IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Paid tax return preparers now prepare over 80 million individual tax returns annually. The United States has a substantial interest in ensuring that these many returns are properly completed, and that any taxes due are reported and paid. And for many Americans, completing and filing their tax return is one of their larger financial transactions of the year. Even though accurate tax return preparation is of great importance to both the United States and to taxpayers, paid tax return preparers have historically not been required to be licensed, to pass any competency examination, or to satisfy any continuing education requirements. Nor have they been subjected to uniform standards of ethics and conduct across the country.

The Internal Revenue Service ("Service") recently promulgated final regulations under notice-and-comment procedures that complied with the Administrative Procedure Act ("APA"), and which address the concerns discussed above. These new regulations became effective on August 2, 2011. In pertinent part, the new regulations require that paid tax return preparers who are not attorneys, certified public accountants, or otherwise enrolled with the Service must become "registered tax return preparers" by (1) passing a competency exam; (2) satisfying annual continuing education requirements; and (3) complying with the standards of conduct set forth in 31 C.F.R. part 10 (reprinted and known as Treasury Department Circular 230).

The new regulations are well within the Secretary of the Treasury's statutory authority. An agency's authority to regulate the practice of those who appear before it is one of the most fundamental administrative powers. In addition to such inherent agency authority, Congress granted substantial powers to the Secretary of the Treasury including expressly authorizing the Secretary to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a); see also 5 U.S.C. § 301; 31 U.S.C. § 321. This Court should grant substantial deference under the two-step *Chevron* analysis to the new regulations adopted pursuant to this express statutory delegation of authority. Moreover, the new regulations were promulgated only after the Secretary had received significant input from a diverse community of stakeholders including consumer advocates, and only after compliance with APA notice-and-comment. Accordingly, the Court should grant the defendants' motion for summary judgment and uphold the new regulations in full, but deny plaintiffs' competing summary judgment motion.

FACTUAL BACKGROUND

Tax return preparation has historically been an ancillary service provided mainly by lawyers and accountants. A.R. 132. But in recent decades the tax return preparation field has grown substantially. A.R. 131. Although the exact number of paid tax return preparers is not known, the Service estimates that they now prepare over 80 million tax returns annually thereby constituting the majority of individual filed returns. A.R. 133-35; see also 75 Federal Register

51713, 51718 (Aug. 23, 2010); A.R. 1255. Tax return preparation is now a multibillion dollar industry with its own standard industry classification. A.R. 133.

The Service has for many years regulated five separate categories of "practitioners" before it: (1) attorneys; (2) certified public accountants ("CPA"); (3) enrolled agents; (d) enrolled actuaries; and (5) enrolled retirement plan agents. See Former 31 C.F.R. Part 10 (2009). Attorneys, CPAs, and actuaries have been required to pass examinations in order to obtain a state license and/or professional society membership. Enrolled agents and enrolled retirement plan agents have been required to pass special examinations administered under the oversight of Service proving their competence on tax related matters. See Former 10 C.F.R. § 10.4(1)-(b) (2009). All five categories of "practitioners" have also been subject to federal regulation by the Service, including sanctions for incompetent or disreputable conduct. See Former 31 C.F.R. § 10.50 (2009).

But "practice" before the Service has long been defined broadly also to comprehend "all matters connected with a presentation" to the Service or its employees including "preparing and filing documents" as well as "representing a client at conferences, hearings and meetings." See Former 31 C.F.R. § 10.2(a)(4) (2009). Consequently, even before the new regulations unlicensed and unenrolled individuals (such as the three plaintiffs here) have long held "limited" practice and representation rights associated with the preparation of a particular return. See Former 31 C.F.R. § 10.7(c)(1)(viii) (2009); Revenue

Procedure 81-38 (Aug. 31, 1981); 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR).[1] The Service has estimated that there have about 700,000 of such unlicensed tax return preparers across the nation. 75 Federal Register 51713, 51725 (Aug. 23, 2010); A.R. 1262. Data collected by the Service indicates that the unlicensed and unenrolled tax return preparer segment comprises the majority of the paid tax return preparation industry.[2]

These unlicensed and unenrolled individuals have not been required to have any minimum education, knowledge, or skill before they prepare a tax return for a fee. A.R. 134. Nor have they been regulated as "practitioners" before the Service, although the Service has had the authority to discipline certain unenrolled tax return preparers for disreputable or other unethical conduct. Revenue Procedure 81-38, § 7 (Aug. 31, 1981); 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR). Although there has been no federal licensing regime for tax return preparers, four states have undertaken to do so. A.R. 754 (Oregon,

[1] Specifically, the prior regulations stated that an "individual who prepares and signs a taxpayer's return as the preparer . . . may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return" but may not provide representation before "appeals officers, revenue officers, Counsel or similar officers" of the Service. 31 C.F.R. § 10.7(c)(1)(viii) (2009); *accord* Revenue Procedure 81-38, 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR) (individual preparer of tax returns "may exercise, without enrollment, the privilege of limited practice as a taxpayer's representative before the Internal Revenue Service").

[2] Interim data from the tax return preparer registration process identified 429,475 unlicensed individuals; 197,232 CPAs; 40,109 enrolled agents; and 25,185 attorneys. A.R. 772-73.

California, Maryland, and New York regulate tax return preparers). The Government Accountability Office ("GAO") found in 2008 that Oregon's regulatory regime may have led to more accurate federal tax returns, too. A.R. 754. The GAO suggested that the federal government adopt nationwide regulations covering paid tax return preparers. A.R. 754. Another federal survey in 2008 likewise indicated that uniform federal regulation of unlicensed tax return preparers would be beneficial.[3]

Given this backdrop, the Commissioner of Internal Revenue launched the Service's Return Preparer Review in June 2009. IR-2009-57; A.R. 127, 168. The review was intended to achieve the goals of increasing taxpayer compliance and ensuring uniform and high standards of conduct for tax return preparers. IR-2009-57; A.R. 168. As part of the review, the Service announced a series of public forums at which consumer groups and tax professionals could provide input and recommendations regarding the development of tax return preparer performance standards. IR-2009-66, IR-2009-74; A.R. 169, 174. The Service also requested written public comments regarding how to ensure that tax return preparers meet high standards of conduct. IR-2009-68, Notice 2009-60; A.R. 170-73. The Service particularly solicited comments regarding what minimum level of education and training, if any, should be required of tax return preparers.

[3] A.R. 53-86 (Treasury Inspector General for Tax Administration, "Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors," TIGTA Rept. # 2008-40-172 (Sept. 3, 2008).)

Notice 2009-60; A.R. 172. The Service received over 500 written comments regarding how to improve the education and regulation of tax return preparers. A.R. 157, 185-747. The series of public forums provided further input from the tax preparer community. A.R. 152-57, 175-78. Besides hearing from commercial tax preparation firms, the Service heard from hundreds of independent tax return preparers and individual taxpayers, too. A.R. 157.

In December 2009, the Service issued its detailed report that incorporated the substantial public input it had received. IRS, "Return Preparer Review," December 2009; A.R. 124-180. The Service noted the strong public support for greater federal regulation of tax return preparers.

- 88% of individuals who expressed an opinion favored registration of paid tax return preparers;
- 90% of individuals who commentated on education and testing supported minimum education and testing requirements for paid tax return preparers;
- 98% of those commenting on quality and ethics supported establishing quality and ethics standards for paid tax return preparers; and
- 98% of individuals who commented on oversight favored increased oversight and enforcement of paid tax return preparers.

A.R. 157. The Service concluded that the public "overwhelmingly supports efforts to increase the oversight of paid tax return preparers." A.R. 158.

The December 2009 Return Preparer Review then made several separate recommendations that form the basis for the regulations challenged in this lawsuit. For example, the Review recommended mandatory registration of tax

return preparers; a competency examination requirement for preparers who are not attorneys, CPAs, or otherwise enrolled before the Service; a continuing education requirement for tax return preparers; and that all paid preparers be subject to the standard of conduct found in Treasury Circular 230. The Review also recommended that those who are not attorneys, CPAs, or otherwise enrolled before the Service should continue to have only limited practice and representation rights. A.R. 158-64.

As a result of the 2009 Return Preparer Review, the Treasury Department first issued proposed regulations requiring paid return preparers to obtain a Preparer Tax Identification Number ("PTIN"). 75 Federal Register 14539-45 (Mar. 26, 2010); A.R. 36-43. Those PTIN regulations became final in the fall of 2010 and require that tax return preparers obtain a PTIN. 75 Federal Register 60309-16 (Sept. 30, 2010); A.R. 28-35. The PTIN regulations are not challenged in this action.

The plaintiffs do challenge the subsequent new regulations governing practice before the Service that initially appeared as proposed regulations on August 23, 2010. 75 Federal Register 51713-34 (Aug. 23, 2010); A.R. 1250-71. The proposed regulations provided notice of proposed rulemaking, solicited written comments, and announced a public hearing. Id., Id. The proposed regulations established that "registered tax return preparers" would constitute a new category of "practitioners" authorized to practice before the Service. 75 Federal Register at 51715; A.R.1252. They required that a registered tax return preparer,

in addition to possessing a current PTIN, must (1) pass a minimum competency exam; (2) satisfy annual continuing education requirements; and (3) would be subject to the standards of conduct in Treasury Circular 230. 75 Federal Register at 51716; A.R. 1253. The Secretary also considered other regulatory alternatives. However, the costs and benefits of proposed regulations were judged superior to those of other regulatory options. 75 Federal Register at 51725-26; A.R. 1262-63. In order to allow registered tax return preparers a transition period to pass the competency examination, the Service subsequently announced that successful completion of the exam would not be required until December 31, 2013, so long as the individual renews her PTIN, passes any required suitability check, and pays the applicable user fee. Notice 2011-6 (Dec. 30, 2010); A.R. 14-27.

A public hearing on the proposed regulations also occurred on October 8, 2010, at which representatives from a number of interested professional organizations participated. A.R. 1159-1217. In addition to the substantial public input received by the Service during its 2009 Return Preparer Review, the proposed regulations solicited additional comments, and the Service received another 250 pages of written comments in 2010 and early 2011. A.R. 894-1155, 1274-93. After this notice-and-comment had occurred, the Secretary of the Treasury issued the final regulations on June 3, 2011. 76 Federal Register 32286 (June 3, 2011); A.R. 1220. The final regulations acknowledge that some commenters requested that the Service not include registered tax return preparers as individuals who may practice before the Service. The Service

responded to these comments by explaining that registered tax return preparers must be included as practitioners in order to be consistent with the definition of "practice" employed by Treasury Circular 230. "Representation" is defined as "[a]cts performed on behalf of a taxpayer by a representative before the Internal Revenue Service." See 26 C.F.R. § 601.501(b)(3). The preparation of a document constitutes "practice," so it follows that the preparation of a tax return is "practice." A registered tax return preparer preparing all or substantially of a tax return on behalf of a taxpayer is "practicing" before the Service. The new regulations accurately define and describe such "practice" before the Service. 76 Federal Register 32288 (June 3, 2011); A.R. 1222.

Some commenters requested delay in implementing the continuing education requirement. In response to these comments, Treasury and the Service permitted individuals required to take the competency examination to continue to prepare returns without becoming a registered tax return preparer until the end of 2013. Also in response to comments, Treasury and the Service postponed the continuing education requirement until after the first year of registration that began on September 30, 2010. A.R. 1223. These significant adjustments to the program are indicative of the efforts that Treasury and the Service made to involve the public and the tax return preparer community in the development of the tax return preparer initiative.

Plaintiffs admit that the Secretary complied with the APA's notice-and-comment procedures. In addition, the new registered tax return preparation

regulation was considered to be a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563, and a "major rule" under the Congressional Review Act of 1996, 5 U.S.C. §§ 801-808, which establishes "fast track" procedures for Congressional disapproval of certain regulatory rules. Before any rule covered by the Act can take effect, the rule must first be submitted for Congressional consideration. Accordingly, the effective date for the new regulations was delayed 60 days until August 2, 2011, in order to allow for that Congressional review. On July 28, 2011, the House Ways & Means Subcommittee on Oversight held a public hearing on the Service's return preparer program. See A.R. 750-799. Congress did not take any action under the Congressional Review Act to modify the final regulations in any respect.

ARGUMENT

I. The Court should grant defendants' summary judgment motion

The Court should grant the new regulations deference under *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, the Court should uphold the new regulations in full and grant the defendants' motion for summary judgment.

A. The Court should uphold the new regulations as within the Secretary of the Treasury's statutory authority

As sovereign, the United States is immune from suit except where Congress has unambiguously consented. *United States v. Nordic Village,* 503 U.S. 30, 34 (1992). Plaintiffs bring this action under the APA which does waive federal sovereign immunity in certain respects. 5 U.S.C. §§ 702, 703. Under the APA, the Court may set aside agency final regulations aside where they are "in excess of statutory . . . authority" or are arbitrary and capricious. 5 U.S.C. § 706(2)(A) & (C).

This Court's review of the final regulations under the APA should follow the familiar two-step approach of *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Ass'n of Private Sector Colleges v. Duncan,* 681 F.3d 427, 441 (D.C. Cir. 2012) (a challenge that a regulation is in "excess of statutory jurisdiction" under 5 U.S.C. § 706(2)(C) is reviewed under *Chevron*). The Supreme Court has noted that that the "principles underlying our decision in *Chevron* apply with full force in the tax context." *Mayo Found. for Medical Ed. & Res. v. United States,* --- U.S. ---, 131 S.Ct. 704, 713 (2011). The Court of Appeals for the District of Columbia has further explained that

> [u]nder *Chevron* step 1, "if the Congress has directly spoken to the precise question at issue . . . , that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Under *Chevron* step 2, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

United States Postal Service v. Postal Regulatory Comm'n, 640 F3d 1263, 1266 (D.C. Cir. 2011), quoting *Chevron,* 467 U.S. at 842-43.

The *Chevron* analysis of the new regulations is straightforward. Agencies have the inherent power to regulate those who represent others before them. In addition, 31 U.S.C. § 330 provides an express statutory delegation of authority to the Secretary of the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1). However, Congress' delegation of authority is "silent or ambiguous with respect to the specific issue[s]" of (1) whether preparing or filing tax returns qualifies as "practice" before the Service; and (2) what requirements the Secretary may impose upon those who choose to "practice" as registered tax return preparers. Consequently the new regulations easily pass *Chevron* step 1 and this Court should grant substantial deference and uphold them under *Chevron* step 2. Because the new regulations constitute not only a rational but a very reasoned response to the challenge posed by the unlicensed paid tax return preparer industry, this Court should uphold the regulations under *Chevron* step 2.

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

The Secretary of the Treasury promulgated the new regulations under the authority of a particular statutory provision, 31 U.S.C. § 330, discussed further below. The *Chevron* analysis of the Secretary's action under that provision, though, should reflect the overarching principle that agencies hold the inherent authority to regulate the practice of those before them.

"One of the most urgent problems of our day is the responsibility of the courts and other government bodies to prescribe high standards of conduct for their members and for those who practice before them." *Touche Ross & Co. v. S.E.C.,* 609 F.2d 570, 572 (2d Cir. 1979). The Supreme Court has long-recognized an agency's inherent authority to regulate practice before it. In *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117 (1926), the Supreme Court determined that "so necessary is the power and so usual is it" for an agency to regulate those who practice before it that a general grant of authority to the Board of Tax Appeals automatically included the authority to determine who was qualified to practice before it. *Goldsmith,* 270 U.S. at 122.

Agencies' inherent authority to regulate the practitioners before them continues today. *E.g., Davy v. S.E.C.,* 792 F.2d 1418, 1421 (9th Cir. 1986) (Securities and Exchange Commission had authority to disbar accountant from practice before it under general statutory delegation to the S.E.C. to "make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter . . . "); *accord Touche Ross,* 609 F.2d at 581-82; *Koden v. United States,* 564 F.2d 228, 232-33 (7th Cir. 1977) (Attorney General had authority to penalize immigration lawyer for improper solicitation of clients that occurred apart from any deportation proceedings based upon statutory delegation of authority to promulgate regulations "necessary for carrying out his authority" and to regulate "practice" in deportation proceedings); *Herman v. Dulles,* 205 F.2d 715, 716 (D.C. Cir. 1953) (International Claim Commission had inherent authority to

regulate practice of those before it because an "administrative agency that has general authority to prescribe its rules of procedure may set standards for determining who may practice before it").

The Secretary of the Treasury has broad powers including the statutory authority to "prescribe regulations to carry out the duties and powers of the Secretary." 31 U.S.C. § 321(b)(1); 5 U.S.C. § 301. The Secretary therefore also has the inherent authority to regulate the practice of those before it. However, as explained below, Congress has made an additional express delegation of authority to the Secretary to regulate "practice" before the Service.

C. The new regulations pass *Chevron* step 1

The express enabling statutory authority that is relevant here is 31 U.S.C. § 330 which states in pertinent part:

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

> (b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who—
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> (1) is incompetent;
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> (2) is disreputable;
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> (3) violates regulations prescribed under this section; or
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> (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

31 U.S.C. § 330(a) & (b). Congress has subjected the broad delegation of authority to the Secretary under section 330(a) only to section 500 of Title 5, United States Code. See 31 U.S.C. § 330(a). Section 500 of Title 5 provides that duly licensed attorneys and certified public accountants are authorized to represent a person before the Service upon filing of an appropriate declaration, but does not preclude others from doing so. 5 U.S.C. § 500(b), (c) & (d)(1).

Chevron step 1 ends the analysis only "if the statute unambiguously forecloses the agency's interpretation." *Friends of Blackwater v. Salazar*, --- F.3d --- , 2012 WL 3538236 (D.C. Cir. 2012). The challenged regulations pass step 1 because Congress did not unambiguously define the term "practice" before the Department of the Treasury or otherwise expressly determine whether the preparation of a tax return constitutes "practice." Nor did Congress expressly set forth what requirements the Secretary may impose upon "practitioners." Consequently, section 330(a) does not "unambiguously foreclose" the Secretary's regulation of paid tax return preparers. In accord with this conclusion, the

Eleventh Circuit in *Wright v. Everson,* 543 F.3d 649 (11th Cir. 2008), held that "Congress has not directly spoken on the precise question of whether an unenrolled representative is entitled to represent taxpayers before the IRS" as specified in the prior regulations and that "Congress has delegated to the Secretary the right to regulate practice before the IRS via an express delegation of authority." *Wright v. Everson,* 543 F.3d at 656. Consequently, the earlier Treasury Regulations limiting the practice of unenrolled tax return preparers – such as the three plaintiffs here -- satisfied *Chevron* step 1. *Id.* at 656-57; *see also Mayo Foundation,* 131 S.Ct. at 711 (Congress had not expressly defined who was a "student" thereby qualifying for a statutory tax exemption and Treasury Regulation excluding medical residents from the "student" category therefore satisfied *Chevron* step 1). The new regulations likewise satisfy *Chevron* step 1.

D. The new regulations pass *Chevron* step 2

A regulation enjoys deference under step 2 "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority." *Wright v. Everson,* 543 F.3d at 655 *quoting United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In particular, *Chevron* deference is routinely granted when the agency has engaged in notice-and-comment rulemaking. *See California Valley Miwok v. United States,* 515 F.3d 1262, 1266 (D.C. Cir. 2008). In this instance, section 330 delegated to the Secretary of the Treasury authority to "make rules carrying the force of law," and the Secretary followed

APA notice-and-comment in promulgating the new regulations. Consequently, just as the earlier regulations regarding tax return preparers won approval in *Wright v. Everson,* the new regulations at bar also pass *Chevron* step 2.

Under *Chevron* step 2, the "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in the judicial proceeding." *Gentiva Healthcare v. Sebelius,* 2012 WL 1142450 at *8 (D.D.C. 2012) *quoting Chevron,* 467 U.S. at 843 n.11. Rather, the regulation should not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843-44; *Mayo Foundation*, 131 S.Ct. at 711 ("we may not disturb an agency rule" under *Chevron* step 2 "unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute"); *Jululang v. Holder,* --- U.S. ---, ---, 132 S.Ct. 476, 483, n.7 (2011); *North Carolina v. E.P.A.,* 531 F.3d 896, 906 (D.C. Cir. 2008); *Ass'n of Private Sector Colleges,* 681 F.3d at 441.

Courts have recognized that an agency's inherent power to regulate practice before it informs the *Chevron* analysis of any additional express grant of authority to an agency. For example, Congress has delegated to the United States Patent and Trademark Office ("PTO") the statutory authority to establish regulations governing the conduct and practice of attorneys and others "before the Office." 35 U.S.C. §§ 2(b)(2)(D) & 32. In *Bender v. Dudas,* 490 F.3d 1361 (Fed. Cir. 2007), an attorney challenged PTO regulations imposing conflict of interest

and disclosure requirements upon him as exceeding the agency's express statutory authority because the regulations imposed standards of conduct and restricted activity that was not "before the Office." *Id.* at 1368 (citing 35 U.S.C. §§ 2(b)(2)(D) & 32). But the Federal Circuit rejected the challenge because "[t]o the extent the phrase 'before the Office' in sections 2 and 32 is ambiguous" the Court would defer under *Chevron* to the PTO's interpretation of that phrase. *Id.* at 1368. The Federal Circuit therefore concluded that "before the Office" authorized regulation of communications with and disclosures to the client even though not strictly "before the Office." *Id.* at 1368. This Court should give the Secretary's interpretation of section 330(a) similar deference here.

The administrative record amply supports the Secretary's determination to require previously unenrolled and unregulated individuals to become "registered tax return preparers" and, therefore, "practitioners" subject to Treasury Circular 230's standards of conduct. Most important, the administrative record demonstrates that these regulations were only proposed after an in-depth review of tax return preparers that the Service commenced in 2009, which sought methods to ensure uniform and high ethical standards for tax return preparers and increased taxpayer compliance. During this review, the Service requested and received input from a large and diverse community through numerous channels, including public forums, solicitation of written comments, and meetings with advisory groups. See Notice 2009-60; A.R. 181. Comments were received from all interested parties, including tax professional

groups representing large and small entities, Federal and state organizations, IRS advisory groups, tax software vendors, individual tax return preparers, and the public. In addition, the Service reviewed tax return preparer studies performed by other governmental agencies which generally demonstrated negative performance by paid tax return preparers. The input received from this large and diverse community overwhelmingly expressed support for regulatory efforts to increase the oversight of tax return preparers, particularly for those who are not attorneys, CPAs, or other enrolled individuals. E.g., A.R. 268, 270, 286, 298, 302, 303, 305, 307, 312, 313, 322, 329, 336.

> For example, the GAO had noted that paid tax return preparers
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> prepare approximately 60 percent of all tax returns filed, and their actions have an enormous impact on IRS's ability to administer tax laws effectively. . . Improved compliance would reduce the tax gap between what is owed in taxes and what is paid voluntarily and on time. IRS's most recent estimate for the gross tax gap was $345 billion for 2001. Increased paid preparer performance could also benefit taxpayers by reducing their likelihood of being audited by IRS and subjected to resulting penalties and interest.

A.R. 752. In another report the GAO found that individuals significantly overpaid their taxes by failing to itemize deductions alone with paid tax return preparers having prepared about half of those inaccurate returns. A.R. 753. Yet another GAO report found that Oregon's state paid preparer regulatory regime may have led to more accurate federal returns as well and could serve as a template for nationwide regulation of unlicensed preparers. A.R. 754 & n.6.

Oregon has a stringent licensing regime for paid tax return preparers. E.g., A.R. 302, 307, 329.

In 2008, the Treasury Inspector General for Tax Administration ("TIGTA") conducted a study of the accuracy of tax returns prepared by unenrolled paid tax return preparers. TIGTA's sample of unenrolled preparers found that "most made significant errors when preparing tax returns." A.R. 54. TIGTA observed that over 80 million returns are prepared by paid preparers but that "[c]urrently there are no national standards that preparers are required to satisfy before selling tax preparation services to the public. Because more than one-half of all taxpayers use preparers to file their tax returns, preparers have a significant effect on taxpayer compliance." A.R. 54. TIGTA further noted that "[a]ttorneys, certified public accountants, and enrolled agents are regulated by the Internal Revenue Code, Treasury Department Circular 230, and the individuals States in which they practice." A.R. 61. By contrast, "[u]nenrolled paid preparers are not required to demonstrate a minimum competency in tax law, nor are they required to satisfy any continuing education requirements in order to prepare Federal tax returns." A.R. 60. Although its sample size was admittedly small, the TIGTA study found an uncomfortably high rate of error in returns prepared by unlicensed and unenrolled tax preparers. A.R. 64.

In fact, many enrolled preparers argued for even higher competency standards for previously unlicensed preparers than the competency standards the Secretary adopted in the final regulations. A.R. 765. The National

Association of Tax Professionals, which represents CPAs, attorneys, enrolled agents, and previously unlicensed tax return preparers such as plaintiffs, commented that "[n]othing but good can come from raising the bar and enhancing professional knowledge and competence in complying with our complex tax code." A.R. 770.

As a result of the Service's 2009 Return Preparer Review and the collective input from the public and the tax return preparer community received both before and after the publication of the notice of proposed rulemaking for the new regulations, substantial evidence before the agency supported expansion of regulatory authority under Treasury Circular 230 to include "registered tax return preparers," and to require such registered preparers to pass a competency exam and to complete annual continuing education requirements. Accordingly, the Court should grant the new regulations deference under *Chevron* step 2, uphold them under the APA as within statutory authority, see 5 U.S.C. § 706(2), and therefore grant the defendants' motion for summary judgment.

II. The Court should deny plaintiffs' motion for summary judgment

Plaintiffs' motion for summary judgment misses the mark. Plaintiffs expend much effort and cite many statutory provisions in attempting to attack the new regulations. However, plaintiffs cannot avoid the basic facts (1) that Congress did not define "practice" in 31 U.S.C. § 330(a), and (2) that the Secretary's interpretation of that term is reasonable, and certainly far from arbitrary and capricious.

A. Plaintiffs interpret "practice" too narrowly

Plaintiffs claim that the Secretary is mistaken in "defining tax return preparers as 'representatives' and defining the mere preparation of a tax return as 'practice' before the IRS." (Pl. Mem., p. 15.) But plaintiffs admit that Congress did not expressly define either "practice" or "representative" in section 330. (Pl. Mem., p. 17.) Plaintiffs therefore can only weakly argue that "'[p]ractice' *connotes* the conduct of trained professionals such as attorneys" and that it is "*analogous*" to legal practice. (Id., p. 18) (emphasis supplied). But "practice" is a term with many meanings. Webster's Third New International Dictionary (Unabridged) (1986) (providing several definitions of "practice"). Plaintiffs' selection of one dictionary definition that suits their purpose does not mean that the statute is unambiguous. *Mayo Foundation for Medical Educ. & Research v. United States,* --- U.S. ---, ---, 131 S.Ct. 704, 711 (2011) (even though medical residents satisfied dictionary definition of "student," because the relevant statute itself did not expressly define "student" the Treasury Regulation that subjected medical residents to employment taxes was entitled to *Chevron* deference). On the contrary, plaintiff's resort to a dictionary definition, if anything, shows that the statute is ambiguous. An agency's regulation is foreclosed under *Chevron* only when Congress has "directly addressed the precise question at issue." *Mayo,* 131 S.Ct. at 711. Plaintiffs' arguments fail under *Chevron* because Congress did not expressly determine whether preparing tax returns constituted "practice" before the agency.

Plaintiffs' argument is similar to the argument rejected in *Bender*, especially considering the similarity between section 330 and 35 U.S.C. § 2. Even though 35 U.S.C. § 2 does not give the PTO express authority to promulgate rules regarding conflict of interest and disclosure requirements, the court concluded that it is reasonable for the PTO to promulgate such rules given the broad authority to regulate practice "before the Office." *Bender,* 490 F.3d at 1368. Similarly, it is reasonable – and certainly not arbitrary and capricious – for the Service to regulate paid tax return preparation under the Congressional grant of authority to regulate "practice" before the Service. See 31 U.S.C. § 330(a)(1).

B. Unlicensed and unenrolled tax return preparers enjoyed "limited practice" and "limited representation" rights under the prior regulations

Plaintiffs contend that the new regulations run counter to a "century of agency understanding" that preparing tax returns did not count as "practice" or "representation" before the Service. (Pl. Mem., pp. 5, 42-45.) Even if this argument were true, which it is not, it would not advance plaintiffs' argument. Regulation of previously unregulated conduct is, by definition, a departure from past agency practice. Under plaintiffs' logic, no new regulation could ever pass muster under *Chevron*. The Supreme Court has held, however, that "the length of time the regulation has been in effect" is not relevant for *Chevron* analysis. *Mayo Foundation,* 131 S.Ct. at 712. Nor is there any inconsistency between the new regulations and 26 C.F.R. § 301.7701-15(d) because that regulation refers to

"tax return preparers" and not to "registered tax return preparers." (See Pl. Mem., p. 19.)[4]

More important, plaintiffs' argument is false. The new regulations do not dramatically diverge from the prior regulations that provided that "practice before the Internal Revenue Service . . . comprehend[ed] all matters connected with a presentation" to the Service or its employees; such "presentations" to the Service expressly included "preparing and filing documents," including prepared tax returns. See Former 31 C.F.R. § 10.2(a)(4)(2009). The new regulations represent only a clarification of the definitions found in the earlier section 10.2. The new regulations clarify that each of "preparing documents" and "filing documents" constitutes "practice" before the Service. 31 C.F.R. § 10.2(a)(4) (2011).

It is true that under the prior regulations unenrolled tax return preparers were not considered "practitioners."[5] Nevertheless, such paid tax return preparers did enjoy "limited practice" and "limited representation" rights under the prior regulations:

> *Limited Practice* – (1) *In general.* Subject to the limitations in paragraph (c)(2) of this section, an individual who is not a practitioner may represent

[4] To the extent there is any perceived inconsistency between the new regulations and the pre-existing section 301.7701, the new regulations are controlling. *E.g., United States v. Estate of Romani,* 523 U.S. 517, 532 (1997).

[5] As pointed out above, however, the Service retained the authority to regulate such unenrolled preparers' limited practice and limited representation of taxpayers. Revenue Procedure 81-38, 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR).

> a taxpayer before the Internal Revenue Service in the circumstances described in this paragraph (c)(1), even if the taxpayer is not present, provided the individual presents satisfactory identification and proof of his or her authority to represent the taxpayer. The circumstances described in this paragraph (c)(1) are as follows: . . . .
>
> (viii) **An individual who prepares and signs a taxpayer's tax return as the preparer**, or who prepares a tax return but is not required (by the instructions to the tax return or regulations) to sign the tax return, **may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return** . . . but . . . . this right does not permit such individual to represent the taxpayer . . . before appeals officers, revenue officers, Counsel or similar officers of employees of the Internal Revenue Service.

Former 31 C.F.R. § 10.7(c)(1)(viii) (2009) (bold supplied). Plaintiffs' limited representation rights have not significantly changed under the new regulations. The new regulations read:

> "A registered tax return preparer may represent taxpayers before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service (including the Taxpayer Advocate Service) during an examination if the registered tax return preparer signed the tax return or claim for refund for the taxable year or period under examination. . . . this right does not permit such individual to represent the taxpayers . . . before appeals officers, revenue officers, Counsel or similar officers of employees of the Internal Revenue Service . . . "

31 C.F.R. § 10.3(f)(3) (2011). When plaintiffs explain preparers' "practice rights" under the new regulations, plaintiffs only cite subsection 10.3(f)(2), but fail to explain subsection 10.3(f)(3) quoted immediately above. (See Pl. Mem., p. 8.)

And plaintiffs cite to *Wright v. Everson,* 543 F.3d 649 (11th Cir. 2008), see Pl. Mem., pp. 26-27, but that Eleventh Circuit opinion actually supports the United States. *Wright v. Everson* was brought by an unenrolled tax return preparer, such

as plaintiffs. That paid tax return preparer alleged that the prior regulation 31 C.F.R. § 10.7(c)(1)(viii) (2007) "unlawfully and arbitrarily limits his right to represent taxpayers before the Internal Revenue Service." *Wright,* 543 F.3d at 651 & 655. But the Eleventh Circuit pointed out that the plaintiff did have limited "rights to represent a taxpayer" as set forth in section 10.7(c)(1)(viii), and the Appellate Court characterized these rights as "limited practice." *Id.* at 655-56. The Eleventh Circuit further held that "Congress expressly has granted to the Secretary the right to regulate who practices before the IRS in 31 U.S.C. § 330(a) via an express delegation of authority." *Id.* at 656 citing *Chevron,* 467 U.S. at 842-44. Because Congress "has not explicitly defined who is authorized to represent a taxpayer before the IRS," *id.* at 656, the Eleventh Circuit gave deference to the regulations under *Chevron* step 2. The Eleventh Circuit therefore reviewed the Treasury Regulation "only to determine whether it is arbitrary, capricious, or manifestly contrary to statute." *Id.* at 656. Under that deferential standard, the Eleventh Circuit upheld the regulation. *Id.* at 657. This Court should likewise give substantial deference to the new regulations because, as plaintiffs themselves admit, "Congress expressly delegated authority to the Secretary to promulgate regulations governing who may practice before the IRS." (Pl. Mem., p. 27 quoting *Wright v. Everson,* 543 F.3d at 657.)

C. Plaintiffs misconstrue the "context" of 31 U.S.C. §330

Plaintiffs are unable to cite an express statutory definition of "practice" or "representation" to buttress their claim that practice before the Service is

"analogous" to the practice of law. (See Pl. Mem., p. 18.) Plaintiffs must therefore resort to a scatter-shot of other statutory provisions that they claim provides "context" for their argument. (Pl. Mem., pp. 18-22.) However, the actual statutory language of section 330(a) undercuts their argument. Section 330(a) delegates the Secretary the authority to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1). That grant of regulatory authority is expressly subject to only one other statutory provision, namely, to "section 500 of title 5." 31 U.S.C. § 330(a). Under section 500 of title 5, Congress determined that at least attorneys and CPAs be allowed to "represent" persons before the Service. 5 U.S.C. § 500(b) & (c). That is the only relevant statutory "context" for the delegation of authority to the Secretary found in section 330(a)(1), and that "context" supports the Secretary's regulation of registered tax return preparers. See 5 U.S.C. § 500(d)(1).

Plaintiffs assert that section 330(a)(2)(D)'s reference to "presenting their cases" and the Secretary's other authority to "disbar" practitioners show that practice before the Service is "analogous to offering legal counsel." (Pl. Mem., pp. 20-21.) But plaintiffs' argument fails. The express statutory delegation of authority to the Secretary to regulate "practice" is provided in section 330(a)(1). Section 330(a)(2) is a separate grant of authority to the Secretary regarding admission standards for practitioners.[6] Similarly, section 330(b) provides

[6] Nor do the new regulations treat section 330(a)(2)(D) as surplusage. (Pl. Mem., pp. 28-29.) As noted above, subsections 330(a)(1) and 330(a)(2) are separate

additional authority to the Secretary to "suspend or disbar" practitioners for violating "regulations prescribed under this section." 31 C.F.R. § 330(b)(3). These later subsections do not restrict the Secretary's powers under section 330(a)(1); rather, they expand such delegated authority.

Plaintiffs argue that section 330 only authorizes the regulation of those who actually represent and advocate for clients in hearings, conferences, meetings, or other proceedings before the Department of the Treasury. (See Pl. Mem., pp. 25-31.) For many years, however, Treasury Circular 230 has governed the provision of tax advice and tax return positions that occurs outside of hearings, meetings, or conferences with the Service and apart from any advocacy or "cases" before the agency. See 59 Federal Register 31523 (June 20, 1994); see 31 C.F.R. § 10.34(a) (current provision providing substantive standards governing tax return positions recommended by practitioners, and position taken on returns signed by practitioners).

In 1984, Treasury Circular 230 was amended to provide practitioner standards for providing opinions used in tax shelter offerings. See 49 Federal Register 6719 (February 23, 1984); see also 31 C.F.R. § 10.35 (current tax opinion advice regulation). The 1984 regulation and the authority of the Service to regulate tax advice was upheld in *Joslin v. Secretary of the Treasury,* 616 F.Supp.

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delegations of authority to the Secretary. That the Secretary requires tax registered tax return preparers 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).

1023, 1026 (D. Utah 1985) (noting that the Supreme Court "has long recognized that the state may require that a person comply with conditions imposed 'for the protection of society' before he can practice his profession"). Treasury Circular 230 has also long governed practitioners' charging fees, which certainly occurs outside of the context of a meeting or a hearing with the Service. Since 1966, Treasury Circular 230 has prohibited unconscionable fees for representation of a client in a matter before the Service. See 31 Federal Register 10773 (August 13, 1966); see also 31 C.F.R. § 10.27 (current Circular 230 fee regulation).[7] Moreover, as noted above, unlicensed and unenrolled tax return preparers, such as plaintiffs, have long had "limited practice" rights that allowed them to "represent" taxpayers during an examination of a return prepared by them. See Former 31 C.F.R. § 10.7(c)(1)(viii) (2009); Revenue Procedure 81-38, 1981-2 C.B. 592, 1981 WL 164955 (IRS RPR).

In an attempt to buttress their argument that additional statutory authority is needed to regulate tax return preparation, plaintiffs cite Congress' recognition that the Service has the authority to regulate written tax advice in a 2004 amendment to section 330. (Pl. Mem., p. 36) (citing American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 822(b).) But the legislative history for the amendment states that the amendment "confirms the **present-law authority** of

[7] In addition, Circular 230 contains other rules regulating conduct occurring outside of conferences and meetings before the Service. See 31 C.F.R. §§ 10.21 (informing client of error on a prior return), 10.22 (diligence in return preparation), 10.29 (conflict of interest), and 10.36 (procedures for firm compliance).

the Secretary to impose standards applicable to written advice with respect to an entity, plan, or arrangement that is of a type that the Secretary determines as having a potential for tax avoidance or evasion." H.R. Rep. No. 108-548, pt. 1 at 277 (2004) (emphasis supplied). Congress' statement that the amendment confirmed "present-law authority" to regulate written advice supports defendants' contention here that section 330 does not have to explicitly identify every type of activity that the Service may regulate.[8]

Plaintiffs then roam even farther afield by claiming that several other statutory provisions that include various civil and criminal penalties and an injunction authorization would be rendered surplusage if "practice" under section 330(a) included paid tax return preparers. (See Pl. Mem., pp. 6-7, 37-39.) The fundamental flaw in plaintiffs' argument is that none of the cited statutory provisions are expressly exclusive. See 26 U.S.C. §§ 6694, 6695, 6700, 6702, 6707A, 6713, 7201, 7206, 7207, 7213, 7216, 7407. In the absence of an express statutory statement of exclusivity, nothing precludes the same conduct being subject to administrative, civil, and criminal sanctions. The very existence of multiple statutory provisions undermines plaintiffs' argument. And the 2009

[8] It is true Congress amended 26 U.S.C. § 6109(a)(4) to authorize the use of other identifiers (e.g., PTINs) by return preparers, but that is because Congress understood that previous law required preparers to identify themselves by recording their Social Security Number on the returns they prepared for compensation. H.R. Conf. Rep. 105-599, 105th Cong., 2d sess., 1998 WL 915495 (Leg. Hist.) at *309-310 (see Pl. Mem., p. 36) (referencing IRS Restructuring and Reform Act of 1998, P.L. No. 105-206, § 3710, 112 Stat. 685.)

Return Preparer Review revealed the need for greater regulatory oversight despite the numerous statutory provisions cited by plaintiffs. (See A.R. 124 – 180.) Moreover, public comments overwhelmingly supported further regulatory oversight in addition to existing remedial provisions. (A.R. 157) ("98 percent of the individuals who offered comments on oversight and enforcement for paid tax return preparers favor increased efforts"); see e.g., A.R. 268, 278, 305, 312, 313.

Because civil and criminal penalties are directed at specific behavior engaged in by the individual, they serve a function distinguishable from the function served by Treasury Circular 230; i.e., to ensure practitioners are ethically and competently fit to practice before the Service. Penalties retroactively punish past conduct and injunctions only seek to bar specific future conduct based upon an individual's prior engagement in that conduct. Penalties and injunctions seek to prevent future harm and to encourage voluntary compliance as opposed to ensuring minimum competency which is the goal of the testing and continuing education requirements at issue in this case. Finally, members of the public commented that current sanctions were not sufficient because they only reach those preparers that the Service catches acting improperly, at most a subset of actual improper conduct. E.g., A.R. 336.

Plaintiffs particularly focus on the injunctive relief available under 26 U.S.C. § 7407. (Pl. Mem., pp. 38-39.) But even 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 new regulations were an overwhelming

success, not that section 7407 was previously surplusage. Enforcement actions under section 7407, in fact, show the need for competency standards for such preparers. *E.g., United States v. Cruz,* 611 F.3d 880 (11th Cir. 2010).[9] None of plaintiffs' cited provisions require paid tax return preparers to demonstrate competency and to complete continuing education requirements. Nor are plaintiff's citation to statutory provisions covering audio recording rights of "taxpayer interviews" and the confidentiality of returns and return information relevant to this suit. (See Pl. Mem., pp. 3, 31 citing 26 U.S.C. §§ 7521 & 6301.)

D. Section 330 does not require an agency relationship

Plaintiffs say that the term "representative" in section 330(a)(1) "*connotes* an agency relationship." (Pl. Mem., p. 24) (emphasis supplied.) Plaintiffs' statutory inference again misinterprets section 330(a)(1). Although "representative" may be used in some circumstances to refer to an agency relationship, it also means "acting for another" or "standing for or in place of another" without any necessary agency relationship. Webster's Third New International Dictionary (Unabridged) (1986) (defining "representative"). And "representation" is defined in the Service's Conference and Practice

[9] Plaintiffs separately overstate the significance of *Cruz.* (See Pl. Mem., pp. 25-26.) Although the district court in that action exercised its discretion not to issue an injunction against the tax return preparer before it, it is undisputed that the "'the court may enjoin such person from acting as a tax preparer' altogether" under 26 U.S.C. § 7407. *Cruz,* 611 F.3d at 881 *quoting* 26 U.S.C. § 7407(b); *e.g., United States v. McIntyre,* 715 F.Supp.2d 1003 (C.D. Cal. 2010) (entering life-time injunction enjoining defendant from preparing tax returns for others).

Requirements within its Statement of Procedural Rules[10] as "[a]cts performed on behalf of a taxpayer by a representative before the Internal Revenue Service," 26 C.F.R. § 601.501(b)(13), and does not require any agency relationship. Plaintiffs also ignore pre-existing regulatory approval for other "representatives" to appear on behalf of the taxpayer, even though not agents. E.g., see Former 31 C.F.R. § 10.7(c)(1)(i) & (c)(1)(vii) (2009).

Plaintiffs cite the 1884 statutory predecessor to 31 U.S.C. § 330(a)(1), but the text of the 1884 statute repudiates plaintiffs' argument that only agents may be the taxpayer's "representative." The 1884 statute reads that the Secretary may regulate the "recognition of agents, attorneys, or **other persons** representing claimants . . . and may require of such **persons,** agents and attorneys, before being recognized as representatives" to meet certain standards. (See Pl. Mem., p. 33) (emphasis supplied). Nor does plaintiffs' narrow construction of "disbar" survive the 1884 statute's actual language that states that the "Secretary may . . . suspend, and disbar from further practice before his department any such **person**, agent or attorney shown to be incompetent . . . ." (See Pl. Mem., p. 33)(emphasis supplied). Even plaintiffs' citation to the section 330 Historical and Revision Notes admits that "representatives of persons" was substituted in section 330 for "agents, attorneys, or **other persons** representing claimants before his department" in the 1884 statute. (Pl. Mem., p. 34) (emphasis supplied.)

[10] The Statement of Procedural Rules is a set of rules of the Service and is not a Treasury Regulation.

Plaintiffs' argument would have force if the 1884 statute had read "agents or attorneys," but it actually read "agents, attorneys, or other persons." Courts agree that the 1884 statute was not limited to agents. *See R.W. Hart & Co. v. Harris,* 83 P.2d 565, 567 (Okla. 1938); *see Poole v. United States,* 1984 WL 742, 54 A.F.T.R.2d 84-5536 (D.D.C. 1984) (rejecting a CPA's argument that he was not covered by section 330 and Treasury Circular 230 and stating that section 330 permits the Service to regulate practitioners "in a general way").

Plaintiffs separately point out that the 1884 Act "predated the modern income tax by nearly 30 years" and therefore could not refer to tax return preparation. (Pl. Mem., pp. 1 & 34, n.29**.)** But "in an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems." *Mayo Foundation,* 131 S.Ct. at 713 quoting *Bob Jones University v. United States,* 461 U.S. 574, 596 (1983). Plaintiffs seek improperly to limit the Department of Treasury's ability to respond to changing conditions.

E. The introduction of bills before Congress mandating further regulation of paid tax return preparers says nothing about the Secretary's pre-existing regulatory authority

Plaintiffs' citation to eight bills introduced in Congress since 2005 proves nothing with respect to the Secretary's pre-existing regulatory authority. Each of the eight bills would have required the Secretary to regulate unlicensed paid tax return preparers. (Pl. Mem., pp. 40-41) (e.g., Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. § 4 (2005) (the Secretary "shall prescribe"

regulations of "compensated tax preparers not otherwise regulated"); Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong. § 202 (2010) (the Secretary "shall prescribe regulations . . . to regulate any tax return preparers not otherwise regulated"). That certain Congressional sponsors introduced legislation to **mandate** regulation of tax preparers provides no logical inference regarding whether those same sponsors believed Secretary already had, or did not have, **discretionary** authority to regulate tax return preparers. The introduction of those bills more likely indicates that the Congressional sponsors believed that "passage [of federal regulation] is long overdue . . . [and] that the current tax return preparer environment is inadequate because it leaves taxpayers vulnerable to abuses from unqualified or unethical individuals who present themselves as tax professionals." A.R. 151. Although defendants do not rely upon these proposals as authority for promulgating the regulations at issue, the introduction of the eight cited bills supports defendants, and not plaintiffs. In any event, any inference from such earlier proposed legislation must give way to Congress' determination in 2011 not to take any action upon the new regulations under the Congressional Review Act.

CONCLUSION

Defendants thereby respectfully request that the Court uphold the new regulations in full and grant defendants' motion for summary judgment but deny plaintiffs' motion for summary judgment.

Dated: October 26, 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The United States respectfully moves this Court for summary judgment pursuant to Fed.R.Civ.P. 56(a), on the grounds that there is no genuine issue as to any material fact and that it is entitled to summary judgment upon plaintiffs' complaint as a matter of law.

The final regulations promulgated by the Department of the Treasury which bring previously unlicensed and unenrolled paid tax return preparers under the purview of 31 C.F.R. part 10 (commonly known as Treasury

Department Circular 230) as "practitioners" are within statutory authority under 31 U.S.C. § 330(a)(1) which empowers the Secretary of the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury." The final regulations are within the Secretary of the Treasury's statutory authority and are not arbitrary and capricious under 5 U.S.C. § 706(2). The court should grant the final regulations deference under *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and grant the defendants summary judgment on all claims raised in plaintiffs' complaint.

This motion for summary judgment is based upon this motion, the defendants' supporting memorandum, the proposed order granting defendants summary judgment, all papers and pleadings on file, and any oral argument such as the court allows.

Dated: October 26, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2012, I caused to be served via the Court's ECF system the following documents:

(1) **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT;**

(2) **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT;**

(3) **[Proposed] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BUT DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,**

upon:

Dan Alban
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901 N. Glebe Road, Suite 900
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/s/ Joseph E. Hunsader
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