IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

The United States of America, the Internal Revenue Service, and the Commissioner of Internal Revenue, appellants herein (collectively, the Government), hereby move this Court for a stay pending appeal of the District Court's January 18, 2013 judgment (as modified on February 1, 2013), which enjoined the enforcement of regulations issued by the Department of the Treasury to regulate individuals who prepare federal tax returns for compensation. Pursuant to Circuit Rule 8(a)(2), counsel for the Government informed opposing counsel of this motion prior to filing.

BACKGROUND

1. This case arises out of regulations issued by the Department of the Treasury (Treasury) in 2011 that set forth minimum practice requirements for paid tax-return

preparers. (Op. 5.)[1] These regulations resulted from a review by the Internal Revenue Service of that industry, which produced "recommendations to ensure uniform high ethical standards of conduct for all tax return preparers and to increase taxpayer compliance." 76 Fed. Reg. 32,286 (June 3, 2011). "The primary benefit anticipated from these regulations is that they will improve the accuracy, completeness, and timeliness of tax returns prepared by tax return preparers." *Id*. at 32,294.

To achieve these objectives, the regulations require a paid tax-return preparer to "(1) [p]ass a one-time competency exam, (2) pass a suitability check, and (3) obtain a PTIN [preparer tax identification number] . . . ." *Id.* at 32,287. The competency test is similar in function to the special enrollment examinations required for enrolled agents and enrolled retirement plan agents. *See id.* at 32,289. The suitability check is to determine whether the tax-return preparer "has engaged in disreputable conduct," which could lead to suspension or disbarment. *Id.* The regulations also require completing at least 15 hours of continuing education during "each registration year." *See* 31 C.F.R. § 10.6(e)(3).

After the issuance of the regulations, IRS Notice 2011-6, 2011-3 I.R.B. 315, announced that individuals could prepare tax returns until December 31, 2013, without passing the competency test or becoming registered tax-return preparers, so long as

[1] "Op." refers to the District Court's January 18, 2013 slip opinion, which is attached. "Doc." refers to the District Court's docket entries. "Campbell Decl." refers to the Declaration of Carol A. Campbell, Director of the IRS Return Preparer Office, attached hereto.

such individuals obtained a provisional PTIN and paid the PTIN user fee. In addition, although the continuing education requirements took effect in 2012, the IRS extended the time period for satisfying the 2012 requirement until December 31, 2013.

2. On March 13, 2012, Sabina Loving, Elmer Kilian, and John Gambino (together, plaintiffs) filed a complaint for declaratory and injunctive relief, asserting that the regulations "exceed[ ] the IRS's statutory authority under 31 U.S.C. § 330." (Doc. 1 at 2.) Plaintiffs, who are tax-return preparers, alleged that they "would be forced to pay a substantial amount" in fees and expenses to satisfy the competency and continuing education requirements. (*Id.* at 19.) Two of the plaintiffs indicated that they would rather close their businesses than comply with the regulations. (*Id*. at 16-18.)

The parties each moved for summary judgment as to whether the Treasury had the authority to implement the regulations. (Docs. 12-13.) Both parties focused on 31 U.S.C. § 330(a)(1), which grants the Secretary of the Treasury authority to "regulate the practice of representatives of persons before the Department of the Treasury." The Government also argued that the Treasury could issue the preparer regulations based on its inherent authority to regulate those who appear before it. (Doc. 13 at 12-14.)

3. The District Court issued a declaratory judgment that the regulations were invalid and enjoined their enforcement. (Doc. 21.) In its memorandum opinion, the court noted that plaintiffs offered "no independent argument for why, if the statute is ambiguous, the IRS's interpretation would be 'arbitrary or capricious in substance, or

manifestly contrary to the statute'. . . ." (Op. 9.) The court, however, ruled that the statute was unambiguous, and invalidated the regulations. (Op. 10.)

As an initial matter, the District Court held that the Treasury could not rely on its inherent authority, "[b]ecause 31 U.S.C. § 330 specifically defines the Treasury's authority to regulate the people who practice before it." (Op. 9.) As to that provision, the court acknowledged that § 330(a)(1) gave the Treasury authority to "regulate the practice of representatives" before it, and that that provision did not define what constituted the "practice of representatives." (Op. 11.) The court nonetheless ruled that 31 U.S.C. § 330(a)(1) "unambiguously foreclosed" the issuance of the return-preparer regulations, based on three textual grounds. (Op. 10.)

The District Court first relied on 31 U.S.C. § 330(a)(2)(D), which provides that, before admitting a representative to practice, the Secretary of the Treasury "may . . . require that the representative demonstrate . . . competency to advise and assist persons in presenting their cases." (Op. 11.) The court concluded that this provision equated "practice" to "advising and assisting [in] the presentation of a case," and that because, in the court's view, the preparation of tax returns for submission to the IRS did not involve the presentation of a *case*, the term "practice of representatives" in 31 U.S.C. § 330(a)(1) did not include the preparation of tax returns. (*Id.*)

The District Court next looked to 31 U.S.C. § 330(b), which granted the Secretary authority to "suspend or disbar from practice before the Department"

representatives for certain misconduct, or impose monetary penalties on them. (Op. 12-19.) The court noted that the Internal Revenue Code (26 U.S.C.) (I.R.C.) provided specific penalties for tax-preparer misconduct. (Op. 13-15.) The court ruled that "if the 'representatives' that the IRS could penalize under § 330(b) include tax-return preparers, the IRS would be able to punish everything covered by the ten penalties in [the Internal Revenue Code] . . . [which] would trample the specific and tightly controlled penalty scheme." (Op. 14.)

Finally, the court relied on I.R.C. § 7407, which allows the IRS to seek an injunction against a tax-return preparer if the preparer has engaged in specified unlawful conduct. (Op. 16-18.) The court observed that "if § 330 covers tax-return preparers, the IRS could sidestep every protection § 7407 affords . . . while effectively obtaining the same result" by disbarring the tax-return preparer from practice pursuant to 31 U.S.C. § 330(b). (Op. 17.) The court noted, however, that "the IRS's interpretation of § 330 would not render § 7407 surplusage because § 7407 still offers a different remedy: a judicial injunction versus IRS disbarment." (*Id.*) The court also observed that I.R.C. § 7408 "might seem to undercut" its interpretation, as it allows the IRS to seek an injunction against attorneys and CPAs who are subject to the disbarment mechanism of 31 U.S.C. § 330(b), "perhaps suggest[ing] that this injunctive remedy remains useful despite the availability of remedies under § 330(b)." (Op. 18.)

Although the court declined to decide whether any of these points alone would be dispositive, it concluded that together they "unambiguously foreclose the IRS's interpretation of 31 U.S.C. § 330." (Op. 19.) After determining that the regulations exceeded the Treasury's authority, the court ruled that injunctive relief was appropriate. The court relied on plaintiffs' declarations that they would close their businesses if forced to comply with the regulations, which, according to the court, constituted irreparable injury. (Op. 22.) The court ruled that the balance of hardships accordingly favored plaintiffs, and that the public interest would be served because the regulations were *ultra vires*. (*Id*.)

4. The Government filed a motion in the District Court for a stay pending appeal. (Doc. 23.) Although the court ruled that the case "raises serious and difficult legal questions" sufficient to satisfy the Government's showing as to its likelihood of success on appeal (Doc. 28 at 3), the court nevertheless denied the motion (*id.* at 7). The court modified its injunction, however, to clarify that it did not encompass the PTIN program, and that the IRS could still offer testing and continuing education – and collect fees – on a voluntary basis. (*Id*.) Thereafter, the Government filed a protective notice of appeal.[2] (Doc. 29.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[2] The prosecution of this appeal requires the approval of the Solicitor General, whose office is currently considering the matter. If the appeal is authorized, the Government intends to file its opening brief in March and to move for an expedited oral argument.

DISCUSSION

In determining whether to grant a stay, this Court considers "(1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest." *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982). "Each of these requirements may, of course, be applied flexibly according to the unique circumstances of each case." *Id.* As the Supreme Court has noted, the first two factors are particularly important. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). To establish a likelihood of success "an appellant who will suffer serious irreparable injury need only raise questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911-12 (D.C. Cir. 2008) (internal quotations omitted). Each of the factors favors a stay here.

A. The Government is likely to succeed on the merits

As the District Court itself concluded in evaluating the Government's stay motion, this case "raises serious and difficult legal questions," and, thus, the Government has demonstrated the likelihood-of-success requirement. (Doc. 28 at 3.) The Government has a reasonable likelihood of success on the merits both because of the Treasury's inherent authority to regulate individuals that appear before it, and

because the specific grant of authority contained in 31 U.S.C. § 330(a)(1) to "regulate the practice of representatives" is broad enough to permit the Secretary of the Treasury to issue regulations regulating the practice of paid tax-return preparers.[3]

1. The IRS has inherent authority to govern the practice of paid tax-return preparers who prepare returns for submission by their clients to that agency. The Secretary has broad authority to "prescribe regulations to carry out the duties and powers of the Secretary." 31 U.S.C. § 321(b)(1). The Internal Revenue Code also provides that "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title . . . ." I.R.C. § 7805(a). Regulations establishing minimum competency and ethics requirements for those who are paid to prepare tax returns for filing with the IRS fit within the broad authority conferred by Congress.

Further, the Government has strong arguments that, contrary to the District Court's decision, 31 U.S.C. § 330(a)(1) does not unambiguously foreclose the Secretary's authority to regulate tax-return preparers. *See Chevron, U.S.A., Inc. v. Natural Res. Def.*, 467 U.S. 837, 843 (1984); *Mayo Found. for Med. Educ. and Research v. United States*, --- U.S. ---, 131 S. Ct. 704, 711 (2011). Section 330(a) provides that the Secretary "may":

> (1) regulate the practice of representatives of persons before the Department of the Treasury; and

[3] When evaluating an injunction, "[t]o the extent the district court's decision hinges on questions of law, [ ] this court's review is essentially *de novo*." *Ark. Dairy Cooperative Ass'n, Inc. v. United States Dep't of Agriculture*, 573 F.3d 815, 822 (D.C. Cir. 2009).

> (2) before admitting a representative to practice, require that the representative demonstrate --
>
> (A) good character;
>
> (B) good reputation;
>
> (C) necessary qualifications to enable the representative to provide to persons valuable service; and
>
> (D) competency to advise and assist persons in presenting their cases.

As both the District Court and plaintiffs acknowledged, the statute contains no definition of the term "practice of representatives." The plain language of 31 U.S.C. § 330(a)(1), therefore, does not unambiguously foreclose the regulatory regime for tax-return preparers. As the Supreme Court held in *Chevron*, "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." 467 U.S. at 843.

Nothing in the terms or context of 31 U.S.C. § 330, or in the provisions of the Internal Revenue Code pertaining to return preparers, demonstrates that Congress addressed the precise question at issue and manifested, by means of unambiguous statutory language, its intent to limit the term "practice of representatives" in 31 U.S.C. § 330(a)(1) to only those who assist and aid others in the presentation of their cases. Moreover, even the District Court acknowledged (Op. 9) that, if the term "practice of representatives" were ambiguous, the Secretary's construction of that term as including return preparers is a permissible one under step two of the *Chevron* analysis.

Indeed, a separate grant of authority by Congress to the Secretary in 31 U.S.C. § 330(a)(2), which the District Court relied on heavily to support its decision, actually supports the Secretary's authority to regulate return preparers. Before "admitting a representative to practice," the Secretary "may" require, *inter alia*, that the representative demonstrate "necessary qualifications to enable the representative to provide to persons valuable service." 31 U.S.C. § 330(a)(2)(C). The regulatory scheme was created precisely to serve this end: ensuring that tax-return preparers had the necessary competency and ethics to provide their clients "valuable service."

2. In rendering its decision that the term "practice of representatives" in 31 U.S.C. § 330(a)(1) was unambiguous and did not include preparing tax returns for other persons for submission to the IRS, the District Court relied on other provisions in 31 U.S.C. § 330 and the Internal Revenue Code. The court explicitly did not decide "whether any of these three textual points alone would be dispositive." (Op. 19.) Rather, the court claimed sufficient support for its conclusion by stringing them together. A review of each point, however, belies the court's conclusion.

a. The District Court primarily relied on 31 U.S.C. § 330(a)(2)(D). That provision, however, does not even purport to define the term "practice of representatives" in § 330(a)(1). Although § 330(a)(2)(D) grants the Secretary of the Treasury the discretionary authority, before admitting a representative to practice, to require that the representative demonstrate "competency to advise and assist persons in

presenting their cases," this authority does not establish, as the District Court concluded, that Congress (i) addressed the precise question whether "practice of representatives" before the Treasury includes individuals who prepare tax returns for submission by their clients to the IRS, and (ii) answered that question in the negative through plain and unambiguous language. On the contrary, § 330(a)(2)(D) merely equips the Secretary with the authority to inquire into a representative's competency to assist and advise in the presentation of cases – as to those representatives providing those services. But the mere existence of this authority does not delineate the scope of the term "practice of representatives" before the Treasury, and hence does not resolve whether that term may be permissibly construed by the Secretary as including paid tax-return preparers.

b. The court attempted to bolster its determination that the critical language of § 330(a)(1) is plain and unambiguous by pointing out that, if the term "practice of representatives" before the Treasury includes return preparers, there would be an overlap between the provisions of 31 U.S.C. § 330 and provisions in the Internal Revenue Code that pertain to return preparers. The court pointed out that, under the Government's position, return preparers would be subject to monetary penalties under § 330(b) in addition to the penalties specified in the Code. *See, e.g.*, I.R.C. § 6694. But "[r]edundancies across statutes are not unusual events," and where statutes overlap, so long as there is no "positive repugnancy between the two laws," courts "must give

effect to both." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992) (quotation omitted); *see also Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 129 (1995).

c. Similarly misconceived is the court's reliance on what it considered to be an impermissible overlap under the Government's position between 31 U.S.C. § 330(b), which provides for disbarment from practice, and I.R.C. § 7407, which allows the IRS to seek an injunction against tax-return preparers who engage in certain misconduct. The court itself later recognized the tenuousness of this ground, acknowledging that "the IRS's interpretation of § 330 would not render § 7407 surplusage because § 7407 still offers a different remedy: a judicial injunction versus IRS disbarment." (Op. 17.) And, as the court also recognized (Op. 18), Congress itself provided for both injunctive and disbarment "remedies against the same people" in I.R.C. § 7408 and 31 U.S.C. § 330(b).

In short, as even the District Court recognized in denying the Government's motion for a stay (Doc. 28 at 3), the Government has raised serious questions regarding the court's decision, and thus, the Government has established the requisite likelihood-of-success requirement for obtaining a stay on appeal. *See Comm. on Judiciary*, 542 F.3d at 911-12.

B. The Government and the taxpaying public will be irreparably injured absent a stay

Failure to grant a stay of the District Court's injunction will work a substantial and irreparable harm to the Government and the taxpaying public, crippling the

Government's efforts to ensure that individuals who prepare tax returns for others are both competent and ethical. Many of the 80 million individual tax returns prepared annually by tax return preparers are prepared by the 350,000 or so individuals who, prior to the issuance of the regulations in issue, were wholly unregulated. Although the Internal Revenue Code authorizes injunctive suits against unscrupulous return preparers and imposes penalties for certain misconduct, these largely after-the-fact remedies have proven to be insufficient to adequately deal with the substantial and widespread harm to the public and federal fisc caused by incompetent and unethical return preparers.

In the absence of a stay, the IRS will likely be constrained to allow unregulated tax-return preparers to prepare tax returns for the 2014 tax-filing season (for the tax year 2013) that begins on January 1, 2014, thus leaving the public to face another tax-filing season with unregulated tax-return preparers who annually cost the public fisc billions of dollars in proper tax revenues and who concomitantly cause enormous harm to the taxpaying public – precisely the result the regulatory regime is intended to prevent. (Campbell Decl. ¶¶ 17, 19-21.) The IRS also will incur significant costs in complying with the District Court's injunction, from redesigning computer systems to renegotiating contracts with vendors. (*Id.* ¶¶ 6-14.) Absent a stay, the court's ruling will cause irreparable injury to tax administration.

1. The failure to stay the District Court's injunction pending appeal will, in all likelihood, effectively force the IRS to abandon its implementation of the regulatory

regime for return preparers until the 2015 tax-preparation season (for tax year 2014), even if this Court were to reverse the District Court's decision before the close of this year. (Campbell Decl. ¶ 19.) Prior to the issuance of the injunction, the IRS extended until December 31, 2013, the time for return preparers to pass the competency test and complete their continuing-education requirements for 2012 and 2013. *See* IRS Notice 2011-6 at § 2.02, 2011-3 I.R.B. 315. (*See also* Doc. 25 at 5, n. 4.) Between November 2011 and the date of the injunction, approximately 62,300 tax-return preparers passed the competency examination required by the regulations. (Campbell Decl. ¶ 10.) The IRS, however, has estimated that at least 350,000 individuals, previously unregulated at the federal level, are subject to the new regulatory regime. *See* Press Release, Internal Revenue Service (Dec. 20, 2012), *available at* http://www.irs.gov/uac/Newsroom/Renew-PTINs-for-2013,-Take-the-RTRP-Test-if-Required. This leaves hundreds of thousands of return preparers who, absent an extension of the current deadline, will be required to take the competency examination and complete the continuing education requirements for 2012 and 2013 by December 31, 2013, if the regulatory regime is reinstated by this Court. In this regard, the District Court's injunction and modification have sewn considerable uncertainty "among tax return preparers regarding their responsibilities and obligations." (Campbell Decl. ¶ 15.)

Moreover, the IRS is no longer offering the competency examination at testing centers following the court's injunction because, 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.[4] (*Id.* ¶ 13.) Accordingly, even if this Court were to reverse the District Court's decision before the end of this year, the IRS would be in no position to deal with the expected flood of tax-return preparers seeking to complete the regulations' requirements in the few months remaining before the existing deadline of December 31, 2013. Thus, even if this Court were ultimately to sustain the validity of the regulations, in the absence of a stay, the IRS "may be obliged to provide additional transition relief," which "will simply add additional delay to the program which is designed to ensure competent tax return preparation for the taxpaying public." (*Id.* ¶ 21.)

The District Court's observation (Doc. 28 at 4) that the IRS would suffer little harm from the denial of a stay because return preparers have until December 31, 2013, to meet the requirements of the regulations is thus not well-founded. The greatest harm from the injunction will come in 2014, when the regulations meant to guard taxpayers from incompetent and unethical tax-return preparers are scheduled to become fully operational. The IRS estimates that fraud, abuse, and errors cost the taxpaying public billions of dollars annually. (Campbell Decl. ¶ 17.) Accordingly, in the absence of a stay, taxpayers and the federal treasury will incur irreparable financial harm.

[4] The District Court's statement in its denial of the Government's motion for a stay (Doc. 28 at 4) that its injunction does not preclude the IRS from giving the competency test to return preparers on a voluntary basis is beside the point, as the IRS has indicated that it has no means by which to do so.

2. The District Court's injunction, moreover, will impose significant financial burdens on the IRS, which "has invested an enormous amount of time, money and other resources to establish a registration system, a minimum competency examination and continuing education program." (Campbell Decl. ¶ 6.) The IRS has devoted significant resources to establishing the return-preparer regulatory regime, spending many millions of dollars to get the program – required for at least 350,000 individuals – up and running (Campbell Decl. ¶ 12), and the IRS "will incur substantial costs to restart the program" (*id*. at ¶ 6). The IRS has assigned 167 employees to the Return Preparer Office, who provide "preparer assistance, complaint processing, [and] compliance and enforcement oversight," among other services. (*Id*.) One hundred and nineteen of these positions are funded through the collection of user fees, which cannot be spent for other purposes, in accordance with "budget, appropriation, and spending rules." (*Id*.) More than 260 centers for administering the competency examination have been made available across the United States and its territories, and nearly 101,000 examinations have been scheduled. (Campbell Decl. ¶ 10.) The IRS has also been working in tandem with 642 continuing education providers to integrate continuing education programs with the PTIN and return-preparer systems. (Campbell Decl. ¶ 11.) The District Court's injunction precludes the continuation of this integration.

The District Court's injunction will add significant costs to other aspects of the initiative as well. The confusion sparked by the injunction "has caused an increase in the number of calls to the [PTIN and return-preparer] call center, and the increased call volume will result in additional costs to the Service." (Campbell Decl. ¶ 8.) In addition, the IRS would be responsible for costs associated with modifying or breaching vendor contracts, shutting down computer systems, and finding other positions for the IRS employees currently working on this initiative. (*Id.* ¶¶ 7-13.) Although the District Court asserted that the IRS could continue to offer the competency examination on a voluntary basis (Doc. 28 at 4), the IRS (as noted above) is of the view (i) that voluntary testing cannot be offered under its existing contract with the vendor, and (ii) that voluntary testing would require a new contract and bidding process. (Campbell Decl. ¶ 13). Moreover, "[d]uring the course of this litigation the Service expects to receive thousands of requests for refunds and/or reimbursements by preparers who paid for testing and continuing education . . . ." (*Id.* ¶ 14.) And no matter the outcome of the appeal, the IRS will have to devote considerable resources to reach out to the return-preparer community so that they will understand their duties.

The regulations invalidated by the District Court in this case, which require registered tax-return preparers to satisfy competency and ethics standards, were part of a broader, integrated program to improve tax-return preparation that will be severely harmed. In particular, the Treasury issued regulations, unchallenged here, which

require all paid tax-return preparers to obtain a PTIN. *See* 26 C.F.R. (Treas. Reg.) § 1.6109-2(d). *See also Jesse E. Brannen, III, P.C. v. United States,* 682 F.3d 1316 (11th Cir. 2012) (upholding validity of PTIN regulations). The PTIN program and the registered tax-return-preparer program are closely linked and use a common database to track PTIN applications and renewals, as well as the registered tax return preparer applications, renewals, and continuing education. (Campbell Decl. ¶ 7.) The IRS will "incur additional costs in shutting down the PTIN application system, changing the system requirements through reprogramming, and restarting the system because these actions are not covered by the existing vendor contract." (*Id.*)

Given the Government's likelihood of success on appeal and the significant irreparable injuries the Government – and the taxpaying public – will incur in the absence of a stay, this Court should grant the requested stay and allow the IRS to continue implementing the return-preparation initiative during the pendency of this appeal. *See, e.g., O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft,* 314 F.3d 463, 465-67 (10th Cir. 2002) (staying injunction against enforcement of Controlled Substances Act); *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993).

C. A stay will not substantially injure other parties to the proceeding

As opposed to the irreparable injuries that will be incurred by the IRS and the public if the District Court's injunction remains in effect during the pendency of this

appeal, plaintiffs face no substantial harm if the injunction is stayed. IRS Notice 2011-6 already permits plaintiffs to prepare returns until December 31, 2013, without passing the competency examination or becoming registered return preparers. *See* IRS Notice 2011-6 at § 2.02, 2011-3 I.R.B. 315. The IRS also announced that tax-return preparers have until December 31, 2013, to complete their continuing education requirements for 2012 and 2013. Although the District Court notes that two of the three plaintiffs have declared that they will close their businesses rather than comply with the regulations (Doc. 28 at 5), plaintiffs do not have to pass the competency test or fulfill continuing education requirements to prepare tax returns during 2013.

The District Court also posited that staying its injunction would force tax preparers to decide between (1) satisfying requirements that ultimately might not be necessary, or (2) ignoring the requirements in the hope that this Court resolves the matter swiftly. (Doc. 28 at 5.) But the possibility (if a stay is granted) that return preparers may expend a modest amount of time, and incur modest fees, in satisfying the requirements of regulations that ultimately may be determined to be invalid pales in comparison to the substantial and irreparable injuries to both the taxpaying public and the federal fisc that will result from the denial of the requested stay.

D. The public interest will be served by a stay pending appeal

The law is well-settled that where the United States, or an agency thereof, seeks a stay, the requirements that the movant demonstrate that it will suffer irreparable injury

in the absence of a stay and that the public interest will be served by a stay are essentially one and the same. *See Nken*, 556 U.S. at 435 (showing of harm to public interest merges with the Government's own showing of harm when the Government is a party); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). Accordingly, the Government's demonstration herein that it will suffer irreparable injury in the absence of a stay satisfies the requirement that the granting of a stay is in the public interest. In any event, as we have demonstrated, the taxpaying public also will be irreparably harmed by the denial of a stay in this case, and thus a stay is in the public interest.

CONCLUSION

For the reasons stated above, this Court should grant a stay of the District Court's judgment pending appeal.

Respectfully submitted,

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Deputy Assistant Attorney General

s/ PATRICK J. URDA
GILBERT S. ROTHENBERG (202) 514-3361
RICHARD FARBER (202) 514-2959
PATRICK J. URDA (202) 307-0201
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

FEBRUARY 2013

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rule 8(a)(4), it is hereby certified that the following persons or entities were parties who appeared before the District Court:

Gambino, John, Plaintiff-Appellee

Internal Revenue Service, Defendant-Appellant

Kilian, Elmer, Plaintiff-Appellee

Loving, Sabina, Plaintiff-Appellee

Shulman, Douglas, Commissioner of Internal Revenue, Defendant-Appellant

United States of America, Defendant-Appellant

CERTIFICATE OF SERVICE

It is hereby certified that the Government's motion for a stay pending appeal was filed with the Clerk and served on counsel for the appellees on this 25th day of February, 2013 via the CM/ECF system.

s/ PATRICK J. URDA
PATRICK J. URDA
Attorney for the Appellants