and someone who represents him and his interests before a federal agency.

**a. The ordinary meaning of representation and the legal understanding of agency support Plaintiffs’ interpretation of Section 330.**

As Plaintiffs explained in their opening brief, “representatives” are ordinarily understood to be agents of the represented party, as defined in both popular and legal dictionaries. Pls.’ Mem. 24. Even the alternative definitions offered by the IRS describe an agency relationship, and are nearly the same as the definition from Black’s Law Dictionary provided by Plaintiffs. *Compare id. with* Defs.’ Mem. 32.<sup>11</sup> Plaintiffs further demonstrated that merely preparing a tax

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<sup>10</sup> The IRS itself notes the “similarity between section 330 and 35 U.S.C. § 2”, one of the two relevant statutes in *Bender*. Defs.’ Mem. 23.

<sup>11</sup> In addition, as Plaintiffs explained in footnote 27 of their opening brief, the IRS’s regulatory definition of “representation” in 26 C.F.R. § 601.501(b)(13) is tautological, and applying this definition to tax return preparation confuses acts done “on behalf of” a taxpayer with acts done *for* a taxpayer. The IRS fails to address these arguments, instead simply restating the definition. Defs.’ Mem. 33. But IRS regulations do not trump a statute’s plain meaning.

return for someone else for pay is not acting as his representative, nor does it establish any agency relationship. Pls.' Mem. 24-25. The IRS declines to respond to this point, instead challenging Plaintiffs' position that representatives must be agents. Defs.' Mem. 33.

**b. The 1884 statute supports Plaintiffs' interpretation of "representatives" as having an agency relationship with their clients.**

The IRS argues that because the original 1884 statute refers to "other persons" in addition to "agents and attorneys," those "other persons" could not be agents, and therefore there is no agency relationship implied by representation under Section 330. Defs.' Mem. 33. But surely there is an agency relationship between attorneys and their clients, so if Congress meant for the term "agent" to describe the legal relationship between representatives and claimants, it would have only needed to use the term "agents." That the statute includes "attorneys" (and "other persons") along with "agents" indicates that Congress intended a different meaning for the term.

In fact, the legislative history demonstrates that the repeated reference to "agents" is a reference to those acting in the occupation or role of a "claim agent." The floor debate on the 1884 statute is replete with references to purportedly disreputable "claim agents." *See, e.g.*, Pls.' Mem. 32-34; 48 Cong. Rec. H5219, H5221-22 (daily ed. June 16, 1884) ("The officers of the Department have done their duty in endeavoring to guard the interests of claimants against these [disreputable] **claim agents**, but they have been unable to do so because no law authorized them to disbar the disreputable **claim agents** from practice.") (Rep. Townshend) (emphasis added).

The modern-day equivalent of such non-attorney "agents" are known as "enrolled agents," while CPAs and enrolled actuaries would be "other persons." Therefore, all of the persons listed in the 1884 statute as representatives ("agents, attorneys, or other persons") necessarily have an agency relationship with a claimant being represented before Treasury, unlike tax return preparers, who do not act as agents of taxpayers absent special authorization.

**c. The cases cited by the IRS on the issue of agency support Plaintiffs' interpretation of Section 330.**

In addition to the 1884 statute, the IRS cites two cases for the proposition that “representatives” under Section 330 are not agents. Defs.’ Mem. 34. The IRS misconstrues the use of the term “agents” in these cases, and both cases support Plaintiffs’ argument.

The court in *R.W. Hart & Co. v. Harris* explained that the 1884 statute “authorized the Secretary of the Treasury to prescribe rules and regulations governing the recognition of persons permitted to appear as agents for others in presenting claims, and to reprimand or suspend such privilege for various causes.” 83 P.2d 565, 567 (Okla. 1938). This corresponds precisely with Plaintiffs’ understanding of the statute. The court noted that practice before Treasury is “not restricted to attorneys at law, but also agents, auditors, accountants or others.” *Id.* Again, in using the term “agent[],” the court was not describing the legal relationship between representative and claimant, but was instead listing the occupation of “agent[]” along with auditor and accountant. Although recognizing that they were not identical, the court further noted the similarity between practice before Treasury and the practice of law: “persons so enrolled may occupy a position somewhat similar to attorneys at law when they are appearing before the Treasury Department and its agencies.” *Id.*

The IRS also cites *Poole v. United States*, a case involving disbarment of a CPA, but that case does not discuss agency, and applies Plaintiffs’ understanding of “representatives,” finding “[t]hat plaintiff represents taxpayers before the Internal Revenue Service places him squarely within the wording of section 330(a)(1).” 1984 U.S. Dist. LEXIS 15351, at \*3 (D.D.C. 1984).

**C. Context provided by other statutes and case law also indicates Congress’s unambiguous intent to regulate the “practice” of professionals who advocate in adversarial proceedings, and not mere tax return preparers.**

The IRS fails to respond to several arguments in Plaintiffs’ original brief on the context

provided by other statutes and case law indicating that “practice” was understood to mean the professional representation of others in adversarial proceedings, and not mere tax return preparation. Pls.’ Mem. 25-27. Of particular note, the IRS completely fails to address the fact that as recently as 2005, the IRS itself acknowledged that tax return preparation is not part of “practice,” noting that being disbarred from practice before the IRS “does not prevent . . . individuals from filing returns.” *Id.* at 27. The IRS also fails to address Plaintiffs’ citation to sections of the Internal Revenue Code that treat “practice before the Internal Revenue Service” as analogous to practice of law, granting confidentiality privileges and other benefits. *Id.* at 25.

The IRS repeatedly cites *Wright v. Everson*, 543 F.3d 649, 656 (11th Cir. 2008), for two propositions: (1) “Congress has not directly spoken on the precise question of whether an unenrolled representative is entitled to represent taxpayers” and, (2) “Congress expressly has granted to the Secretary the right to regulate who practices before the IRS in 31 U.S.C. § 330(a).” Defs.’ Mem at 15-16, 25-26. However, these two issues are distinct from the issue presented here. Unlike *Wright*, Plaintiffs do not seek to “represent” taxpayers, nor do they challenge the IRS’s authority to limit who may actually appear and represent persons before the IRS. Instead, Plaintiffs challenge the IRS’s claimed authority to license tax preparers who *do not appear before the IRS in a representative role*. The *Wright* case is notable because the Eleventh Circuit acknowledged the difference between “practice” and tax preparation, finding that the IRS could prevent a tax preparer from “practicing” as a representative of persons before the IRS, while recognizing that he could still continue to prepare tax returns. 543 F.3d at 657.<sup>12</sup>

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<sup>12</sup> *United States v. Cruz* is another instance where federal courts have recognized the distinction between “practice” and tax return preparation. 611 F.3d 880 (11th Cir. 2010). As explained in Plaintiffs’ opening brief, both the district and appellate courts in *Cruz* recognized that neither defendant tax return preparer was eligible to “practice” before the IRS, but still permitted them to continue preparing tax returns. *See* Pls.’ Mem. 25-26. If merely preparing a tax return was a

### **III. The New Circular 230 Regulations Are Foreclosed by the Ordinary Meaning of Section 330's Statutory Terms, Which Will Not Bear the IRS's New Interpretation.**

Under *Chevron* step one, a court must determine “whether Congress has unambiguously foreclosed the agency’s statutory interpretation,” such as “by granting the agency a range of interpretive discretion that the agency has clearly exceeded.” *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation omitted). Here, the IRS has clearly exceeded the range of interpretive discretion by ignoring the plain meaning of the words “practice” and “representative” (as discussed *supra* in Part II), by treating Section 330(a)(2)(D) as surplusage, by improperly defining all instances of preparing and filing documents as “practice,” and by inappropriately attempting to bootstrap authority to regulate tax preparers via a “limited practice” privilege.<sup>13</sup> Plaintiffs address these issues in turn. The IRS’s new Circular 230 regulations are foreclosed because, as demonstrated below, Section 330 “simply will not bear the meaning the [agency] has adopted.” *Pittston Coal Grp.*, 488 U.S. at 113.

#### **A. The IRS’s new interpretation treats Section 330(a)(2)(D) as surplusage.**

The IRS claims that it does not treat Section 330(a)(2)(D) as surplusage because “subsections 330(a)(1) and 330(a)(2) are separate delegations of authority to the Secretary.” Defs.’ Mem. 27-28 n.6. But Section 330(a) was all part of a single sentence when passed in 1884, not distinct grants of authority. *See* footnote 9, *supra*. When the act was recodified,

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form of “practice,” these rulings would be nonsensical. The IRS apparently mistakes Plaintiffs’ citation of *Cruz* for a claim that courts may not issue injunctions against tax return preparers under 26 U.S.C. § 7407. Defs.’ Mem. 32 n.9. But Plaintiffs do not dispute that the IRS may seek such injunctions, or that courts may issue them under powers expressly granted by Section 7407. Here, in contrast, the IRS is attempting to exercise authority not found in Section 330.<sup>13</sup> In the alternative, and as noted in Plaintiff’s opening brief at footnote 12 on page 16, if the Court finds that the statute is ambiguous, Plaintiffs assert these same arguments under step two of *Chevron*, as demonstrating that the IRS’s interpretation is not “based on a permissible construction of the statute[s].” *Chevron*, 467 U.S. at 843. Because Plaintiffs bring solely an *ultra vires* claim against the registered tax return preparer (“RTRP”) regulations, the arguments made in support are essentially the same under either step of *Chevron*.



“Congress explicitly stated that it was simplifying the language without making any substantive changes in meaning.” *Poole*, 1984 U.S. Dist. LEXIS 15351, at \*4. Moreover, Section 330(a)(2)(D) is critical to interpreting Section 330 because courts have interpreted it as stating the very purpose of the statute. *See id.* at \*4 (“Congress . . . permitted the Treasury to judge the character, reputation, and competence of those who practiced before it, **in order to ensure that cases were well presented.**”) (emphasis added); *accord Goldsmith*, 270 U.S. at 121–22; *see also Bender*, 490 F.3d at 1368 (interpreting parallel statute in same manner). The IRS’s new Circular 230 regulations do nothing to ensure that “representatives of persons” are qualified to skillfully “present[]” “cases” before the IRS, and are thus inconsistent with the statutory purpose.

The IRS further claims that requiring registered tax return preparers (RTRPs) to be competent in preparing returns “does not preclude the Secretary from requiring other ‘practitioners’ to be competent in presenting ‘cases’ under 31 U.S.C. § 330(a)(2)(D).” Defs.’ Mem. 28 n.6. But Section 330(a)(2) provides no authorization to the Secretary to ensure that non-representative tax preparers are “competent in preparing returns.” *Id.* It only permits the Secretary to require that a “representative” demonstrate, *inter alia*, “competency to **advise and assist persons in presenting their cases.**” 31 U.S.C. § 330(a)(2) (emphasis added). As detailed in Part II(B)(3), *supra*, tax return preparers are not representatives, nor do they advise and assist in the presentation of cases. The IRS thus fails to give meaning to Section 330(a)(2)(D).

**B. The IRS’s attempt to define *all* instances of preparing or filing documents with the IRS as “practice” under Section 330 is flawed.**

The IRS wrongly concludes that all instances of preparing or filing documents with the IRS, including the preparation or filing of tax returns, constitutes “practice” under Section 330. *See* Defs.’ Mem. 9. As explained in Plaintiffs’ opening brief, Pls.’ Mem, 17-27, Section 330 is concerned with the regulation of those who “practice” by representing taxpayers in adversarial

proceedings, e.g., a tax protest, before Treasury or the IRS, in its adjudicative role (known in the tax industry as “controversy”). *See* Pls.’ Mem. 2 n.2. “Practice” in such “controversy” matters requires preparing or filing documents with the IRS. But taxpayers also must prepare or file tax returns with the IRS in its tax administration role (known as “compliance”). *Id.* The paid preparation of others’ tax returns is a non-representational service, and thus falls outside the scope of Section 330. Treating *all* instances of the paid preparation or filing of documents with the IRS as representational “practice” under Section 330 is far too broad a reading of the statute.

Put simply, if someone appears before the IRS as the representative of a taxpayer in a “controversy” proceeding, they are a “practitioner” and the IRS may regulate their “practice” before the IRS under Section 330.<sup>14</sup> But if someone never appears before the IRS as the representative of a taxpayer in such a proceeding, they are not a “practitioner,” even though they may do some of the same things (prepare or file documents with the IRS) that a practitioner does.

**C. The IRS is improperly attempting to bootstrap authority to regulate all tax return preparers using the “limited practice” privilege.**

The IRS claims that RTRPs are “representatives” because they have “limited practice” privileges before the IRS. Defs.’ Mem. 23-26.<sup>15</sup> But this is nothing less than an attempt to bootstrap authority under Section 330, impermissibly transforming a limited grant of authority

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<sup>14</sup> The IRS also argues, irrelevantly, that Circular 230 permits the IRS to regulate the conduct of practitioners that occurs outside of any proceedings, hearings, or cases before the agency. Defs.’ Mem. 28-30. But Plaintiffs do not claim that appearance in proceedings, hearings, or cases is the only component of the “practice of representatives of persons” before the IRS—it is simply a necessary component in order for one to qualify as a “representative” who “practices” before the agency. Nor do Plaintiffs claim that the limiting principle for regulations under Section 330 is whether or not a practitioner is before the agency at the very moment he or she is engaged in any conduct. Instead, Plaintiffs challenge the IRS’s mandatory designation of all tax return preparers as practitioners regardless of whether they *ever* appear before the agency to represent a person.

<sup>15</sup> The very existence of a distinct category of “limited practice” or “limited representation” that did not include preparing tax returns highlights the fact that, until the recent regulatory revisions, even the IRS did not consider the preparation of tax returns to be “practice” or “representation.”

into “a whole new regime of regulation.” *MCI Telecomms. Corp.*, 512 U.S. at 234.

Under the new Circular 230 regulations, RTRPs are only permitted to “practice” by “preparing and signing tax returns and claims for refund, and other documents for submission to the [IRS].” 31 C.F.R. § 10.3(f)(2). (This is not “practice” under Section 330, as it involves no representation before an agency.) However, if RTRPs obtain a taxpayer’s power of attorney, they may “represent taxpayers before revenue agents, customer service representatives, or similar officers and employees of the [IRS] during an examination if the [RTRP] signed the tax return or claim for refund for the taxable year or period under examination.”

31 C.F.R. § 10.3(f)(3).<sup>16</sup> This essentially allows a tax preparer to explain a tax return that he or she prepared to low-level IRS customer service employees during the initial stage of an audit. It does not allow representation in “cases”—adjudicative proceedings in “controversy” matters before appeals officers or other IRS officials—as contemplated by Section 330(a)(2)(D).<sup>17</sup>

**1. The IRS cannot modify the definition of “tax return preparers” by granting preparers a “limited practice” privilege under Circular 230.**

Under the Internal Revenue Code, “‘tax return preparer’ means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax . . . or any claim for refund of tax[.]” 26 U.S.C. § 7701(a)(36)(A). Notably, there is no mention of any “representation” by a “tax return preparer.” But the IRS is now refusing to let anyone prepare tax returns for compensation unless they become an RTRP with “limited practice” privileges; no one may simply be a “tax return preparer” as defined by statute. Thus,

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<sup>16</sup> This is the same extra-statutory privilege known as “limited practice” that was previously accorded to unenrolled preparers under former 31 C.F.R. §10.7(c)(1)(viii), prior to the August 2011 revision of Circular 230. The IRS’s assertion that “the Service has had the authority to discipline certain unenrolled tax return preparers for disreputable or other unethical conduct” under Revenue Procedure 81-38, Defs.’ Mem. 4, is only true with respect to those preparers engaged in this “limited practice.” *See* Rev. Proc. 81-38, § 3.01 (Aug. 31, 1981).

<sup>17</sup> The scope of such “representation” is severely restricted. *See* 31 C.F.R. § 10.3(f)(3).

the IRS is attempting to use its new Circular 230 regulations to modify the *statutory* definition of “tax return preparer,” by adding a mandatory “limited practice privilege.” And, by then claiming that this very “limited practice” privilege justifies its own authority to regulate tax return preparers, the IRS is impermissibly engaging in regulatory bootstrapping. An agency may not grant itself new authority in this manner. *See, e.g., Beverly Enters. v. Herman*, 119 F. Supp. 2d 1, 12 (D.D.C. 2000) (“[T]he plain language and legislative history of the [statute], as buttressed by its structure and purpose, will not sustain this form of regulatory bootstrapping.”); *see generally MCI Telecomms. Corp.*, 512 U.S. at 232, 234. This subverts not only the language and purpose of Section 330, but also the nature of the relationship between Congress and the agency.

**2. Under Section 330, the IRS may permit anyone to “practice,” but it may not regulate those who do not actually engage in “practice” under Section 330.**

RTRPs are entirely a regulatory creation of the IRS; they are nowhere to be found in the U.S. Code. The IRS is attempting to define RTRPs as “representatives” in such a way that they are *only* “representatives” for purposes of being subject to regulation under Section 330(a)(1), but are not truly “representatives” under Section 330(a)(2)(D)—being unable to actually “practice” before the IRS by actually representing taxpayers in “cases.” This is an impermissible attempt to game the system and usurp power that Congress has not granted. The IRS may regulate those who do actually practice before it by representing taxpayers in cases, and it has in fact created a category of non-attorney, non-CPA representatives who are enrolled to appear before the IRS and may represent taxpayers in cases before the IRS (after obtaining power of attorney)—they are called, appropriately enough, “enrolled agents.” *See* 31 C.F.R. §§ 10.3(c), 10.4(a). But the IRS may not attempt to expand the bounds of Section 330 by creating a supposed category of “practitioners” that are not actually permitted to “practice” by acting as the “representative” of taxpayers in “cases” before the IRS as contemplated by Section 330(a)(2)(D).

**IV. The Legislative History and Purpose of Section 330 Show That Congress Did Not Contemplate the IRS Imposing a Licensing Scheme on All Tax Return Preparers.**

Plaintiffs explained at length in their opening brief how the legislative history and purpose of Section 330 foreclose the IRS's new interpretation of Section 330. Pl.'s Mem. 31-35. Other than taking issue with one aspect of the original 1884 statute, discussed *supra* at Part II(B)(3)(b), the IRS largely failed to respond to these arguments. Below, Plaintiffs explain the relevant legal standard and identify how the IRS's new Circular 230 regulations fail to meet it.

**A. Regulations must be consistent with the congressional purpose underlying the statute and contemplated by Congress's grant of authority to the agency.**

In arguing that it has broad authority to pass regulations under Section 330, the IRS fails to recognize that for regulations to be upheld as valid under *Chevron*, they "must be found to be consistent with the [C]ongressional purposes underlying the authorizing statute." *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d at 40 (internal quotations omitted). Regulations cannot be sustained unless the "reviewing court [is] reasonably able to conclude that the grant of authority contemplates the regulations issued." *Planned Parenthood Fed., Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983) (internal quotation omitted).

**B. The new Circular 230 regulations are inconsistent with the purpose of Section 330 and were never contemplated by Congress's grant of authority.**

Plaintiffs showed in their opening brief that the legislative history demonstrates that Congress never contemplated that Section 330 would be used to license all tax preparers either when it originally passed the statute in 1884 or in subsequent revisions. Pls.' Mem. 31-35. The IRS's only response is that the IRS needs to be able to "respond to changing conditions." Defs.' Mem. 34. While an agency may certainly respond to changing conditions, it must do so within the bounds of its statutory authority. See *MCI Telecomms. Corp.*, 512 U.S. at 232, 234 (finding a regulatory scheme *ultra vires* because, regardless of whether it was a good idea in 1994, "it was

not the idea Congress enacted into law in 1934.”) The IRS may not use “changing conditions” to justify imposing a new regulatory regime without express authority from Congress.

**V. The Overall Statutory Scheme Congress Has Enacted—and Declined To Enact—Shows That the IRS’s New Interpretation of Section 330 Is Flawed.**

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

The IRS misconstrues Plaintiffs’ arguments regarding other statutory provisions that regulate tax preparers. Defs.’ Mem. 30.<sup>18</sup> With the exception of 26 U.S.C. § 7407, discussed in the following section, Plaintiffs do not maintain that these statutes “would be rendered surplusage if ‘practice’ under section 330(a) included paid tax return preparers.” *Id.* Rather, as Plaintiffs explained in their opening brief, these statutes indicate the statutory scheme that Congress actually has put in place to regulate tax preparation is based on specific and limited grants of authority, not the broad, plenary authority that the IRS now claims. Pls.’ Mem. 36-38. The IRS suggests that it may go beyond these statutes because they contain no “express statutory statement of exclusivity.” Defs.’ Mem. 30. But delegation of power cannot be presumed by the absence of an express withholding of power. *See, e.g., Am. Petroleum Inst.*, 52 F.3d at 1120.

The IRS further misstates its role by claiming that the Return Preparer Review and public comments justify expanded regulatory oversight.<sup>19</sup> Defs.’ Mem. 31. Absent a grant of statutory authority from Congress, the IRS has no power to expand its regulatory reach based on its own

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<sup>18</sup> The IRS also claims that legislative history indicating that Section 330(d) confirmed “present-law authority” shows that Section 330 “does not have to explicitly identify every type of activity that the Service may regulate.” Defs.’ Mem. 30. But any IRS authority to regulate tax shelter advice was derived from other statutes, *see, e.g.*, 26 U.S.C. §§ 6700, 6701, 6111, 6112, some of which were wholly rewritten in the same 2004 bill. *See* Pub L. No. 108-357, § 815(a)-(b). Section 330(d) confirmed the IRS’s continuing authority despite these changes, while concurrent amendments to Section 330 gave the IRS additional powers, including “censure.” *Id.* at § 822(a).

<sup>19</sup> The IRS further argues that the specific function of the new Circular 230 regulations is distinguishable from the function of extant statutes regulating tax preparation. Defs.’ Mem. 31. This is irrelevant given that the new Circular 230 regulations are not authorized by statute.

conclusions about the public policy benefits of so doing. *See, e.g., Bowen*, 488 U.S. at 208.

The IRS also fails to respond to Plaintiffs' argument that Congress explicitly recognized, in the Tax Reform Act of 1976, that any licensing of tax return preparers should be done at the state or local level. Pls.' Mem. 37-38 (citing 26 U.S.C. § 6103(k)(5)). The language of that statute indicates that Congress did not contemplate giving any licensing authority of tax return preparers to the IRS, recognizing that any such regulation was properly reserved for the states.

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

The IRS barely addresses Plaintiffs' argument that its new interpretation of Section 330 would reduce 26 U.S.C. § 7407 to surplusage, noting simply that "if the new regulations did result in the entire elimination of conduct subject to injunctive relief under section 7407, that would simply show that the regulations were an overwhelming success." Defs.' Mem. 31-32. But this misses the point—the issue is not whether the new IRS licensing regulations might reduce or eliminate conduct subject to injunction under Section 7407, but whether the new Circular 230 regulations permit the IRS to effectively exercise the same (or greater) authority (purportedly under Section 330), thus circumventing the protections built into Section 7407.

As Plaintiffs noted in their initial brief, Section 7407 requires the Secretary to seek the blessing of an Article III court in order to enjoin specific conduct of a tax return preparer or to permanently enjoin a person from continuing to act as a tax return preparer. Pls.' Mem. 38-39. But under the IRS's new interpretation of Section 330, as implemented in the new Circular 230 regulations, the Secretary may directly "suspend or disbar . . . or censure" tax return preparers, as well as impose monetary penalties, all without approval from an Article III court, purportedly under the authority of Section 330(b). Thus, the IRS's new interpretation of Section 330 renders Section 7407 surplusage. Plainly, Congress never intended to give the IRS such authority under

Section 330, and the authority Congress granted under Section 7407 is indicative of Congress's intent to regulate the field of tax return preparation in specific and limited fashion.

**C. Eight recent bills indicate that Congress does not believe it has previously granted statutory authority to the IRS to license tax return preparers.**

The IRS argues that no logical inference can be drawn from eight recent bills that Congress has introduced that would revise Section 330 to give the IRS statutory authority to regulate tax return preparers because the same bills also include provisions mandating the regulation of tax preparers. Defs.' Mem. 34-35.<sup>20</sup> However, the IRS ignores the fact that each of these proposals begins with a separate provision granting authority to the IRS by revising Section 330 to include tax preparers among those who may be regulated by the Secretary. In fact, many of these provisions are even titled, "Authorization." *See, e.g.*, S. 1219, 110th Cong. § 4 (2007). This would have been unnecessary if Congress viewed the IRS as already having such authority.

**D. The IRS's new interpretation of Section 330 runs counter to a century of agency understanding of the authority granted under Section 330.**

The IRS confuses Plaintiffs' argument that the IRS's new interpretation of Section 330 runs counter to a century of agency understanding of the authority granted by the statute with an argument that the IRS can never change its practices or pass new regulations. Defs.' Mem. 23. But Plaintiffs never make such a claim; an agency can certainly change its practices or make changes to its regulations if such changes are within the statutory authority granted to the agency by Congress. What an agency cannot do is what the IRS did here: newly adopt an expansive

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<sup>20</sup> The fact that Congress did not take any action during the 60-day review period for the new regulations under the Congressional Review Act, Defs.' Mem. 10, 35, is not relevant. The relevant statute says that if Congress does not enact a joint resolution of disapproval, "no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval." 5 U.S.C. § 801(g); *see also Layzer v. Leavitt*, 770 F. Supp. 2d 579, 587 (S.D.N.Y. 2011) (rejecting "Congressional acquiescence theory" in part because § 801(g) "prohibits courts from inferring any Congressional intent.") Thus, contrary to the IRS's claim, no inference may be drawn from Congress' inaction.



interpretation of a statute (with very little explanation) that conflicts not only with the language of the statute itself, but also with a century of the agency's own understanding of the statute.

The IRS misstates the law, claiming that the length of time a regulation has been in effect is "not relevant for *Chevron* analysis." Defs.' Mem. 23. But an agency's longstanding and consistent interpretation of a statute is certainly relevant to determining whether the meaning of a statute is clear under *Chevron* step one, as case law in this Circuit has noted. *See, e.g., Fin. Planning Ass'n*, 482 F.3d at 490-91; *Ry. Labor Execs.' Ass'n*, 29 F.3d at 669-70.

The IRS also fails to respond to Plaintiffs' argument that the IRS has previously taken the official position, often before Congress, that it had no authority to regulate tax return preparers under Section 330. *See* Pls.' Mem. 43-44. This is a glaring omission, indicative of the agency's "wholesale attempt to rewrite the statute and history." *Ry. Labor Execs.' Ass'n*, 29 F.3d at 669.

### CONCLUSION

Although Congress is perfectly capable of adding "and tax return preparers" to Section 330, it has not done so despite repeated proposals. Instead, the IRS is attempting to circumvent the absence of a statutory grant of authority by reinterpreting a statute originally written in 1884, giving unnaturally expansive definitions to its terms, contrary to the IRS's own long-standing interpretation of its authority under that statute. But the IRS has no such authority to create new regulatory regimes. That is properly the role of Congress, particularly where, as here, the proposal is a sweeping licensing scheme that burdens up to 700,000 tax preparers, likely forcing many out of business, and affects the nearly 100 million taxpayers who use their services.

Therefore, this Court should grant Plaintiffs' Motion for Summary Judgment, declare that the RTRP licensing scheme is *ultra vires*, enjoin Defendants from enforcing the RTRP regulations in Circular 230, and deny Defendants' Motion for Summary Judgment.

**RESPECTFULLY SUBMITTED** this 20th day of November, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2012, I electronically transmitted the attached **PLAINTIFFS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** and the accompanying Proposed Order to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECD registrants:

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INSTITUTE FOR JUSTICE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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**[Proposed] ORDER GRANTING PLAINTIFFS’ MOTION FOR SUMMARY  
JUDGMENT AND DENYING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Having fully considered the cross motions for summary judgment by Plaintiffs and Defendants, the briefing submitted by the parties, and the points and authorities cited thereto,

IT IS HEREBY ORDERED that Defendants’ motion for summary judgment is DENIED in full; and

IT IS FURTHER ORDERED that Plaintiffs’ motion for summary judgment is GRANTED in full, and summary judgment shall be entered for Plaintiffs Sabina Loving, Elmer Kilian, and John Gambino.

This Court finds that Defendants’ August 2011 revision to Treasury Department Circular No. 230 (“Circular 230”), 31 C.F.R. pt. 10, which imposes a “registered tax return preparer” licensing scheme on all previously unlicensed tax return preparers, is *ultra vires*. Plaintiffs are therefore entitled to judgment that the challenged regulations are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]” 5 U.S.C. § 706(2)(C).

IT IS FURTHER ORDERED that:

- A. This Court DECLARES that Defendants are without statutory authority to enact, promulgate or enforce the licensing scheme for “registered tax return preparers” as described in Circular 230 (Rev. 8-2011), 31 C.F.R. pt. 10, specifically the amendments to 31 C.F.R. pt. 10 that became effective on August 2, 2011;
- B. Defendants and their agents are PERMANENTLY ENJOINED from enforcing the IRS licensing scheme for “registered tax return preparers” as described in Circular 230 (Rev. 8-2011), 31 C.F.R. pt. 10, specifically the amendments to 31 C.F.R. pt. 10 that became effective on August 2, 2011; and
- C. Attorneys’ fees, costs, and expenses may be awarded after an appropriate motion.

IT IS FURTHER ORDERED that the Clerk shall enter judgment forthwith in conformance with the foregoing.

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James E. Boasberg  
United States District Court Judge