ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5061

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, (FORMER) COMMISSIONER OF INTERNAL REVENUE
Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. *Parties and Amici.* The parties in the District Court and in this Court are Sabina Loving, Elmer Kilian, John Gambino, the United States of America, the Internal Revenue Service, and the Commissioner of Internal Revenue. The National Consumer Law Center and National Community Tax Coalition, as well as a group of Former Commissioners of Internal Revenue, are participating as *amici curiae* in support of the Government. Ronda Gordon, Dennis Tafelski, Jason Dinesen, Christine Engel, Russell Fox, Joe Kristan, Richard Schiveley, and the Tax Foundation are participating as *amici curiae* in support of plaintiffs.

B. *Rulings under Review.* The rulings under review are the judgment of the District Court (Judge James E. Boasberg) dated January 19, 2013, the accompanying memorandum opinion of the same date, and the order modifying the court's injunction, which was entered on February 1, 2013.

C. *Related Cases.* To the best of their knowledge, counsel for the Government are not aware of any previous or pending related cases in this Court.

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SUMMARY OF ARGUMENT

Both plaintiffs' answering brief and the brief of the *amici curiae* supporting plaintiffs make a number of arguments in an attempt to defend the District Court's ruling that the Secretary of the Treasury's regulation of those representatives who solely prepare federal tax returns for compensation unambiguously lies outside the authority granted to the Secretary in 31 U.S.C. § 330(a)(1), to regulate "the practice of representatives of persons before the Department of the

Treasury." Their arguments, however, fail to demonstrate that the District Court was correct in its decision that Congress addressed the specific question here and unambiguously foreclosed the Secretary's reasoned interpretation of the term "practice of representatives" in § 330(a)(1) as including paid tax-return preparers. On the contrary, Congress in enacting § 330(a)(1) never spoke to the specific matter at issue here, and, consequently, under the *Chevron* step-one analysis, the Secretary was not precluded from regulating the practice of paid tax-return preparers.

ARGUMENT

The District Court erred as a matter of law in holding that 31 U.S.C. § 330(a)(1) unambiguously foreclosed the Secretary of the Treasury from regulating the practice of tax-return preparers, and, accordingly, erred in declaring the tax-return preparer regulations invalid and enjoining their enforcement

A. The term "practice of representatives of persons before the Treasury Department" in § 330(a)(1) is ambiguous

1. As demonstrated in our opening brief (US Br. 30-45)[1], the District Court erred as a matter of law in holding that the tax-return preparer regulations fail under the first prong of the *Chevron* analysis. Section 330(a)(1) grants the Secretary of the Treasury authority to "regulate the practice of representatives of persons before the Department of the Treasury." In enacting that statute, Congress did

[1] "Doc." references are to documents contained in the record, as numbered by the Clerk of the District Court. "JA" references are to the documents contained in the Joint Appendix filed with our opening brief. "US Br." references are to our opening brief. "Aple. Br." references are to appellees' response brief. "Comm'r Am. Br." references are to the brief filed by *amici curiae* Former Commissioners of Internal Revenue. "Consumer Am. Br." references are to the brief filed by *amici curiae* National Consumer Law Center and National Community Tax Coalition. "Aple. Am. Br." references are to the brief filed by *amici curiae* in support of appellees.

not unambiguously limit the Secretary's authority to regulate "the practice of representatives" to only those representatives who advise and assist others in presenting their *cases* to the Treasury Department, and, accordingly, to thereby preclude the Secretary from regulating those other representatives who solely prepare tax returns for others (including returns that are claims for refund of tax) for submission to, and review by, the IRS.[2] As we explained (US Br. 32-34), Congress did not define the term "practice of representatives" in § 330(a)(1), or in any other provision, and that term does not have a well-established meaning that precludes the Secretary's interpretation. Indeed, the

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[2] Although the United States has not affirmatively argued that the preparation of tax returns for submission to, and review by, the IRS amounts to the presentation of a case, we note that the brief filed by the five former IRS Commissioners makes a strong argument why "preparing and filing a tax return is indeed the presentation of a case, in which taxpayers pursue a wide variety of financial claims against the Treasury." (Comm'r Br. 2.) The National Taxpayer Advocate made a similar point in a recent article, presenting statistical data showing the extent to which taxpayers make claims against the government on their income tax returns, including data showing that more than 100 million taxpayers claimed refundable tax credits on tax returns filed for 2010 alone. *See* Nina E. Olson, *More than a 'Mere' Preparer: Loving and Return Preparation*, Tax Notes 767, 776 (May 13, 2013), *available at* http://www.taxpayeradvocate.irs.gov//userfiles/file/NTA_TaxNotes_LovingCase.pdf.

District Court itself acknowledged (JA 18) that, as an abstract matter, the term "practice of representatives" in § 330(a)(1) can be reasonably construed as encompassing individuals who prepare tax returns on behalf of others for submission to, and review by, the IRS. The court, accordingly, turned to other statutory provisions, some in a separate title of the United States Code, to negate the inherent ambiguity in § 330(a)(1). These other provisions, however, as demonstrated in our opening brief (US Br. 35-45), cannot bear the weight placed upon them by the District Court in its decision.

2. The District Court's decision is founded primarily (JA 19-21) on 31 U.S.C. § 330(a)(2)(D), which the court held "defines 'the practice of representatives' in a way that does not cover tax-return preparers" (JA 19). Section 330(a)(2)(D) grants the Secretary the *discretionary* authority to require, before admitting a representative to practice, that he or she demonstrate "competency to advise and assist persons in presenting their cases." The District Court held that, in providing the Secretary with this authority, Congress necessarily equated the term "practice" in § 330(a)(1) with advising and assisting others in the presentation of a case. "Since § 330(a)(2) makes clear that the 'practice'

of these representatives is advis[ing] and assist[ing] persons in presenting their cases', 'practice' in § 330(a)(1) must mean the same thing." (JA 21.)

The District Court's decision, however, rests upon a fundamental misperception of the relationship between § 330(a)(1) and § 330(a)(2). In § 330(a)(1), Congress authorized the Secretary to regulate the "practice of representatives of persons before the Department of the Treasury." In § 330(a)(2), Congress did not define the term "practice" in § 330(a)(1) or otherwise impose a limitation on the types or classes of representatives the Secretary was authorized to regulate. On the contrary, as an adjunct to the authority granted the Secretary in § 330(a)(1), Congress in § 330(a)(2) authorized the Secretary, in his discretion, to require, before admitting a representative to practice, that the representative establish his or her fitness to practice by demonstrating –

> (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.

31 U.S.C. § 330(a)(2).

Thus, Congress did no more in § 330(a)(2) than to make explicit that the Secretary, as part of his authority to regulate the practice of representatives, could, at his discretion, require a particular representative to demonstrate as a matter of fitness to practice that he or she possessed one or more of the qualifications listed therein as the Secretary deemed appropriate. Contrary to the core of the District Court's decision invalidating the return-preparer regulations, Congress, in enacting § 330(a)(2), did not equate the term "practice" in § 330(a)(1) with those representatives who advise and assist others in presenting their cases. Indeed, if Congress intended the term practice to be limited in the manner determined by the District Court, it would have so provided in its grant of authority to the Secretary in § 330(a)(1), *i.e.*, Congress would have provided therein that the Secretary was authorized to regulate the practice of representatives in advising and assisting others in the presentation of their cases. *See City of Arlington, Texas v. Fed. Commc'ns Comm'n*, 569 U.S. ---, --- S. Ct. ---, 2013 WL 2149789, at *5 (May 20, 2013) ("Congress knows to speak in plain terms

when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").

Moreover, as explained in our opening brief (US Br. 34-35), the District Court, in relying on § 330(a)(2)(D) for its conclusion that Congress equated "practice" with those representatives advising and assisting others in the presentation of their cases, completely ignored the provisions of § 330(a)(2)(C) and, in so doing, rendered that latter provision meaningless. Included in the grant of discretionary authority to the Secretary in § 330(a)(2) is the authority, before admitting a representative to practice, to require that the representative demonstrate "necessary qualifications to enable the representative to provide to persons *valuable service*." 31 U.S.C. § 330(a)(2)(C) (emphasis added). If, as the District Court held, Congress equated the term "practice" in § 330(a)(1) with those representatives advising and assisting others in the presentation of their cases, there would have been no reason for Congress to authorize the Secretary, in § 330(a)(2)(C), to require that a representative demonstrate the necessary qualifications to provide "valuable service," and to further authorize the Secretary, in § 330(a)(2)(D), to require a representative to

demonstrate competency to advise and assist persons in presenting their cases. The enactment of § 330(a)(2)(C) can only be reasonably construed as the recognition by Congress that the "practice of representatives" might entail providing a valuable service other than advising and assisting persons in the presentment of their cases and that the Secretary, therefore, should have the authority to require that representatives demonstrate that they possess the necessary qualifications to provide such service.

Plaintiffs' attempt (Aple. Br. 31-36) to show that the District Court's decision does not serve to render § 330(a)(2)(C) meaningless amounts to little more than grasping at straws.[3] In this regard, plaintiffs point out that § 330(a)(2)(C) authorizes the Secretary to require that a representative demonstrate "necessary qualifications" to provide valuable service, whereas § 330(a)(2)(D) allows the Secretary to require a representative to demonstrate "competency" to advise and

[3] As indicated, the District Court wholly ignored § 330(a)(2)(C) in its opinion and hence offered no explanation why Congress would have enacted that provision if it had intended, in § 330(a)(2)(D), to equate "practice" in § 330(a)(1) with representatives advising and assisting others in the presentation of their cases.

assist persons in presenting their cases, and then plaintiffs speculate that the quoted terms might not be synonymous. (Aple. Br. 33.) Thus, plaintiffs are, in effect, contending that Congress enacted § 330(a)(2)(C) because the Secretary's authority in § 330(a)(2)(D) to require a representative to demonstrate "competency" to advise and assist persons in presenting their cases might not permit the Secretary to require the representative to demonstrate that he or she has the "necessary qualifications" to so advise and assist. That is a nonsensical assertion.[4] If Congress had been of that opinion, it would not have enacted § 330(a)(2)(C), which pertains to representatives providing "valuable service," but would have provided in § 330(a)(2)(D) that the Secretary may require a representative to demonstrate that he or she has the competency *and* the necessary qualifications to advise and assist persons in presenting their cases.

Plaintiffs' attempt (Aple. Br. 33) to bolster their argument on the basis of the word "and" in § 330(a)(2) is misconceived. Plaintiffs would

[4] Indeed, the text of the 1884 Act indicates that Congress regarded the term "necessary qualifications" as a subset of the broader term "competency." (JA 55-56.)

have this Court construe § 330(a)(2) as defining the scope of the term "practice of representatives" in § 330(a)(1) as those representatives having good character; good reputation; necessary qualifications to provide valuable service; *and* competency to advise and assist persons in presenting their cases. As explained above, however, § 330(a)(2) does not define the term practice or limit the Secretary's authority to regulate the practice of representatives to representatives performing particular activities. On the contrary, § 330(a)(2) gives the Secretary the discretionary authority to require, before admitting a representative to practice, that the representative demonstrate *any* or all of the qualifications specified therein as the Secretary deems appropriate. Thus, for a representative providing valuable service, not involving the presentation of a case, the Secretary might require the representative to demonstrate that he has the necessary qualifications to provide such service, but might not require the representative to demonstrate that he also has the skills to advise and assist in the presentation of a case.[5] In

[5] To be sure, representatives advising and assisting others in the presentation of their cases are a subset of representatives providing valuable service to others. It is hardly unusual, however, for Congress to use a broad term in a statute, and then also include narrower terms
(continued…)

short, in light of the purpose and overall context of § 330(a)(2), the use of the word "and" therein does nothing to support the District Court's decision that, in enacting § 330(a)(2)(D), Congress necessarily equated the term "practice" in § 330(a)(1) with representatives advising and assisting others in the presentation of their cases. *See Slodov v. United States*, 436 U.S. 238, 248-49 (1978) (construing the word "and" in 26 U.S.C. § 6672 to mean or).

3. It must be recognized that the *Chevron* step-one analysis imposes a relatively low threshold for the promulgation of regulations by an agency. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *see Mayo Found. for Med. Educ. and Research v. United States*, --- U.S. ---, 131 S. Ct. 704 (2011). Under *Chevron*, unless Congress has spoken to the precise issue presented, an agency's

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that are encompassed within that broad term. Thus, for example, 26 U.S.C. § 6701 imposes a penalty on any person who, *inter alia*, assists in the preparation of a return, affidavit, claim, or other *document* that he knows will be used to produce an understatement of tax. Congress could have simply used the term document, but chose to also include specific examples thereof, *e.g.*, "return." In this regard, the provisions of § 330(a)(2)(D) pertaining to representatives assisting in the presentation of cases are best understood as a specific example of a person providing a "valuable service" referenced in § 330(a)(2)(C).

regulation is valid if the regulation fills a statutory gap or defines a term, in a reasonable fashion. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 980 (2005). In the instant case, as the District Court acknowledged and we have shown, the term "practice of representatives" in § 330(a)(1) can reasonably be construed as encompassing tax-return preparers. Further, Congress' enactment of § 330(a)(2)(C) belies the District Court's determination that the provisions of § 330(a)(2)(D) cure the inherent ambiguity of the term "practice of representatives" in a way that precluded the Secretary of the Treasury from construing that term as encompassing representatives who prepare tax returns on behalf of others for submission to, and review by, the IRS. Simply stated, Congress nowhere has spoken to the precise question here, *i.e.*, whether, in preparing returns for others for submission to the IRS, return preparers are practicing before the IRS within the meaning of § 330(a)(1). This being the case, the Secretary was not precluded from issuing regulations resolving, with a reasonable rule, the ambiguity in the term "practice" as it relates to tax-return preparers. *See Chevron*, 467 U.S. at 843; *see also Mayo*, 131 S. Ct. at 711; *Brand X*, 545 U.S. at 980.

4. Plaintiffs fare no better in their attempt to bolster the District Court's decision with their contention (Aple. Br. 36-39) that the term "representative" in § 330(a)(1) has a plain and unambiguous meaning that excludes paid tax-return preparers. The District Court implicitly rejected this argument in concluding (JA 18) that, as an abstract matter, the language of § 330(a)(1) could reasonably be construed as encompassing return preparers. Plaintiffs assert that "'[r]epresentatives' are ordinarily understood to be agents of the represented party, who can act on behalf of the represented party and can even obligate the represented party. . . ." (Aple. Br. 37.) Plaintiffs further contend that "IRS regulations also recognize a clear distinction between 'representation' and tax-return preparation," relying on 31 C.F.R. § 10.51(a)(18) and 26 C.F.R. § 601.504(a)[6]. (Aple. Br. 38.)

As the District Court apparently recognized, the term "representative" is a broad one with many meanings and connotations. Although an agent obviously would be a representative of his principal,

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[6] 26 C.F.R. § 601.504 is not a Treasury Regulation, but instead is a part of the IRS's Conference and Practice Requirements within its Statement of Procedural Rules, which are procedural and not binding. *See Boulez v. Commissioner*, 810 F.2d 209, 215 (D.C. Cir. 1987).

the two terms are hardly synonymous, contrary to plaintiffs' suggestion. Nor is the term "representative" limited to someone acting under a power of attorney. If a neighborhood civic association selected a member to express the views of the association at a public hearing on a zoning matter, the selected member plainly would be regarded as a representative of the association, notwithstanding his lack of authority to enter into any type of binding agreement on behalf of the association. *See* Webster's Third New International Dictionary (unabridged) (1986) (defining representative as "acting for another").

The snippets of the Code of Federal Regulations that plaintiffs cite are red herrings. As to 31 C.F.R. § 10.51(a)(18), that provision merely states that an individual may be sanctioned for "willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so . . . ." Similarly, 26 C.F.R. § 601.504(a) does not attempt to define "representation," but only discusses when a power of attorney is required. Representation is defined in 26 C.F.R. § 601.501(b)(13) as "[a]cts performed on behalf of a taxpayer by a representative in practice

before the Internal Revenue Service," which is in no way inconsistent with the Secretary's determination.

In short, as the District Court implicitly concluded, the term "representative" in § 330(a)(1) does not have a plain and unambiguous meaning that excludes tax-return preparers.

B. The various provisions of the Internal Revenue Code (26 U.S.C.) pertaining to tax-return preparers do not resolve the inherent ambiguity in the meaning of the term "practice of representatives" in § 330(a)(1)

1. The District Court (JA 21-28) attempted to rely on provisions in the Internal Revenue Code pertaining to tax-return preparers to shore up the foundation of its decision that 31 U.S.C. § 330(a)(1) does not authorize the Secretary of the Treasury to regulate the practice of return preparers. As demonstrated in our opening brief (US Br. 39-45), the court's reliance on these provisions was misplaced. None of the Internal Revenue Code provisions cited by the court has anything to do with delineating the scope of the term "practice of representatives" in 31 U.S.C. § 330(a)(1), and, consequently, these provisions do nothing to resolve the ambiguity of that term.

Plaintiffs' attempt (Aple. Br. 39-50) to defend the reasoning of the District Court in this regard is unconvincing. The District Court correctly noted that the Internal Revenue Code contains at least ten penalties specific to tax-return preparers, each of which address particular conduct related to preparing and filing tax returns. (JA 22-24.) The court also correctly observed that the Secretary has the authority under 31 U.S.C. § 330(b) to impose a range of monetary penalties on representatives practicing before the Treasury Department and that, accordingly, if return preparers were deemed to be practicing before the Treasury under § 330(a)(1), they would be potentially subject to monetary sanctions under § 330(b), as well as to the return-preparer penalties imposed by the Internal Revenue Code. (JA 23.) The District Court further observed that the Secretary has the authority under § 330(b) to disbar representatives from practice for misconduct, while 26 U.S.C. § 7407 authorizes the Secretary to obtain a judicial injunction barring a return preparer from continuing to prepare tax returns. (JA 25-27.) The District Court determined that, if return preparers were held to be practicing before the Treasury, the Secretary could use the provisions of § 330(b) to eclipse the specifically crafted return-

preparer penalty scheme of the Internal Revenue Code. (JA 23.) The court similarly determined that, under the Government's position, the Secretary's authority under § 330(b) to disbar practitioners for misconduct would cause the injunction remedy of 26 U.S.C. § 7407 to lose all relevance. (JA 26.) These determinations by the court are both inaccurate and beside the point.

The fact that return preparers are potentially subject to disciplinary sanctions under § 330(b), as well as to the specific return-preparer penalties imposed by the Internal Revenue Code, and can also be enjoined from preparing returns, in no way supports the District Court's decision that, in enacting § 330(a)(1), Congress unambiguously foreclosed the Secretary from regulating the practice of return preparers. First, there is nothing in the legislative history of the return-preparer provisions in the Internal Revenue Code that indicates that Congress, in enacting those provisions, had determined that the provisions of § 330(b) would have no application to return preparers.[7]

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[7] Moreover, the views of a later Congress as to what an earlier Congress intended are entitled to little weight. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of

(continued…)

Thus, to the extent there is an overlap between the provisions of § 330(b) and the return-preparer provisions of the Internal Revenue Code, that overlap sheds no light on what an earlier Congress intended in authorizing the Secretary in § 330(a)(1) to regulate the "practice of representatives."

2. The premise of the District Court's reasoning, *i.e.*, that treating return preparers as practitioners under § 330(a)(1) would cause § 330(b) to eclipse what, according to the court, is the carefully crafted, comprehensive return-preparer provisions of the Internal Revenue Code, is incorrect. Contrary to plaintiffs' contention (Aple. Br. 46), the fact that, under the Government's position, both the § 330(b) sanctions and the Internal Revenue Code penalty provisions would apply to tax-return preparers does not serve to either render the penalty provisions superfluous or unambiguously foreclose the interpretation of "practice of representatives" as including tax-return preparers. The sanctions available under § 330(b), including suspension, disbarment, and

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an earlier one") (quoting *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 348–349 (1963)).

censure, complement the Internal Revenue Code penalty provisions, offering a different tool to effectuate the goal of promoting competent and ethical tax-return preparers. As discussed above, there is no indication that the Congress that enacted the monetary penalties in the Internal Revenue Code understood that those penalties would be the *exclusive* means of discouraging incompetent and unethical tax-return preparers. And, even if Congress had that understanding, it would not establish what the earlier Congress that enacted § 330(a)(1) intended.

Plaintiffs are simply wrong in their contention that the Internal Revenue Code penalty provisions would be rendered meaningless under the Government's interpretation, because § 330(b) also grants the Secretary the discretionary authority to sanction tax-return preparers using monetary penalties. The availability of discretionary monetary sanctions under § 330(b) does not displace the penalties that Congress has chosen to impose on specified misconduct by tax-return preparers. Moreover, as we noted in our opening brief (US Br. 40-41), a possible overlap of statutory provisions is hardly an unusual statutory occurrence. *See Connecticut 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). The possible overlap between the later-enacted specific return-preparer penalties in the Internal Revenue Code and the already existing sanctions available under § 330(b) is of no probative value in ascertaining the intent of Congress in enacting § 330(a)(1).

3. Equally meritless is plaintiffs' argument (Aple. Br. 47-51) that the District Court was also correct in concluding that accepting the Government's interpretation of § 330(b) would render superfluous 26 U.S.C. § 7407, which allows the IRS to seek an injunction against tax-return preparers who engage in certain misconduct. As explained in our opening brief (US Br. 42-44), plaintiffs' position is unfounded. Indeed, the District Court itself acknowledged that the Government's "interpretation of § 330 would not render § 7407 surplusage because § 7407 still offers a different remedy: a judicial injunction versus IRS disbarment." (JA 26.) Plaintiffs' attempt (Aple. Br. 49) to breathe life into the District Court's hesitant reliance on a purported overlap between the disbarment remedy of § 330(b) and the injunctive remedy of 26 U.S.C. § 7407 is unconvincing. Contrary to plaintiffs' assertion, administrative disbarment is not the same as a judicial injunction,

since, as part of an injunction order, the court could require the return-preparer to disclose to the IRS the names of all of his own clients and to post the injunction order on his or her website, among other requirements or restrictions within the court's extensive powers of equity. Moreover, a return preparer who violates a judicial injunction faces a contempt citation that could lead to a monetary sanction and/or imprisonment.

Plaintiffs take issue with the point in our opening brief (U.S. Br. 43-44) that the interplay between 26 U.S.C. § 7408 and § 330(b) undercuts the District Court's conclusion that Congress could not have intended for both 26 U.S.C. § 7407 and § 330(b), with its disbarment remedy, to co-exist as to tax-return preparers. (Aple. Br. 49-50.) As explained in our brief (US Br. 43-44), our argument in this regard stems straight from the court's own observations in its opinion (JA 27) that Congress has provided for both injunctive and disbarment "remedies against the same people" in 26 U.S.C. § 7408 and § 330(b), "suggesting that this injunctive remedy remains useful despite the availability of remedies under § 330(b)." Plaintiffs attempt to blunt the District Court's own recognition of the weakness of its reasoning by suggesting

that 26 U.S.C. §§ 7407 and 7408 do not implicate § 330(b) in the same manner. (Aple. Br. 50.) Section 7408, however, unquestionably allows the Secretary to initiate a civil action to enjoin a person already subject to disbarment under § 330(b) from engaging in certain prohibited conduct.[8]

In sum, the return-preparer provisions of the Internal Revenue Code, whether viewed on their own or in conjunction with the provisions of § 330(a)(2)(D), do not unambiguously foreclose the Secretary's determination that the term "practice of representatives" in § 330(a)(1) includes representatives who prepare tax returns for others for submission to, and review by, the IRS.

C. Neither subsequent Congressional actions nor purported past administrative practice unambiguously foreclose the Secretary's interpretation of § 330(a)(1)

Plaintiffs also argue that the legislative history and original purpose of 31 U.S.C. § 330 foreclose the Secretary's interpretation of

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[8] It appears that the overlap between 26 U.S.C. § 7408 and 31 U.S.C. § 330(b) was intentional on the part of Congress. *See* H.R. Conf. Rep. No. 755 at 392, 394-95 (2004), *available at* 2004 U.S.C.C.A.N. 1473, 1474-76.

"practice of representatives" as including return preparers. (Aple. Br. 51-57.) Plaintiffs assert that "Section 330 was passed in an era when Congress could not possibly have intended to empower the IRS to license tax-return preparers . . . and instead only gave the Treasury the authority to regulate those who engaged in advocacy before it on behalf of others, much like a court." (Aple. Br. 52.) According to plaintiffs, "[i]n view of this legislative history, it is hard to imagine how Congress could be said to have contemplated and authorized the sweeping changes imposed by the [return-preparer regulations] under Section 330." (Aple. Br. 53.)

But plaintiffs have it precisely backwards: under *Chevron* step one the question is whether Congress unambiguously *foreclosed* the return-preparer regulations, not whether Congress unambiguously authorized them. *See Brand X*, 545 U.S. at 980. On this point, the legislative history gives plaintiffs no support. As plaintiffs themselves recognize (Aple. Br. 52-53), the purpose behind § 330 was to equip the Secretary of the Treasury with the regulatory authority to deal with representatives before that Department who act unscrupulously, or who fail to represent a person properly or intelligently. This is precisely

what the return-preparer regulations seek to do. *See* I.R.S. Pub. No. 4832 (Rev. 12-2009) at 33-37, *available at* http://www.irs.gov/pub/irs-pdf/p4832.pdf. *See also* National Taxpayer Advocate, FY 2002 Annual Report to Congress, at 216-30, *available at* http://www.irs.gov/pub/irs-utl/nta_2002_annual_rpt.pdf. That Congress did not affirmatively grant the Secretary his regulatory authority with an eye to the subsequent enactment of the income tax or to the increasing importance of the return-preparation industry a century later does not establish that Congress intended to foreclose the Secretary from later regulating those who prepare federal tax returns on behalf of other persons for filing with (and review by) the Internal Revenue Service.[9] Indeed, in choosing not to define the term "practice of representatives," or to otherwise delineate the intended scope of that term, Congress left the door open for the Secretary to construe the term "practice. . . before the Department of the Treasury" to reflect the modern concept of that term.

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[9] Underlying plaintiffs' argument is the distinction they posit between the practice of those representatives involved in tax "compliance" work, and those involved in tax "controversy" work. The tax world does not neatly divide into plaintiffs' binary categories, however, and the term "practice of representatives" is not limited to only those who present cases in plaintiffs' "controversy" realm.

Needless to say, Congress did not intend to limit the Secretary's regulatory authority to claims by Civil War soldiers relating to horses and unpaid compensation, which was the impetus for the enactment of the original 1884 Act that later was recodified in § 330(a)(1).

Plaintiffs further argue that Congress' failure to amend § 330 to expressly define practice as including return preparers, as well as its rejection of bills that would have confirmed the Secretary's regulatory authority over tax-return preparers, buttresses the correctness of the District Court's decision. (Aple. Br. 54-57.) As this Court has observed, however, "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,' *United States v. Price,* 361 U.S. 304, 313, 80 S. Ct. 326, 332, 4 L.Ed.2d 334 (1960), and have 'very little, if any, significance.' *Rainwater v. United States,* 356 U.S. 590, 593, 78 S. Ct. 946, 949, 2 L.Ed.2d 996 (1958)." *PDK Labs., Inc. v. U.S.D.E.A.*, 362 F.3d 786, 794-95 (D.C. Cir. 2004). Even if a subsequent Congress were of the view that the Secretary's authority to regulate the "practice of representatives" does not, or should not, reach tax-return preparers, this would shed no light on what the Congress that enacted § 330(a)(1) intended. Actions or inactions by a subsequent Congress

cannot unambiguously establish what an earlier Congress intended in enacting a particular statute. That bills to clarify the Secretary's authority to regulate return preparers have hitherto been unsuccessful just as easily supports the view that Congress understands that the Secretary already possesses this authority, and chooses not to do a "futile thing." *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000).

Plaintiffs finally contend that their interpretation of § 330 is confirmed by the Government's own policies and actions. (Aple. Br. 57-58.) As an initial matter, an agency may change its position and depart from its precedent. *See, e.g., Am. Radio Relay League v. FCC*¸ 524 F.3d 227, 234 (D.C. Cir. 2008). New regulations often constitute a change in position, but that is not determinative for the *Chevron* analysis. *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone."); *Mayo*, 131 S. Ct. at 712 ("[w]e have repeatedly held that '[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'") (quoting *Brand X,* 545 U.S. at 981). Here, the fact that the Secretary of the Treasury did not exercise his authority to issue regulations of tax-

return preparers until 2011 hardly establishes that he lacked this authority. As explained in I.R.S. Pub. No. 4832, at 1, the Secretary of the Treasury acted when the need for such regulations became critical, namely, as the return-preparer industry assumed an increasingly central position in tax administration, and it became apparent that the penalties and related provisions designed to deal with unscrupulous and incompetent preparers were not adequate to protect the taxpaying public from such preparers.

Moreover, the issuance of the return-preparer regulations does not conflict with prior agency understanding of the scope of § 330(a)(1). Prior to the issuance of the return-preparer regulations, tax return preparers were subject to the Secretary's regulatory authority under former 31 C.F.R. § 10.7(c)(1)(viii), which granted unenrolled tax return preparers' "limited practice" rights. The Secretary also had set forth standards of ethics and conduct for such unenrolled individual preparers of tax returns in Rev. Proc. 81-38, 1981-2 C.B. 592, § 7. Plaintiffs assert in their statement of facts that the IRS did not view tax-return preparers as "representatives," but Rev. Proc. 68-29, 1968-2 C.B. 913, on which they rely, merely addresses the specific instance

whether a tax-return preparer can testify as a fact witness in an in-person IRS administrative hearing. This Revenue Procedure does not establish, as a general rule, that, when preparing tax returns, these individuals do not constitute representatives for purposes of § 330(a)(1).

Plaintiffs also cite in their statement of facts selected statements by IRS officials and IRS Publication 947 (Apr. 2009 rev.), *available at* http://www.irs.gov/pub/irs-utl/publication_947_practice_before_the_irs_and_poas_rev_4_09.pdf, to support their assertion that the IRS previously was of the view that, absent legislation, it lacked the authority to regulate return preparers. (Aple. Br. 10-11, n.11.) Plaintiffs have taken some of these statements out of context,[10] but the statements are beside the point in any event.

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[10] For example, plaintiffs assert the National Taxpayer Advocate, through quoted "admissions," has conceded the IRS did not possess the authority to implement the return preparer program on its own. (Aple. Br. 11, n.12.) It does not necessarily follow, however, that a statutory change was required to provide that authority to the IRS. The authority for the IRS to implement the return preparer program could have been provided either through Treasury regulations or through a change to the tax code. In a recent article, the National Taxpayer Advocate explained her approach as follows: "As with many of the legislative recommendations I have proposed over the years, I suggested legislative action because the IRS, for various reasons discussed in the

(continued…)

Regardless of any earlier views by the IRS, the Secretary of the Treasury expressly determined, in issuing the return-preparer regulations in issue, that representatives solely preparing tax returns were practicing before the Treasury within the meaning of § 330(a)(1). *See* 31 C.F.R. § 10.2(a)(4). *See also* 76 Fed. Reg. 32,286, 32,288 (June 3, 2011). The question before this Court is whether *Congress* has unambiguously foreclosed the Secretary's construction of the term "practice." In resolving that question, it is of no moment whether the IRS earlier may have been of the view that it lacked authority to regulate return preparers.

D. The return-preparer regulations are not arbitrary and capricious

As we pointed out in our opening brief (US Br. 46), and as the District Court expressly acknowledged (JA 18), plaintiffs made no separate argument that, even if the regulations satisfied the *Chevron* step-one analysis, they would still be invalid under *Chevron* step two. Plaintiffs nevertheless contend, in footnotes 19 and 35 of their brief,

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(…continued)
text, was unwilling to act administratively at that time." Olson, *supra* note 2, at 770, n.17.

that they preserved an argument as to *Chevron* step two in the District Court. But this Court "need not consider cursory arguments made only in a footnote." *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 539 n. 3 (D.C. Cir. 1999). In any event, as the District Court observed (JA 18), plaintiffs failed to make any "independent" argument as to step two, merely incorporating the same arguments as in step one. Plaintiffs themselves acknowledge this fact in footnote 19. The court, therefore, correctly understood that the case turned on step one of the *Chevron* analysis.

In their brief, *amici curiae* supporting plaintiffs contend that the regulations were arbitrary and capricious for purposes of the Administrative Procedure Act (APA) and *Chevron* step two – an argument that *amici* concede (Aple. Am. Br. 16) plaintiffs failed to raise below and do not advance on appeal. In any event, *amici* are plainly wrong in asserting that the regulations are invalid under the arbitrary-and-capricious standard. *Amici* claim that the return-preparer regulations failed to satisfy the arbitrary-and-capricious standard because, according to *amici*, the Government: (i) failed to adequately explain the regulations' jurisdictional basis (Aple. Am. Br. 18-22); (ii)

did not comply with the Regulatory Flexibility Act (Aple. Am. Br. 23-29); and (iii) ran afoul of notice-and-comment rulemaking by failing to make available the underlying comments used to derive the percentages of support in favor of various options (Aple. Am. Br. 29-31).

To satisfy the arbitrary-and-capricious standard, however, an "agency need only articulate a 'rational connection between the facts found and the choice made.'" *Am. Radio*, 524 F.3d at 233 (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted)). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43.

The APA requires that when a rule is adopted, a concise and general statement of its basis and purpose must accompany publication, *see* 5 U.S.C. § 553(c), in order to apprise courts of the legal and factual framework underlying the agency's action. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This requirement "has not been interpreted technically, in recognition of its limited purpose." *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 710 (D.C. Cir. 1977). The

Supreme Court has made clear that a court will "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System,* 419 U.S. 281, 286 (1974)).

Amici's argument that the IRS violated the arbitrary-and-capricious standard by failing to articulate the reasons for its conclusion that the "practice of representatives" under § 330(a)(1) includes tax-return preparers is firmly refuted by the proposed return-preparer regulations, *see* 75 Fed. Reg. 51,713 (Aug. 23, 2010), which also are referenced in the final return-preparer regulation, *see* 76 Fed. Reg. 32,286, 32,287. The regulations, therefore, provide the explanation required by the APA for the Government's conclusion that it had jurisdiction over tax-return preparers under § 330(a)(1).

Amici's other arguments fare no better. "The Regulatory Flexibility Act requires that agencies issuing rules under the Administrative Procedure Act publish a final regulatory flexibility analysis," but the Act's requirements are "purely procedural." *National Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)). *Amici*

concede that both the proposed and final regulations included such analyses (Aple. Am. Br. 26), and the final regulations plainly satisfy the requirements of 5 U.S.C. § 604 that they explain the attempts to minimize the costs on small business, consistent with the objectives of the regulation, *see* 76 Fed. Reg. at 32,299-32,300. Likewise, *amici* admit that the regulations comply with Executive Order 12866 (Aple. Am. Br. 23), and their contention that the regulations did not include adequate analysis of costs on consumers – who, based on comments to the regulations, were largely in favor of the regulations – does not render the regulations arbitrary and capricious. Finally, *amici* assert that the regulations violated the APA's notice-and-comment requirements by not adequately disclosing the IRS's analyses of the public comments in response to I.R.S. Notice 2009-60, 2009-2 C.B. 181. Under the APA's notice-and-comment requirements, "[a]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in its rulemaking]." *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (citation omitted). *Amici* have cited no authority (and we are aware of none) supporting their assertion that the "studies" that must

be revealed for public evaluation includes agency analysis of the public comments themselves.[11]

[11] In any event, the comments to IRS Notice 2009-60 were publicly available, posted (at that time) on the IRS webpage at www.irs.gov/taxpros/article/0,,id=212569,00.html, and are still available upon request.

CONCLUSION

For the reasons stated above, and in our opening brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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