

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

**THE GOVERNMENT’S REPLY TO APPELLEES’ RESPONSE TO THE
GOVERNMENT’S MOTION FOR A STAY PENDING APPEAL**

In their response to the Government’s motion for a stay, plaintiffs essentially ignore the Government’s actual arguments as to its likelihood of success on appeal, and distort the very real and irreparable harm that the Government and the taxpaying public face absent a stay. For the reasons set forth below and in our motion for a stay, the Government requests that this Court stay the District Court’s January 18, 2013 judgment (as modified on February 1, 2013), pending appeal.¹

¹ The Solicitor General recently authorized appeal in this case.

A. The Government has established the likelihood-of-success-on-appeal requirement

The Government has plainly met the requirement that it demonstrate that it has a strong likelihood of success on the merits. Consistent with the broad power of the Department of the Treasury (Treasury) to issue rules and regulations to implement its mandate, Congress equipped the Secretary of the Treasury with the authority to “regulate the practice of representatives of persons before the Department of the Treasury.” 31 U.S.C. § 330(a)(1). The Treasury relied upon this authority when issuing, after notice and a comment period, regulations governing the practice of paid tax-return preparers, who assist taxpayers in preparing federal tax returns for submission to the IRS. *See* 31 C.F.R. § 10.0, *et seq.*

As we explained in our stay motion (Mot. 8-10), 31 U.S.C. § 330(a)(1) does not define the term “practice of representatives,” and the District Court erred when it concluded that other statutory provisions resolved the inherent ambiguity of that term. The court relied on three textual grounds for this conclusion, but none suffices. Section 330(a)(2)(D), on which the court primarily relied, permits the Secretary of the Treasury, before admitting a representative to practice, to require that the representative make various showings, including demonstrating “competency to advise and assist persons in presenting their cases.” The court held that this grant of discretionary authority to the Secretary meant that only those representatives who helped their clients to present *cases* to the IRS were practicing before the agency. This holding is unfounded. By

describing in some detail the types of regulatory requirements that the Secretary *might* adopt in his discretion, Congress did not imply that every aspect of the statutory authorization would be germane to every covered representative. And it certainly did not establish, by means of plain and unambiguous statutory language, an intent to limit the term “practice of representatives” to individuals who assist others in presenting their cases to the Treasury, and to thereby exclude those representatives who prepare tax returns for their clients for submission to, and review by, the IRS. The court also relied on a purported overlap between 31 U.S.C. § 330 and various provisions of the Internal Revenue Code, which would allegedly result if the term “practice of representatives” includes paid tax-return preparation. But even if some redundancy would result from the Government’s interpretation, there is no statutory conflict that warrants the court’s restrictive interpretation of the term “practice of representatives.”

In response, plaintiffs simply assert that the District Court’s decision was correct for the reasons stated by the court in its opinion, but they fail to show any error in the Government’s analysis, focusing instead on positions that the Government has not taken. (Resp. 4-6.) Plaintiffs also assert that, although the District Court ruled that the Government had met its burden to show a substantial likelihood of success, this burden is heightened before this Court. (Resp. 4.) Plaintiffs offer no support for their contention in this regard, and this Court has explained that “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”

Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 844

(D.C. Cir. 1977) (internal quotations omitted).

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

The Government also demonstrated that it and the taxpaying public will be irreparably injured without a stay. As explained in our motion (Mot. 12-15), absent a stay, the IRS will essentially be forced 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.)² As explained in our motion (Mot. 14), there are hundreds of thousands of return preparers who are required under the regulations in issue to pass a competency exam and complete continuing education requirements for 2012 and 2013 that have not yet done so. Accordingly, absent a stay, even if this Court were to reverse the District Court’s decision before the end of this year, the IRS would face a flood of return preparers seeking to take the competency examination and complete the required continuing education courses by the current deadline of December 31, 2013. (Mot. 13-15.) In that circumstance, for practical reasons the IRS would likely be forced to extend the deadline for meeting the requirements of the

² “Campbell Decl.” refers to the Declaration of Carol A. Campbell, Director of the IRS Return Preparer Office, attached to our stay motion.

regulations, which, in turn, would delay the implementation of the regulatory regime for another entire tax filing season, *i.e.*, until the 2015 filing season (for the 2014 tax year).

(Campbell Decl. ¶¶ 19, 21.)³

Absent a stay, the injury resulting from the District Court's injunction will be irreparable. The regulations are intended to safeguard taxpayers from incompetent and unethical tax-return preparers, who *annually* cost the taxpaying public billions of dollars.⁴ (Campbell Decl. ¶ 17.) Thus, there is no merit to plaintiffs' flippant remark (Resp. 1, 8) that, because before the issuance of the regulations in question there was no regulation of return preparers for the prior 100 years, no harm would come to the Treasury or the taxpaying public from delaying the regulation of return preparers for one more year. The problem of unregulated return preparers obviously represents a major public concern. According to the IRS Oversight Board 2012 Taxpayer Attitude Survey, 93% of taxpayers surveyed indicated that it was either very important (77%) or somewhat important (16%) that paid tax-return preparers meet standards of competency to enter the tax preparation business. *See* IRS Oversight Board 2012 Taxpayer Attitude

³ Obviously, if this Court were to reverse the decision of the District Court after the close of this year, in the absence of a stay the IRS would be compelled to extend the December 31, 2013 deadline for complying with the regulations.

⁴ Plaintiffs assert in a series of footnotes that the Government's return-preparer initiative is directed at the incompetent, and that "only the PTIN program is directed toward fraud prevention." (Resp. 16.) Although the PTIN requirement is one tool in the fight against return-preparer fraud, the tax compliance and suitability checks promulgated as part of the return-preparer regulations also serve this end. *See* 31 C.F.R. § 10.5(d).

Survey at 10, 22, available at <http://www.treasury.gov/irsob/board-reports.shtml>.

Absent a stay, the District Court's injunction will delay the implementation of the protections afforded to taxpayers in the regulations and will result in significant harm to the Government and the taxpaying public.

Plaintiffs agree that the likely effect of the injunction will be to delay the implementation of the return-preparer regulations until the 2015 return-preparation season, but claim that this delay does not warrant a stay because the IRS "is taking at least four and a half years to roll out the RTRP scheme." (Resp. 8.) This argument is specious. The Government is currently suffering an injury because the injunction is blocking its implementation of the return-preparer regulations for the next tax season, and the full force of this injury will be felt on January 1, 2014, when the tax preparation season for tax year 2013 begins. The amount of time that the Government has spent thus far (in completing its review of the tax-return-preparation industry, soliciting public comments, issuing proposed regulations, giving another chance for the public (including plaintiffs' counsel) to comment, and then issuing final regulations) has absolutely no bearing on the irreparable injury that the Government and the taxpaying public will suffer absent a stay.

Plaintiffs also argue that the harm is not irreparable because, if the Government prevails on appeal, the IRS can "implement the RTRP regulations (if it prevails on appeal) just one year later than it would have otherwise." (Resp. 9.) This observation is

cold comfort, however, to taxpayers who will be forced to deal with incompetent or unethical tax-return preparers in the interim, since the IRS is currently enjoined from enforcing the return-preparer program that is designed to ensure competency and suitability in the preparation of tax returns. Return preparers, after all, are not mere scribes. Paid tax-return preparers are advising their clients about the tax law and how to report their clients' financial data to comply with the tax law. And a significant number of them are providing incompetent or unscrupulous advice, as the National Taxpayer Advocate has warned in her annual reports to Congress since 2002. *See, e.g.*, 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. And, as we have demonstrated, additional delay in implementing the regulatory scheme will result in billions of dollars in lost tax revenue. The harm to the Government from the District Court's injunction is palpable.

Plaintiffs spend the bulk of their response attempting to rebut the costs to the IRS that flow from the injunction. (Resp. 9-17.) Plaintiffs miss the mark: the principal irreparable injury to the Government (and to the taxpaying public) is that incompetent and unethical tax return preparers will continue to practice while the regulations are suspended. Plaintiffs themselves have implicitly conceded that, if the injunction remains in place, the IRS likely will not be able to fully implement the regulatory regime on January 1, 2014, as it intended to do, even if this Court ultimately upholds

the regulations' validity. (Resp. 8, n. 5.) The irreparable injury that will result from such a delay is directly attributable to the injunction issued by the District Court.

In any event, plaintiffs are incorrect as to the costs involved in restarting the return-preparer program. Contrary to plaintiffs' assertions, the regulatory program, which involves vendors, computer systems, and a sizable number of IRS employees, does not operate on a turnkey model. In the absence of a stay, the Government will have to expend significant costs in re-implementing the program, even if the Court upholds the validity of the regulations, (Campbell Decl. ¶¶ 6-14), as explained in our stay motion (Mot. 16-18). These costs, directly attributable to the District Court's injunction, further support a finding of irreparable injury.

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

None of the plaintiffs will incur any injury before the end of the year, if at all, if this Court stays the District Court's injunction. As explained in our motion, IRS Notice 2011-6 already permits plaintiffs to prepare returns until December 31, 2013, without passing the competency examination or becoming registered tax-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. Thus, because plaintiffs do not have to pass the competency test or fulfill the continuing education requirements of the regulations to prepare tax returns during 2013, the purported harm to them is non-existent.

Plaintiffs more broadly assert that the regulations impose considerable fees and time commitments on paid tax-return preparers. (Resp. 19-20.) But the instant case is not a class-action suit, and plaintiffs here represent only themselves and not the class of tax-return preparers who are subject to the regulations in question. Thus, plaintiffs' speculative assertions (Resp. 19) about the total costs that would be borne by return preparers – as a class – in complying with the regulations if a stay were granted have absolutely no bearing on the question whether *plaintiffs* here will be substantially harmed if a stay is granted.

Moreover, if a stay is granted, plaintiffs face only modest expenses in complying with the requirements of the regulations by the December 31, 2013 deadline, *i.e.*, a one-time, three-hour competency examination at any of 260 locations, which costs a total of \$116, and the expense of complying with the requirement that they complete 15 hours of continuing education every year. In this regard, the IRS itself offers webinars of qualifying continuing education on its website without charge. *See*

<http://www.irs.gov/Tax-Professionals/IRS-Sponsored-Continuing-Education-Programs>.

Plaintiffs' expenditures, comprised of the one-time \$116 competency-test fee and any continuing-education fees required, plainly do not outweigh the immediate injury that the Government and the tax administration will suffer if the injunction is not stayed.

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

Plaintiffs offer no support for their assertion that the irreparable injury to the United States fails to establish that the public interest will be served by a stay. As we have demonstrated, the taxpaying public, which overwhelmingly supports competency and ethics regulations, *see, e.g.*, IRS Oversight Board 2012 Taxpayer Attitude Survey at 10, 22, *supra*, 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 and in our motion for a stay, this Court should grant a stay of the District Court's judgment pending appeal.

Respectfully submitted,

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MARCH 2013

CERTIFICATE OF SERVICE

It is hereby certified that the Government's reply to appellees' response to the Government's motion for a stay pending appeal was filed with the Clerk and served on counsel for the appellees on this 14th day of March, 2013 via the CM/ECF system.

s/ PATRICK J. URDA
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