UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SABINA LOVING; ELMER KILIAN; and JOHN GAMBINO, Plaintiffs-Appellees, v. INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA; and DOUGLAS H. SHULMAN, COMMISSIONER OF INTERNAL REVENUE, Defendants-Appellants.	No. 13-5061

APPELLEES' RESPONSE TO GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

The sky is (still) not falling. Despite the sensationalist, everything-but-the-kitchen-sink claims of harm by Defendant-Appellants ("the IRS"), nothing justifies extraordinary relief in this case. Notably, the IRS fails to allege any *imminent, irreparable harm*. This tax season is unaffected because the IRS had already postponed its deadlines to the end of this year *two weeks before* the injunction issued. Gov'ts Mot. for Stay Pending Appeal 14 ("Mot."). The IRS even admits that most of its alleged harms would not occur until 2014. *Id.* 13-14. As the district court recognized, the injunction preserves the historical status quo. There has never been federal tax-preparer licensing in the 100-year history of the modern income tax. Thus, the district court correctly found that "the injunction effects far less a change in the landscape of tax preparation than does implementation of the regulations." Mem. Op & Order 6, February 1, 2013 (Boasberg, J.), ECF No. 28 ("Feb Op.")

Moreover, the district court's cautious and thorough ruling denying a stay is reviewed for abuse of discretion. Here, the district court exercised sound discretion in declining to grant a stay pending appeal, an extraordinary remedy which is rarely granted, and for which this Circuit follows a strict standard for a showing of irreparable harm. Unlike a preliminary injunction, this stay motion was denied after full summary judgment briefing on a complete record, and after the district court had produced a definitive, detailed opinion on the merits, including a determination that weighing four very similar factors justified the grant of a permanent injunction. The district court even offered the IRS a compromise. It noted that "the Court is not requiring the IRS to dismantle its entire scheme," and made clear that the IRS is not

required to shut down any facilities or lay off any staff, and may continue to operate the registered tax return preparer (RTRP) program as a voluntary certification program. Feb. Op. 4, 7. The court also clarified that the separate identification number (PTIN) requirement, which Plaintiffs did not challenge, is unaffected by the injunction against the RTRP licensing scheme. *Id.* at 1-2, 7. This accommodating, measured opinion easily passes the "abuse of discretion" standard of review.

If the IRS prevails on appeal, the worst-case scenario it alleges is that it would have to delay implementing the RTRP regulations by just *one* additional tax season. Mot. 14. Given that tax preparers have been unlicensed by the IRS for the 100-year history of the income tax, this is decidedly not imminent and irreparable harm.

STANDARD OF REVIEW

A stay is "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Thus, an appellate court reviews a district court's overall decision to grant or deny a stay, as well as the district court's weighing of the four relevant factors, for abuse of discretion. *See Chaplaincy of Full Gospel Churches v. U.S. Navy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977). This Court "will overturn any of the district court's factual findings only upon a finding of clear error." *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). Review of questions of law is "essentially *de novo*." *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 821 (D.C. Cir. 2009).

LEGAL STANDARD FOR GRANTING A STAY

A stay pending appeal is very unusual; indeed, it is an "extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). A stay is

"an intrusion into the ordinary processes of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation omitted). "[I]t is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978; *accord Nken*, 556 U.S. at 433–34.

Federal courts consider four factors in reviewing a motion for a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[1] *Nken*, 556 U.S. at 426.

ARGUMENT

In this brief, Plaintiffs explain how the IRS fails to meet its burden of showing that all four factors—in fact, *any* of the four factors—to be considered weigh in favor of the IRS. Aside from likelihood of success on the merits (which the district court declined to fully evaluate because it had just ruled against the IRS on the merits), the district court correctly found that the IRS failed to meet its high burden of showing that the remaining factors justified judicial exercise of this extraordinary remedy.

The IRS also fails to show that the district court's denial of a stay was an abuse of discretion. Weighing the stay factors, the district court found that they "do not decisively tilt in favor of the IRS—indeed, they tip somewhat against." Feb. Op. 6.

[1] This Circuit has indicated that motions for extraordinary relief such as a stay should face "a more demanding burden" in which each of the four factors must be satisfied independently. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

Thus, there was "no basis to lift [the] injunction pending appeal." *Id.* This ruling is subject to review only for abuse of discretion.

Having failed on all counts, the IRS's motion should therefore be denied.

I. The IRS Is Unlikely to Succeed on the Merits and Has Not Made a Strong Showing That It Will.

The IRS wrongly claims that it can satisfy this factor by merely showing that this case "raises serious and difficult legal questions," as the agency did below. Mot. 7. However, before *this* Court, the IRS must make "a strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 426. When the district court indicated it would permit the IRS to satisfy this factor with a lesser showing if the other factors strongly favored a stay, that was because it is difficult for a court to assess whether its own opinion is likely to be overturned. *See* Feb Op. 3. This Court does not face the same difficulty as the district court; its very job is to review district court opinions.

In its thorough and conclusive merits opinion, *see* ECF No. 22, following full summary judgment briefing, *see* ECF Nos. 12, 13-1, 16, 17, the district court already considered and rejected the arguments raised by the IRS in its present motion. The IRS's rehashing of arguments made below utterly fails to make a "strong showing" that raises any question about the district court's definitive analysis. *Compare*, *e.g.*, Mot. 12, *with* Mem. Op. 16-18, Jan. 18, 2013, ECF No. 22 ("Jan. Op.") (thoroughly addressing the same issues). Because there is not sufficient space in this brief for Plaintiffs to fully discuss the merits of this case *and* debunk the IRS's many specious claims of irreparable harm, Plaintiffs refer the Court to the district court's detailed

opinion and the merits briefs filed for summary judgment, and offer just a few points to supplement those sources and address a few new variations the IRS offers.

A. The IRS Has No "Inherent" Authority to License All Tax Preparers.

The IRS continues to claim that it has "inherent authority to govern the **practice** of paid tax-return preparers." Mot. 8 (emphasis added). But as the district court correctly held, 31 U.S.C. § 330 governs practice before the agency. Jan. Op. 9. The IRS cannot invoke "inherent" authority under Treasury's general, organic statutes to override the text of the specific statute that defines the IRS's authority to regulate those who interact with the agency.[2] *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). Moreover, this Court has flatly 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).

B. Section 330 Does Not Authorize the IRS to License Tax Preparers.

As the district court correctly found, Congress did not give the IRS the authority to license all tax preparers in section 330, and the IRS cannot give itself that authority by passing *ultra vires* regulations. Jan. Op. 10-20. Instead, as the district court found, "[i]n the land of statutory interpretation, statutory text is king." *Id.* at 19.

[2] Not only does it add nothing to the IRS's argument, it is also improper for the agency, at this late stage, to newly claim a different organic statute, 26 U.S.C. § 7805(a), as a general source of statutory authority for the challenged RTRP regulations. As Plaintiffs will detail further in their merits brief, it is also arbitrary, capricious, and an abuse of discretion for the IRS to adopt this litigation position when 26 U.S.C. § 7805 is nowhere to be found in the "Authority" section of the relevant regulations. *See* 31 C.F.R. part 10; 76 Fed. Reg. 32,300.

The IRS raises only insubstantial objections to the district court's opinion, ignoring this Court's clear precedent on applying step one of *Chevron*. For example, the IRS argues that a statute is ambiguous if it does not define its terms, Mot. 9; *contra*, *e.g.*, *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006), and disputes that statutory language is to be interpreted in light of the overall statutory scheme passed by Congress. Mot. 11-12; *contra*, *e.g.*, *Goldstein*, 451 F.3d at 878. The IRS thus fails to make a "strong showing" that is likely to succeed on the merits.

II. The IRS Will Not Suffer Irreparable Harm Absent a Stay and the IRS Fails to Meet Its Burden of Showing That It Will.

Like the boy who cried wolf, the IRS is once again attempting to arouse fear about phantom harms if a stay is not granted.[3] But the IRS's claims of irreparable harm are as implausible now as they were before the district court, which found "[t]hese harms, **to the extent they exist, are hardly irreparable**, and some **cannot even be traced to the injunction**." Feb. Op. 4 (emphasis added).

[3] The IRS's dire projections of harm before the district court have proven illusory. The IRS implausibly claimed that, as a result of the injunction, its online PTIN registry would have to be "completely shutdown [sic]." Campbell Decl. ¶ 12, Jan. 23, 2013, ECF No. 23-2 ("Jan. Decl."); *but see* Order, Jan. 18, 2013, ECF No. 21, and Jan. Op. (neither even mentions PTINs); *see also* Alban Decl. Ex. 9. The IRS also wrongly claimed that there was currently no way for non-RTRPs to "qualify for" a PTIN and that the online PTIN system was not configured to accept PTIN applications from non-RTRPs because CE requirements were so deeply integrated. Defs.' Reply 6-7, ECF No. 25; *but see*, *e.g.*, Alban Decl. Ex. 13; Loving Decl. ¶ 5, ECF No. 12-2; Kilian Decl. ¶ 6, ECF No. 12-3; Gambino Decl. ¶ 9, ECF No. 12-4. However, the agency reopened the online PTIN system to all applicants the very next morning (a Saturday) after the district court denied a stay, with a note that users might need to check a box on a single unnecessary screen about CE requirements in order to proceed. *See infra* note 10; Alban Decl. ¶¶ 4-10, Exs. 1-4. Once the IRS corrected this self-inflicted harm, tax administration proceeded normally this tax season and the online PTIN system is still available. *See*, *e.g.*, Alban Decl. Exs. 8-9.

As a movant requesting extraordinary relief, the IRS has the burden to demonstrate that it will suffer irreparable harm absent a stay. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Nken*, 556 U.S. at 433–34; *Cuomo*, 772 F.2d at 978. As detailed below, although the agency alleges a variety of potential harms, none of them are imminent and irreparable, if they are even harms at all. The IRS also fails to show how the alleged harms are causally connected to the injunction such that a stay would actually remedy the alleged harms. In fact, a stay would cause immediate harm to the IRS, and thus may prove counterproductive. Finally, the agency fails to provide adequate evidentiary support for most of its alleged harms. The IRS thus fails to meet its high burden of showing that extraordinary relief is warranted.

A. The IRS Fails to Demonstrate That Its Alleged Harms Are Imminent.

To justify extraordinary relief, harm must be imminent. The movant "must show that the injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas Co.*, 758 F.2d at 674 (internal quotations omitted). But as even the IRS acknowledges, its alleged harms are not imminent: "[t]he greatest harm from the injunction will come in 2014 when the regulations . . . are scheduled to become fully operational." Mot. 15. The district court's injunction has no immediate effect because the IRS Return Preparer Office (RPO) announced on January 3, 2013 (two weeks before the ruling in this case) that the 2012 RTRP continuing education (CE) requirements would be postponed for an entire year, until December 31, 2013 (which was already the deadline for the RTRP exam requirement). *See* Feb. Op. 2; Mot. 3. This illustrates the IRS's own lack of

urgency to impose tax-preparer licensing.[4] After nearly a century of inaction, the IRS is taking at least four and a half years to roll out the RTRP scheme and admits that the stay "will simply add additional delay to the program." Campbell Decl. ¶ 21, Feb. 25, 2013 ("Feb Decl."). Indeed, it seems quite likely that the exam deadline would have been (or will be) postponed regardless, for purely practical reasons.[5]

B. The IRS Fails to Demonstrate That Its Alleged Harms Are Irreparable.

No matter how substantial its allegations of harm, none of the IRS's alleged harms are *irreparable*, as the district court correctly found. Feb. Op. 4. "[T]he standard for showing irreparable harm in this jurisdiction is strict." *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 120 (D.D.C. 2012). This Court has emphasized that "[t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674, (D.C. Cir. 1985) (quotation omitted) (emphasis in original). Irreparable harm "must be both certain and great; it must be actual and not theoretical." *Id.*

Under the IRS's (speculative) worst-case scenario, it will still be able to

[4] The lack of any immediate urgency is also highlighted by the fact that the IRS took nearly a month to file the instant motion after its motion for stay was denied on February 1, 2013, and has not sought emergency relief under Circuit Rule 27(f).

[5] If the injunction is lifted, over 300,000 tax preparers would need to take the exam sometime between April 16 (preparers are typically very busy during tax season, and the exam has a "black-out" period from April 1-15) and December 31, 2013, which is about 178 business days. *See* Mot. 14 (admitting this problem); Alban Decl. Ex. 13 (over 320,000 preparers who would need to take exam by year-end). In order for all preparers to be tested by the end of the year, a daily average of nearly 1,700 preparers would need to take the 3-hour exam every business day in 2013 from April 16 to year-end (assuming each only takes the exam once). However, as the IRS admits, only 12,000 preparers even had a test *scheduled* when the injunction issued. Feb. Decl. ¶ 14.

implement the RTRP regulations (if it prevails on appeal) just one year later than it would have otherwise. Mot. 14. That simply does not constitute irreparable injury, particularly when the delay was already likely to occur. *See supra* note 5. Moreover, any incidental administrative costs of money, time, and energy incurred in delaying implementation of the program are also not irreparable, but standard litigation-related costs associated with losing in district court and the uncertainty of success on appeal.[6] *See Wis. Gas Co.*, 758 F.2d at 674; *McSurely v. McClellan,* 697 F.2d 309, 317 n. 13 (D.C. Cir. 1982). That much of the IRS's focus is on the costs of "restarting" the RTRP licensing scheme, *see* Mot. 13, 16-18; Feb. Decl. ¶¶ 6-14, just demonstrates that the claimed harms are not irreparable; although the program is currently suspended, the IRS can in fact "restart" it on a mandatory basis if the agency prevails on appeal.[7]

C. The IRS Fails to Prove That the Injunction Will Prospectively Cause Any Alleged Harms or That a Stay Will Remedy Any Alleged Harms.

The IRS also fails to demonstrate a causal relationship between the alleged harms and allowing the injunction to remain in place, or that issuance of a stay will

[6] The IRS's claims of irreparable financial harm due to (unsupported) "contract costs" ring particularly hollow given that it admits that it has taken in nearly twice what it has spent on the overall "return preparer program" (a term which includes the PTIN requirement), grossing over $105 million in user fees, while incurring only about $54 million in costs. Feb. Decl. ¶ 12. The IRS further admits that income derived from PTIN and RTRP exam fees can *only* be spent on the program. *Id.* And it continues to collect PTIN user fees, which make up 95% of "return preparer program" funding and have averaged nearly $4 million per month. *Id.* Thus, the IRS has an ever-growing $50+ million rainy-day fund (a figure far larger than its implausibly high $20 million claim of harms), which cannot be spent on other programs, yet still claims it would be "irreparably harmed" by using this fund to cover any costs directly resulting from litigation over the RTRP aspect of the "return preparer program."

[7] The IRS attributes nearly all of its alleged costs to "restarting" the RTRP licensing scheme but fails to offer any specifics explaining how or why "restarting" would result in these alleged but unspecified and non-itemized costs. *See infra* Part II(D)(1).

remedy the alleged harms. But, to justify the extraordinary remedy of a stay, the agency has the burden of showing that allowing the injunction to remain in place will cause the alleged harms, and that a stay will provide an adequate remedy. *See Wis. Gas Co.,* 758 F.2d at 674 ("the movant must show that the alleged harm will **directly result** from the action which the movant seeks to enjoin.") (emphasis added); *Nken*, 556 U.S. at 434-35. The IRS fails to meet this burden of showing causation.

1. Many of the IRS's alleged harms are speculative and uncertain.

Many of the IRS's alleged harms are speculative and contingent on uncertain future events. For example, any "harm" that will result from "restarting" the RTRP licensing scheme, Feb. Decl. ¶ 6, is dependent on speculation that the IRS will prevail on appeal, an outcome which is by no means "certain" or "actual."[8] *See Wis. Gas Co.,* 758 F.2d at 674; *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (noting that "assuming petitioners prevail," *inter alia*, indicates uncertainty about "whether the harm will *in fact* occur" (quoting *Wis. Gas Co.,* 758 F.2d at 674)). Other speculative claims of harm also do not qualify as irreparable harm. *See, e.g.*, Feb. Decl. ¶ 21(the IRS "**may** be obliged to provide additional transitional relief"); *id.* ¶ 14("the Service **expects** to receive thousands of requests") (emphasis added in both). Such speculation is insufficient for the agency to meet its heavy burden on causation.

2. Many of the IRS's claims of harm are retrospective, not prospective.

Stays can only provide relief from *future* irreparable harm, not past harm, so allegations of imminent, irreparable harm necessarily must be prospective in order for

[8] This also illustrates why actual *likelihood* of success on the merits—rather than merely raising serious and difficult legal questions—must be considered under the first factor.

a stay to provide an adequate remedy. Nonetheless, many of the IRS's claims of harm are entirely retrospective, such as its references to the various sunk costs of implementing the unlawful RTRP scheme.[9] Mot. 16; Feb. Decl. ¶¶ 6-7, 10-12. In addition, the agency makes a number of claims of harm relating to the costs it "will incur" associated with shutting down and reopening the PTIN computer system and the PTIN call center, modifying the PTIN application (both paper and online versions), breaching vendor contracts, and the like. Mot. 13, 17; Feb Decl. ¶¶ 7-8. These claims of harm are bizarre because they refer to events that have already happened. Although not compelled by the district court's ruling (which does not even mention PTINs), the IRS shut down its PTIN operations for nearly two weeks—including the opening days of tax season—from January 22, 2013 until the morning of February 2, 2013.[10] Changes to the online PTIN registry have already been made.[11]

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[9] The IRS also cannot blame the injunction for the cost of expanding its "existing call center contract," when the agency admits it initiated the $2.6 million expansion *before* the injunction issued. *See* Mot. 17; Feb. Decl. ¶ 9. The IRS also fails to specify any increase in costs, or even call volume, attributable to the injunction. *See id.* ¶¶ 8-9. Furthermore, any increase in calls that might normally result from such a ruling was greatly compounded by the "unforced error" of shutting down the PTIN registry for nearly two weeks during the opening of tax season, *see supra* note 3; *infra* note 10; Alban Decl. Ex. 9, as well as the ambiguous and uninformative series of notices the IRS posted on its website after the ruling, which prompted the Chairman of the House Subcommittee on Oversight, which oversees the IRS, to write a letter to the Acting Commissioner of the IRS on January 31, 2013, expressing concern that the conflicting information on the IRS website and the lack of clear and timely guidance provided by the IRS was causing serious confusion. *See* Alban Decl. Exs. 5, 6.

[10] *See* Alban Decl. ¶¶ 4-10, Exs. 1-5; Return Preparer Office, Internal Revenue Service, *ATTENTION TAX PROS*, (Feb. 2, 2013, 6:05am), https://www.facebook.com/#!/IRStaxpros/posts/106948349474089 (announcing "the PTIN system is now reopened for processing renewals and new applications").

[11] *Compare* Alban Decl. Ex. 1 (before fully updated, on Feb. 2, 2013), *and* Alban Decl. Ex. 7 (updated, no "ALERT" message on Feb. 15, 2013), *with* Alban Decl. Ex. 8 (updated, no "ALERT" message on Mar. 8, 2013); *see also* Alban Decl. ¶¶ 9-10, Ex. 4.

The paper PTIN form has already been updated.[12] None of this alleged harm can be remedied by staying the injunction *in the future* because any such costs were *already incurred*, and the IRS offers no reason these costs are anything other than one-time transition costs. Also, the IRS has claimed since January 23, 2013, when it filed its motion for stay below, that the injunction would force it to breach or modify vendor contracts.[13] It is now March. If these contract changes have still not been made—the IRS fails to clarify their status—then these claims of harm are hardly imminent.

3. Reimposing the RTRP scheme would immediately harm the agency.

A stay allowing the IRS to reimpose the RTRP licensing scheme while on appeal would unnecessarily cause immediate harm to the IRS itself, and thus may be counterproductive. A stay would immediately increase many of the costs that the IRS complains were imposed by the injunction, such as the number of tax-return preparer calls to the IRS's call center. It would also increase the IRS's potential liability for refund claims brought by preparers over RTRP fees unlawfully assessed by the IRS.[14]

The IRS also alleges that it will incur "substantial costs to **restart** the program" Feb. Decl. ¶ 6 (emphasis added). However, as these harms are described by the agency, granting a stay would not evidently decrease the IRS's costs.[15] Rather, it would

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[12] *Compare* Alban Decl. Ex. 10 (Form W-12, Sept. 2012 version), *and* Alban Decl. Ex. 11 (temporary placeholder), *with* Alban Decl. Ex. 12 (Form W-12, Jan. 2013 version).

[13] *See* IRS Mot. to Suspend Inj. Pending Appeal 7, Jan. 23, 2013, ECF No. 23; Jan. Decl. ¶ 12, ECF No. 23-2.

[14] This is because "[t]he IRS's liability [for refunds] . . . turns on the case's merits, not on the stay. If the Court issues a stay and its merits decision is affirmed above, then the IRS will be on the hook for even more money in refunds." Feb. Op. 5.

[15] The IRS's lack of specificity regarding these alleged costs makes it impossible to understand precisely how or why they would be incurred. *See supra* note 7; *infra* Part II

only serve to accelerate them into the present, changing a *possible* future cost (incurred only if the IRS wins) into a *guaranteed* present cost. For example, the agency's claims of "contract costs" to "restart" the program are both speculative and non-immediate. *Id.* However, reimposing the RTRP scheme now would only ensure that any "contract costs" truly necessary to "restart" the program will be incurred with certainty in the present. Moreover, incurring any transition costs now creates an additional risk: the agency may be forced to incur any such costs *yet a third time* if it loses on appeal.

D. The IRS's Alleged Harms Are Largely Unsupported or Supported Only by Conclusory and Vague Allegations That Lack Evidentiary Value.

The IRS fails to provide adequate evidentiary support for most of its claims, many of which are conclusory, vague and unquantified, or exaggerated. To obtain extraordinary relief, a movant must "substantiate" its claim of irreparable injury. *Wis. Gas Co.*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value . . . The movant must provide proof "). In addition, the IRS's many factual claims in its supporting declaration cannot be independently verified absent discovery, because the IRS has sole control over most of the relevant evidence, including contracts, cost figures, and other details relating to administering agency programs.[16] Thus, the IRS *also* has the evidentiary burden because nearly all of the evidence it ostensibly relies on is exclusively under its control. *See, e.g.*, *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843,

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(D)(1). Plaintiffs interpret these harms as alleged in the IRS's declaration: costs incurred if and when the RTRP scheme is reimposed by the agency. Feb. Decl. ¶ 6.

[16] If the Court is inclined to credit *any* factual claim from the IRS's supporting declaration as dispositive against Plaintiffs, Plaintiffs respectfully request that a Special Master be appointed under Fed. R. App. Proc. 48(a) so that Plaintiffs may conduct discovery, including deposing the declarant, on the IRS's claims of irreparable harm.

849 n.12 (D.C. Cir. 1975). Although the IRS could have provided adequate evidentiary support in its declaration, or in documents accompanying its declaration, it failed to do so. The agency therefore fails to meet both of its evidentiary burdens.

1. The IRS's claims of harm are conclusory and unsubstantiated.

Many of the IRS's claims of harm are based on conclusory and unsubstantiated statements in the agency's accompanying declaration. These claims lack sufficient detail (and supporting documentation) for Plaintiffs and this Court to assess their veracity or plausibility.[17] For example, the IRS implausibly claims that it will suffer $20 million in "contract costs" from "restarting" the RTRP licensing scheme, but fails to provide *any* itemization indicating the component costs of this figure, or explain how this figure was calculated. Feb. Decl. ¶ 6. Nor does it explain what it means by "contract costs" or how and why these costs would be incurred for "restarting" the RTRP licensing scheme. Other claims of harm are extremely vague and

[17] The IRS states that "in the IRS's opinion, its contract with the testing vendor does not permit it to go forward with the testing program on a voluntary basis." Mot. 14-15. The IRS offers nothing—certainly not the contract itself—to explain the basis for its opinion, other than the hearsay statement of a declarant (which itself also violates the best evidence rule). Feb. Decl. ¶ 13. One problem with such conclusory claims is highlighted by the fact that this claim appears to be inaccurate: As the IRS's own website acknowledges, the IRS had previously made voluntary testing available to people not required to take the exam. *See* Internal Revenue Service, Frequently Asked Questions: Testing Requirements, http://www.irs.gov/Tax-Professionals/Frequently-Asked-Questions:-Testing-Requirements (last updated Oct. 3, 2012) (see Question 2). The IRS further implausibly claims that this contract "cannot be modified," Feb. Decl. ¶ 13, and thus "it has no means by which to" implement voluntary RTRP testing. Mot. 15 n.4. But the IRS certainly has options: it could unilaterally modify the contract, bilaterally modify the contract, or even terminate the contract for convenience if the vendor refuses comply with any needed changes. *See*, *e.g.*, 48 C.F.R. §§ 43.103, 12.403, 49.502.

unquantified.[18] But the IRS, not Plaintiffs, has exclusive control of the relevant evidence, and has the burden of proof for justifying extraordinary relief.

2. The IRS's claims of harm are inflated and exaggerated.

As the district court found, "**the IRS's numbers inflate the true effects of the injunction** . . . the IRS's expenses and staff cover both the registered-tax-return-preparer program and the PTIN program, and Plaintiffs do not challenge the latter." Feb. Op. 4-5 (emphasis added). Having contested the matter below, *see supra* note 3, the IRS now admits that Plaintiffs did not challenge the PTIN regulations. Mot. 17-18. But the IRS continues to conflate the two sets of regulations, calling them collectively the "return preparer program," Feb. Decl. ¶ 12, and improperly lumping in alleged costs related to: contracts with PTIN vendors, modifying PTIN computer systems and paper forms, the PTIN call center, total program cost, and staffing. Mot. 13, 16-18; Feb. Decl. ¶¶ 6-9, 12. But these costs of a program unchallenged by Plaintiffs and not enjoined by the district court are largely irrelevant and, if anything, self-imposed.[19] Other costs unrelated to the injunction are also included to inflate the agency's alleged costs.[20]

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[18] For example, the IRS claims as irreparable harms, "costs associated with increasing call volumes over a previously specified number," Feb. Decl. ¶ 8, but oddly fails to actually specify either these costs or the "specified number." *See also id.* ¶¶ 7, 9.

[19] Taking down the PTIN system unnecessarily was a self-inflicted harm. *See supra* notes 3, 9. Any need to modify the PTIN system to not require satisfaction of CE requirements was caused by the IRS's own decision, two weeks prior to the issuance of the injunction, to postpone the CE deadline by an entire year. *See supra* Part II(A).

[20] The IRS cites the cost of expanding an "existing call center contract" but the IRS had already initiated that expansion *before the injunction issued*. Feb. Decl. ¶ 9. It is not even clear that this call center exclusively handles calls from tax preparers. *See id.* Perhaps unsurprisingly, the IRS also fails to account for the savings accrued by not

The IRS also attempts to claim the fraud-prevention benefits of the PTIN program for the RTRP program, and thus claims that many taxpayers will be harmed by fraud as a result of the injunction.[21] Mot. 2, 15, 18-20; Feb. Decl. ¶¶ 17-20. However, only the PTIN program is directed toward fraud prevention; the RTRP program, as implemented, does not address fraud.[22] The two aspects of the RTRP licensing scheme that were actually implemented, testing and CE requirements, do

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enforcing the regulations. But as the district court pointed out, "[a]s long as portions of such regulations remain blocked, less money will be needed." Feb. Op. 6.

[21] The IRS provides no evidence to support its claims regarding the magnitude of fraud by tax preparers and provides no specific evidence of tax preparers defrauding individual taxpayers. *See* Mot. 15; Feb. Decl. ¶ 17. The only evidence the IRS provides relating to the costs of fraud in its entire declaration is a single total figure for Earned Income Tax Credit (EITC) fraud, which includes fraud on returns prepared by anyone, including self-prepared returns. Feb. Decl. ¶ 17. Moreover, despite what the agency implies, EITC fraud involves false claims for refundable tax credits from the government; it is thus fraud against the government, not against individual taxpayers. The IRS also provides *zero information* about any fraud specifically attributable to preparers subject to the RTRP regulations. Preparing returns with EITC claims is certainly not illegal, and it is unsurprising that paid tax preparers prepare about two-thirds of returns with such claims, *see id.*, since they prepare about two-thirds (well over 80 million annually) of all tax returns, as the IRS admits. Mot. 13; s*ee also, e.g.*, 75 Fed. Reg. 51713, 51718. Moreover, unlike self-prepared or volunteer-prepared returns, returns by paid preparers are already uniquely subject to EITC due diligence requirements, including a mandatory four-page, 27-question (some multi-part) EITC checklist and a $500-per-return EITC due diligence penalty under 26 U.S.C. § 6695(g). *See* Internal Revenue Service, Form 8867, Paid Preparer's Earned Income Credit Checklist (2012), *available at* http://www.irs.gov/pub/irs-pdf/f8867.pdf.

[22] The agency also wrongly implies the injunction interferes with "suitability checks," *see* IRS Mot. 2; Feb. Decl. ¶¶ 18, 20, failing to disclose that it has never implemented any suitability check under the RTRP regulations, and that it withdrew its plans to use the PTIN regulations to require every tax preparer to be fingerprinted and undergo an FBI criminal background check after widespread industry protest. *See*, *e.g.*, Internal Revenue Service, Prepared Remarks of IRS Commissioner Doug Shulman at the AICPA Fall Meeting in Washington, D.C., Nov. 8, 2011, http://www.irs.gov/uac/Prepared-Remarks-of-IRS-Commissioner-Doug-Shulman-at-the-AICPA-Fall-Meeting-in-Washington,-D.C.,-on-Nov.-8,-2011. The only requirements even resembling a "suitability check" are two questions on the PTIN application, which remain unchanged. *See* Alban Decl. Ex. 12 (Questions 5 and 6).

nothing to prevent fraud; dishonest people can pass exams and take CE courses. In contrast, requiring each preparer to have a unique PTIN is what allows the IRS to use computer algorithms to identify and track fraud. *See* Feb. Decl. ¶ 19. Claims of harm from fraud are thus not attributable to the injunction, which does not affect the PTIN regulations. Feb. Op. 1, 7. In any event, the IRS's own admissions demonstrate that it already has the legal and technical tools necessary to investigate, prosecute, penalize, or enjoin those who violate the tax code, Mot. 12-13, 17-18, Feb. Decl. ¶ 17-20, and any lack of resources to fully prosecute cases cannot be blamed on the injunction.

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

The district court twice found that the balance of interests favored Plaintiffs and like-situated tax preparers on the issue of harms, and this balancing is reviewed only for abuse of discretion. Jan. Op. 22 ("With an invalid regulatory regime on the IRS's side of the scale and a threat to Plaintiffs' livelihood on the other, the balance of hardships tips strongly in favor of Plaintiffs."); Feb. Op. 5 (noting that, "if the injunction is stayed, then all preparers are faced with a Hobson's choice" between procrastination and potential noncompliance versus potentially "wasted time, effort, and expense" and concluding "[t]he harm is thus considerable."). The district court also pointedly asked, "why should tax-return preparers continue to pay into a system the Court has found unlawful?" Feb. Op. 5.

A. Plaintiffs Will Be Substantially Harmed by the Stay.

In the absence of the injunction, even if permitted to prepare taxes this season, Plaintiffs would still have to meet the exam and CE requirements before the end of

the year, which will impose burdensome compliance costs on Plaintiff Loving, and will force Plaintiffs Kilian and Gambino out of the tax-preparation business by the end of this year.[23] Sabina Loving would incur compliance costs this year for herself and the other preparers she employs, which would force her to raise her prices, making her less competitive with CPA firms and other firms that are exempt from the RTRP regulations, as well as larger tax preparation firms, which benefit from economies of scale. Loving Decl. ¶¶ 8-17, ECF No. 12-2. The cost and opportunity cost of compliance with these regulations would force Elmer Kilian and John Gambino to close their tax-preparation businesses as soon as the regulations are fully enforced. *See* Kilian Decl. ¶¶ 10-16, ECF No. 12-3; Gambino Decl. ¶¶ 11-17, ECF No. 12-4. The district court credited these claims of harm. Feb. Op. 5, Jan. Op. 6-7, 22. Thus, Plaintiffs will suffer substantial harms if the injunction is lifted.

B. Even the IRS Admits That Harm to Preparers Will Be Substantial.

The district court found that the harm to tax preparers was "considerable." Feb. Op. 5. The IRS on one hand claims that the costs imposed are only "modest." Mot. 19. However, it also admits the burdens imposed by these regulations are substantial when it argues that: "Many tax return preparers have already made arrangements to take the competency examination, which can include making travel arrangements and taking preparatory classes." Feb. Decl. ¶ 15. Plaintiffs certainly sympathize with the plight of the 12,000 preparers who have registered and incurred

[23] The IRS claims Plaintiffs (and, by implication, other tax preparers) won't be harmed this tax season because it won't be enforcing the regulations this year even if the stay is lifted. Mot. 19. This admission undermines the IRS's own claims of imminent harm. In addition, nothing short of the injunction creates a legal obligation that protects Plaintiffs if the IRS changes its mind and begins to enforce the regulations.

costs to take the RTRP exam but are now unable to take it because of the agency's intransigence in not taking the steps necessary to permit voluntary testing. *See supra* note 17. However, the solution is not to now force the roughly 300,000 preparers who have not yet taken the exam to incur these same costs, particularly when, "this might well be wasted time, effort, and expense." Feb. Op. 5.

C. The RTRP Regulations Impose Tremendous Costs on Tax Preparers

If the RTRP licensing scheme went back into effect this year, it would cost tax preparers *a minimum* of over 6.6 million man-hours *this year alone*, which translates into over $112 million in opportunity costs (at the rock-bottom implied hourly rate of $16.89 used by the IRS), to meet the December 31, 2013 deadline, according to the IRS's own figures and some basic arithmetic.[24] This figure *does not include* a minimum of $144 million in out-of-pocket costs on fees (nor any costs for exam preparation courses, transportation, lodging, and incidentals).[25] In every additional year the regulations are in effect (after the initial testing), the regulations would cost tax preparers *a minimum* of nearly 5.8 million man-hours annually, or over $97 million in opportunity costs (at the very low IRS rate).[26] Thus, the actual costs—derived from

[24] *See* Alban Decl. ¶¶ 23-28; *see also* 76 Fed Reg. 32,295-97 (incomplete IRS cost estimate for regulations). This figure does not even include travel time or *any* exam preparation time, for which estimates are unavailable. The exam is not offered online.

[25] *See* Alban Decl. ¶¶ 24, 26, 30-34. Unlike opportunity costs, fees paid from a party to its opponent are essentially zero-sum, although individual tax preparers are more harmed by the transfer than the federal government due to the diminishing marginal utility of money. As the district court explained in rejecting the IRS's claim that it would be irreparably harmed by not collecting fees: "the harm to those paying in is just as great (and perhaps considerably greater for certain tax-return preparers) as the deprivation of the same money is to the Government." Feb Op. 6.

[26] *See* Alban Decl. ¶¶ 24-27, 29. After the first year, all RTRPs must continue to take 15 annual hours of CE courses indefinitely. This figure does not include a minimum

the IRS's own figures—that the RTRP scheme would impose on tax preparers dwarf the IRS's own alleged costs, tipping the balance of hardships strongly against the IRS.

IV. Suspension of the Injunction Would Not Serve the Public Interest, and the IRS Has Not Met Its Burden on This Factor.

The IRS claims that when the government is a party, the government interest merges with the public interest, citing two cases involving immigration removals. Mot. 20. While that may be true in some contexts, such as removal proceedings, it certainly is not generally true. Here, the very basis of this lawsuit is that the agency's regulations went beyond any authority granted by Congress to protect the public interest. There is a strong public interest against enforcing *ultra vires* regulations, as the district court found. Jan. Op. 22. In fact, the district court analyzed this issue twice (once in its merits opinion, and once in denying the stay) and found both times that the public interest favored the injunction. *See id.*; Feb. Op. 6 (noting the injunction best preserves the status quo from a "substantial change" in the regulatory landscape, and that any harms to the public fisc were outweighed by harms to tax preparers).

CONCLUSION

The IRS has failed to demonstrate that the district court abused its discretion. It also has not satisfied the heavy burden of demonstrating that it is entitled to extraordinary relief. In particular, the agency has utterly failed to meet the high burden of demonstrating that it will suffer any imminent and irreparable harm if a stay is not granted. Therefore, the IRS's motion for stay should be denied.

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of $109 million in out-of-pocket expenses for fees for CE courses, s*ee* Alban Decl. ¶ 34, nor does it include the costs on those new to the industry, who would also need to study for, travel to, and take the exam, and pay the exam fee.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I electronically transmitted the attached Appellees' Response to Government's Motion for a Stay Pending Appeal, Declaration of Dan Alban in Support of Appellees' Response to Government's Motion for a Stay Pending Appeal, with exhibits attached thereto, to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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