NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 15 SPRING 2019 NUMBER 2

D.C. CIRCUIT UPHOLDS IRS'S VOLUNTARY REGULATION OF TAX PREPARERS — MAJORITY HOLDS APA'S STATUTORY NOTICE AND COMMENT NOT REQUIRED: *AICPA V. IRS*

FRANK G. COLELLA*

INTRODUCTION 229
I. BACKGROUND 233
A. *Annual Filing Season Program* 233
B. *Administrative Procedure Act* 235
C. *District Court Decisions* 236
D. *D.C. Circuit Decisions* 238
1. *Majority Opinion* 238
2. *Dissenting Opinion* 239
II. ANALYSIS 240
A. *Standing to Challenge the AFSP* 240
B. *Statutory Authority to Promulgate the AFSP* 245
C. *Legislative v. Interpretive Rulemaking* 249
CONCLUSION 253

INTRODUCTION

In *American Institute of Certified Public Accountants* ("AICPA") *v. Internal Revenue Service* ("IRS"), the D.C. Circuit

* Frank G. Colella is an attorney, Clinical Professor of Legal Studies & Taxation, Pace University Lubin School of Business, and serves on the faculty of the International Management & Development Programme, Paris, France. L.L.M., New York University School of Law; J.D., Brooklyn Law School; B.B.A. (Bachelor of Business Administration), Pace University. The author is especially grateful to Patricia S. Colella, Esq., for her invaluable assistance in the preparation of this article.

for the District of Columbia Circuit ("D.C. Circuit") reversed[1] the District Court for the District of Columbia's ("District Court") dismissal and held, for a second time, that the AICPA had standing to challenge the IRS's promulgation of the Annual Filing Season Program ("AFSP" or "the Program").[2] The D.C. Circuit then went a step further and ruled on the merits of the AICPA's challenge to the IRS's rulemaking. It held that the IRS had the statutory authority to promulgate the voluntary program to enhance the skills of licensed tax return preparers. However, while the D.C. Circuit was unanimous on standing and the merits, it split two-to-one on whether the IRS had followed proper procedure when it adopted the AFSP without first providing the requisite "notice and comment" period required by the Administrative Procedures Act ("APA").[3]

The unusual decision to rule on the merits, instead of remanding the case to the District Court for further action, was made at the request of the AICPA, which had urged the Court to take this step because the case had already been remanded to, and dismissed by, the District Court twice. In its initial dismissal, the Court found that the AICPA lacked constitutional standing.[4] That dismissal order was reversed by the D.C. Circuit, which held the AICPA did, in fact, have Article III jurisdiction via "competitor" standing.[5] Upon remand, the District Court once again dismissed the action for lack of standing,[6] holding that despite having the *constitutional* standing, the AICPA did not meet the requirements for *prudential* standing, e.g., it failed to satisfy the zone-of-interests test. The D.C. Cir-

---

1. AICPA v. IRS (*AICPA IV*), No. 16-5256, 2018 WL 3893768, at *3 (D.C. Cir. 2018).

2. Rev. Proc. 2014-42, 2014-29 I.R.B. 192. *See infra* notes 18–25 and accompanying text.

3. Judge Griffith concurred in part and dissented in part. He argued in dissent that the IRS did not follow proper procedure when it adopted the AFSP without first providing for an opportunity for notice and comment, as required by the APA. He found that the AFSP was a legislative rule and, as such, the APA provisions governed. In all other respects, however, Judge Griffith agreed with the majority's analysis.

4. AICPA v. IRS (*AICPA I*), No. 12-1190, 2014 WL 5585334, at *1, *X (D.D.C. Oct. 27, 2014).

5. AICPA v. IRS (*AICPA II*), 804 F.3d 1193 (D.C. Cir. 2015).

6. AICPA v. IRS (*AICPA III*), 199 F. Supp. 3d 55 (D.D.C. 2016).

cuit reversed the second dismissal as well, concluding that the zone-of-interests test had also been satisfied by the AICPA.[7]

Since no factual matters were in dispute, the D.C. Circuit elected to address the merits of the challenge to the AFSP. The AICPA contended, *inter alia*, that the IRS did not have the statutory authority to adopt and implement the AFSP, a voluntary program that provides participating unlicensed tax preparers a limited right to represent clients before the IRS, and that the IRS failed to comply with the APA by promulgating the AFSP without notice and comment. Pursuant to the Program, the limited practice right is available upon the unenrolled preparer's successful completion of the AFSP requirements.[8] The AFSP was a direct consequence of the IRS's earlier effort to institute a mandatory program to regulate unlicensed tax preparers called the Registered Tax Return Preparer Program ("the RTRP Program").[9]

In *Loving v. IRS*, the District Court held that the effort to regulate tax preparers via the RTRP Program exceeded the IRS's statutory authority.[10] The *Loving* Court concluded that the RTRP Program went beyond the Service's statutory authority to "regulate practice before" the IRS and, accordingly, granted the plaintiffs injunctive relief.[11] The District Court subsequently denied the IRS's motion to stay the injunction and, thus, permanently enjoined the RTRP Program.[12]

---

7. *AICPA IV*, 2018 No. 16-5256, 2018 WL 3893768, at *7–8 (D.C. Cir. 2018).

8. The terms "unlicensed tax preparer," "unenrolled preparer," and "non-participant" are used interchangeably throughout. They refer to tax preparers who are not attorneys, CPAs, or enrolled agents—*and who elect not to participate in the AFSP*. After successful completion of the AFSP, the preparer is deemed to be a "participant" of the Program. Following adoption of the AFSP, the IRS withdrew the limited practice rights that unlicensed tax preparers had enjoyed prior to the adoption of the Program.

9. Rev. Proc. 2014-42, 2014-29 I.R.B. 192 ("[I]n 2011 the Treasury Department and the IRS published regulations . . . that established registered tax return preparers ("RTRPs") as a new category of practitioner and prohibited an individual who was not an attorney, CPA, EA [Enrolled Agent], or RTRP from preparing tax returns for compensation.").

10. Loving v. IRS (*Loving I*), 917 F. Supp. 2d 67 (D.D.C. 2013), *stay denied*, 920 F. Supp. 2d 108 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

11. *Loving I,* 917 F. Supp. 2d at 80–81.

12. Loving v. IRS (*Loving II*), 920 F. Supp. 2d 108, 111–12 (D.D.C. 2013). For a fuller discussion of the *Loving* decision, see Frank G. Colella, Loving *Is*

However, in *dictum*, the *Loving* court stated that it was "not requiring the IRS to dismantle its entire scheme. It may choose to retain the testing centers and some staff, as it is possible that some preparers may wish to take the exam or continuing education even if not required to. *Such voluntarily obtained credentials might distinguish them from other preparers*."[13] Except for the voluntary participation aspect, the AFSP is the functional equivalent in terms of requirements imposed on the participants, of its earlier, mandatory predecessor, the RTRP.[14] Participants who successfully complete the AFSP are listed in the IRS's online directory of tax preparers (among, *inter alia*, attorneys, CPAs, and enrolled agents) in addition to earning the limited practice rights.

Whether the IRS had the authority to adopt the voluntary AFSP (as contrasted with the mandatory RTRP enjoined by *Loving*) is a separate and distinct question from whether the Service adhered to proper procedure in promulgating the AFSP. That latter question, in turn, requires an examination of the nature of the rulemaking. If the rulemaking (in this case, a Revenue Procedure setting forth the AFSP) is legislative in nature, the statutory requirements of the APA must be complied with for the rule to be lawful. If the rulemaking is merely interpretive, the statutory notice and comment period is not required.[15]

It was on this critical point—whether the notice and comment requirements of the APA applied—that the three-judge panel in *ACIPA IV* disagreed. The majority held the IRS rulemaking was interpretive and, accordingly, no notice and comment was required. Conversely, Judge Griffith, in dissent, argued that the AFSP was legislative rulemaking and therefore

---

Affirmed: IRS Lacked Authority to Regulate Preparers, 143 TAX NOTES 371 (2014); and Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515 (2014).

13. *Loving II*, 920 F. Supp. 2d at 111 (emphasis added). This dicta was cited by the District Court in *AICPA III*, 199 F. Supp. 3d at 59 ("*Perhaps taking this clarification to heart*, the IRS decided to retain much of the rule's infrastructure, but did so by relying on tax preparers' willingness to voluntarily participate. It is this voluntary program that sits at the heart of the current suit." (emphasis added)). *See also infra* note 37.

14. *AICPA I*, No. 12-1190, 2014 WL 5585334, at *2 (D.D.C. Oct. 27, 2014) ("The criteria for participation are strikingly similar to the requirements of the 2011 Rule.").

15. *See infra* note 32 and accompanying text.

the IRS was bound by the APA to provide public notice and comment before it formally adopted the AFSP.[16] He agreed with the majority that the IRS had the authority to promulgate the AFSP, but its failure to provide notice and comment was fatal—and would have required *vacatur*.

This Article briefly reviews the statutory framework of the APA and the elements of the AFSP. It then reviews the four separate court opinions that have been issued. This Article then analyzes the three critical issues: standing, the merits of the challenge, and the dissent's contention that the APA requires notice and comment for this rulemaking. The article concludes that Judge Griffith's analysis is compelling and the IRS should have not have bypassed the notice and comment period in its rulemaking. Despite the unanimous holding on the merits of the AFSP, that glaring procedural defect warranted the critical remedy of remand and *vacatur*. Without it, future IRS rulemaking may be guided by the "no harm, no foul" mindset and result in an unfortunate erosion of the due process protections of the APA.[17]

I.
BACKGROUND

A. *Annual Filing Season Program*

Shortly after the *Loving* decision enjoined the mandatory regulation of unlicensed tax preparers, the IRS formally adopted the AFSP via Revenue Procedure[18] 2014-42.[19] It

16. *AICPA IV*, No. 16-5256, 2018 WL 3893768, at *12–14 (D.C. Cir. 2018).

17. *See generally* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008).

18. *See AICPA III*, 199 F. Supp. 3d at 59 ("Internal Revenue Manual 32.2.2.3.2 . . . [defines] 'Revenue Procedure' as 'an official statement of a procedure by the Service that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties, and regulations, or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.'").

19. Rev. Proc. 2014-42, 2014-29 I.R.B. 192 ("Until legislation is enacted, the Treasury Department and the IRS have established an Annual Filing Season Program designed to encourage tax return preparers who are not attorneys, CPAs, or EAs to improve their knowledge of federal tax law.").

promulgated the new voluntary program without the notice and comment required by the APA.[20] The AFSP described in Revenue Procedure 2014-42 is "voluntary and *no tax return preparer is required to participate*."[21] Upon the successful completion of the AFSP, participants earn a "Record of Completion" and are included in the IRS online database of tax preparers.[22] In addition, participants earn limited practice rights before the IRS. Those limited rights permit them to represent clients during audits of the tax returns that were prepared by the AFSP participants.[23]

The crux of the AFSP requires passage of a comprehensive test that covers general tax practice and then annual maintenance of a certain minimum level of continuing education via refresher courses. The applicant must also obtain a preparer tax identification number ("PTIN").[24] The Record of Completion is valid for one tax year, and may be renewed upon the completion of annual "refresher" courses. More importantly, in addition to the educational requirements, AFSP participants must consent to be governed by the rules of practice before the IRS contained in Circular 230.[25]

---

20. Despite not having provided for a formal opportunity for notice and comment, the IRS did receive some initial feedback: "While the AFSP was being developed, both the American Institute of Certified Public Accountants and the National Association of Enrolled Agents expressed to the IRS their doubts about the wisdom and legality of the initiative." Steve R. Johnson, *How Far Does Circular 230 Exceed Treasury's Statutory Authority?*, 146 TAX NOTES 221, 225 n.55 (2015).

21. Rev. Proc. 2014-42 (emphasis added).

22. *Id.*

23. *Id.*

24. The PTIN requirement has also resulted in litigation. A class action lawsuit, *Steele v. United States*, challenged the IRS's authority to require practitioners to obtain and pay for a PTIN in order to prepare tax returns. 260 F. Supp. 3d 52, 67–68 (D.D.C. 2017) ("In sum, the Court finds that although the IRS may require the use of PTINs, it may not charge fees for issuing PTINs."), *stay pending appeal denied*, 287 F. Supp. 3d 1 (2017). *See* Vincent R. Barrella & Walter G. Antognini, *PTINs and Tax Return Practice following* Steele, 96 TAXES 51 (2018).

25. The IRS explains those rules as follows:

> Circular 230 is the common name given to the body of regulations promulgated under the enabling statute found at Title 31, [U.S.C.] section 330. This statute and the body of regulations are the source of the OPR [Office of Professional Responsibility]'s authority. Circular 230 defines "practice" and who may practice before the IRS; describes a tax professional's duties and obligations while practic-

Circular 230 requirements govern practice before the IRS and apply, primarily, to attorneys, CPAs, and enrolled agents—the three principal groups of tax professionals that interact with the IRS. With the limited practice rights afforded to AFSP participants, the IRS created a fourth, albeit more limited, category: unenrolled agents with a Record of Completion.[26] This group of practitioners would become the focal point of the AICPA challenge to the program.

B. *Administrative Procedure Act*

The APA provides for judicial review of the rulemaking actions of administrative agencies.[27] The coverage of the APA specifically includes the "inaction" of an administrative agency; judicial review extends to "a claim that an agency or an officer or employee thereof acted *or failed to act* in an official capacity or under color of legal authority."[28] The APA does not, however, create any new substantive rights for the plaintiff beyond those that have already been statutorily committed to the agency. Likewise, the APA does not permit the award of monetary damages.

The AICPA sought judicial review of the IRS's failure to provide for the statutorily required public notice and comment before it promulgated the AFSP. Whenever an agency engages in "rulemaking," the APA requires that it first notify[29] the public of the proposed rule and provide any interested person the opportunity to comment[30] on the proposal. The agency is under no obligation to adopt any proposed changes or modifications that may be proffered by interested parties.[31]

---

ing before the IRS; authorizes specific sanctions for violations of the duties and obligations; and, describes the procedures that apply to administrative proceedings for discipline.

See Office of Prof'l Responsibility, *Frequently Asked Questions*, IRS, https://www.irs.gov/tax-professionals/frequently-asked-questions (last visited Oct. 20, 2018).

26. *AICPA III*, 199 F. Supp. 3d 55, 59 (D.D.C. 2016). Prior to the AFSP, all unlicensed preparers enjoyed limited practice rights.

27. 5 U.S.C. § 702 (1976). However, the APA does not create any additional judicial remedies if Congress has already provided adequate remedies for review of the action in question.

28. *Id.* (emphasis added).

29. 5 U.S.C. § 553(b) (1966).

30. 5 U.S.C. § 553(c) (1966).

31. *Id.*

The agency must provide for the statutory notice and comment unless an exception to the general rule applies. The APA provides that the notice and comment provisions do not apply "*to interpretative rules*, general statements of policy, or rules of agency organization, procedure, or practice."[32] Following this, the IRS asserted that the notice and comment requirement should be excused because the AFSP is merely an interpretive[33] rule. The AICPA argued that the IRS was not engaged in interpretive rulemaking; to the contrary, the AICPA asserted that the general rule was applicable because the rulemaking was—to use a judicially-created term of art—"legislative" in nature.[34]

C. *District Court Decisions*

The District Court twice ruled that the AICPA lacked standing to challenge the AFSP. Its first decision held that the AICPA lacked constitutional standing and thus it was not the proper aggrieved party to undertake the litigation.[35] The AICPA proffered three theories regarding the standing requirement.[36] All three rationales were rejected by the District Court and it concluded that the AICPA did not have the requisite standing and, accordingly, dismissed the action. The merits of the AICPA's challenge to the AFSP were not considered.

The D.C. Circuit reversed the District Court and held that the AICPA did, in fact, have "competitor" standing to maintain

---

32. 5 U.S.C. § section 553(b)(1)(3)(A) (1966) (emphasis added).

33. *See AICPA IV*, No. 16-5256, 2018 WL 3893768 (D.C. Cir. 2018) (using the terms "interpretative" and "interpretive" interchangeably).

34. *Id.* at *10 ("The AICPA argues the Revenue Procedure is a legislative rule and therefore had to be adopted through notice and comment rulemaking pursuant to the APA, 5 U.S.C. § 553.").

35. *AICPA I*, No. 12-1190, 2014 WL 5585334, at *4 (D.D.C. Oct. 27, 2014).

36. The three theories are:

> (1) "employ individuals [i.e., uncredentialed tax preparers] who will be injured by the additional regulatory burdens created by the AFS Rule"; (2) "will be directly injured by the AFS rule because it requires firms to 'take reasonable steps' to ensure that their newly regulated employees comply with Circular 230"; and (3) "will suffer injuries because the rule will cause confusion among consumers."

AICPA I, 2014 WL 5585334, at *3.

the action.[37] On remand, the District Court once again dismissed the AICPA's challenge, albeit on prudential standing grounds. Prudential standing is more properly viewed as a question of statutory interpretation, rather than a jurisdictional issue. The doctrine seeks to determine whether the challenged source of authority had envisioned the plaintiff's particular cause of action. If so, the plaintiff is within the zone of interests sought to be protected by the statute.

The District Court found that the relevant statutory authority relied upon by the IRS to promulgate the AFSP was contained in 31 U.S.C. § 330, which governs "Practice before the Department." The statute provides, in relevant part:

> [T]he Secretary of the Treasury may—
>
> (1) regulate the practice of representatives of persons before the Department of the Treasury; and
>
> (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.[38]

The District Court held that the primary purpose of this statute was focused on "consumer protection" and not the protection of tax professionals.[39] Whether this interpretation was correct—e.g., the statute is, in fact, indifferent to the concerns of tax professionals—would be revisited by the D.C. Circuit.

As a result of granting both of the IRS's motions to dismiss, the District Court did not ever reach the merits of the AICPA's position with regard to the IRS's authority to promul-

---

37. *AICPA II*, 804 F.3d 1193, 1194 (D.C. Cir. 2015) ("[W]e conclude that Appellant has adequately alleged the program will subject its members to an actual or imminent increase in competition and that it therefore has standing to pursue its challenge.").

38. 31 U.S.C.A. § 330 (West 2015).

39. *AICPA III*, 199 F. Supp. 3d 55, 69 (D.D.C. 2016) (identifying "Congress's purpose in enacting § 330(a) as one of consumer protection").

gate the AFSP.[40] This, in turn, led the AICPA to request in its brief to the D.C. Circuit, should the Court find the AICPA had satisfied the zone-of-interests test, not to remand the case back to the District Court for further consideration. Instead, since the question of the IRS's authority was a matter of law, the Court should decide the merits itself. The IRS opposed that request.

D. *D.C. Circuit Decisions*

The initial appeal to the D.C. Circuit resulted in a reversal of the District Court's first dismissal for lack of standing. On remand, however, despite the D.C. Circuit holding that the AICPA had standing, the IRS raised the "zone of interests" doctrine, which had not been considered in the earlier proceeding. As discussed above, the District Court agreed with the IRS position and, despite a significantly lower bar, concluded that the AICPA failed to allege any conceivable injury that fell within the zone of interests that section 330 was arguably meant to protect. Accordingly, the District Court again dismissed the AICPA's challenge to the AFSP, without reaching the merits. The District Court's second dismissal was, likewise, appealed to the D.C. Circuit for review.

1. *Majority Opinion*

When the case came before the D.C. Circuit for a second time, the judges once more revisited the question of standing to challenge the AFSP. With the constitutional standing question disposed of in its earlier opinion, the Court now focused its attention on the prudential and/or statutory interpretation nature of the zone-of-interests test. The three-judge panel unanimously held that the AICPA had properly alleged a cognizable injury, and that injury was within the contemplated zone of interests protected by the statute. Accordingly, the AICPA was properly before the Court with its challenge that

---

40. As one commentator has noted, had the Court actually reached the merits, it may have ruled in favor of the IRS. *See* Johnson, *supra* note 20, at 226 n.63 ("Although the district court did not reach the merits, the government might have won if it had. The same judge decided *Loving* and *AICPA*. In *Loving,* the judge had suggested in *dictum* that the IRS try a voluntary program, a fact the judge noted in *AICPA*."). *See also Loving II*, 920 F. Supp. 2d 108, 111 (D.D.C. 2013); *supra* note 13 and accompanying text.

sought to redress the injuries to its members from the adoption of the AFSP. The panel was unanimous on both branches of the jurisdiction inquiry.

In its second decision, the Court found that the scope of 31 U.S.C § 330 was much broader and more encompassing than the limited focus of "consumer protection" articulated by the District Court. That broader reading of the statute brought the AICPA within the contemplated zone of interests and, therefore, satisfied the prudential considerations of the test. Then, instead of remanding to the District Court, the Court decided the merits of the challenge directly. On the merits, the Court unanimously ruled in favor of the IRS.

2. *Dissenting Opinion*

The singular difference between the majority opinion and the dissent, albeit a significant one, was the characterization of the AFSP. The majority concluded that because the AFSP was voluntary in nature, it was an interpretive rule and outside the scope of the APA. The dissent, conversely, viewed the promulgation of the AFSP as a significant regulatory undertaking and, accordingly, found that it was legislative in nature. As such, the AFSP was squarely within the scope of the APA, and thus the IRS was required to comply with the notice and comment provisions of the APA to legally promulgate the AFSP. Because the IRS did not provide the requisite notice and comment, the dissent insisted, the AFSP was unlawful and should be vacated.

In reaching that conclusion, the dissent was not persuaded of the voluntary nature of the AFSP. The dissent noted that while participation in the program was voluntary for the individual preparer, it had two "binding" effects on other actors. For those who employed the participating unenrolled preparer, the level of supervisory burden was increased because of the application of Circular 230.[41] Those supervisors would now have an affirmative duty to ensure the AFSP participants they employ comply with the requirements of Circular 230.

For those tax preparers who elected not to participate in the AFSP, their limited practice rights were eliminated. They were no longer entitled to represent clients before the IRS in

41. *AICPA IV*, No. 16-5256, 2018 WL 3893768, at *3, *16 (D.C. Cir. 2018) (Griffith, J., concurring in part and dissenting in part).

any proceeding; only participating unenrolled preparers now had those limited rights. This changed the regulatory landscape. Prior to the adoption of the AFSP, all unlicensed tax preparers enjoyed limited practice rights. The removal of limited practice rights made the decision to opt-out of the AFSP a significantly costly one for the non-participant.

II.
ANALYSIS

This analysis reviews three major themes presented by the four opinions and one dissent. The majority of the judicial analyses, including all of the first three opinions, was solely focused on the question of standing. Article III standing and prudential standing were considered in detail, and the D.C. Circuit held that the AICPA met the requirements of both. In so holding, the Court significantly strengthened the competitor standing doctrine and provided a roadmap to increased associational challenges to IRS regulations.

On the merits, the D.C. Circuit reached the question of whether the IRS had the statutory authority to regulate unlicensed tax preparers, albeit under a voluntary system. It concluded, unanimously, that the IRS had such authority, despite having ruled in *Loving* that the IRS did not have the authority to impose the mandatory regulation of the tax preparation industry.

The majority also held that the IRS action was interpretive in nature and, accordingly, that notice and comment pursuant to the APA was not required. The dissent conversely argued that the AFSP was, despite voluntary participation, a legislative action specifically covered by the APA. Therefore, its promulgation without notice and comment was unlawful. The dissent agreed that the IRS had the authority to adopt the AFSP, but that its adoption was procedurally flawed.

A. *Standing to Challenge the AFSP*

The standing question received the most judicial attention, with the District Court twice dismissing the AICPA's challenge for lack of standing. The first decision concluded that the AICPA did not meet the requirements for associational standing, and thus failed to satisfy the fundamental Article III requirements for Constitutional standing. On remand, after

that decision had been reversed, the District Court again dismissed the AICPA's lawsuit, on what can be referred to as prudential standing grounds. This, too, was reversed by the D.C. Circuit. The common thread of the District Court's view was an exceedingly narrow one of the AICPA's ability to satisfy the standing doctrine because it was not harmed by the adoption of the AFSP.

Conversely, the D.C. Circuit took a more expansive view of both issues. It bears mention that before the D.C. Circuit issued the most recent decision and after the District Court dismissed the AICPA's lawsuit for a second time, the Tenth Circuit in *Rivera v. IRS*[42] dismissed a facial challenge to the AFSP on lack of standing grounds.[43] The *Rivera* decision held that the plaintiff failed to allege a cognizable injury that would meet the requirements for standing. The D.C. Circuit did not mention *Rivera* in its decision.

Fundamentally, under Article III of the U.S. Constitution, standing is a jurisdictional prerequisite that must be attained before a plaintiff is properly before the court. The plaintiff must prove that: (1) he has suffered an "injury in fact" that is concrete, particularized, and actual or imminent; (2) a causal connection exists between the injury and the conduct complained of; and (3) the injury will likely be redressed by a decision favorable to the plaintiff.[44]

When the plaintiff is an association (rather than an individual), the test is focused on whether any individual member

---

42. Rivera v. IRS, 708 F. App'x 508 (10th Cir. 2017).

43. In some respects, *Rivera* addressed a more direct standing question than the AICPA litigation (which concerned associational standing). The plaintiff in *Rivera* was a sole practitioner. However, the *Rivera* pleading contained mere conclusory statements and did not contain any facts that the plaintiff had suffered an injury as a consequence of the AFSP. *Id.* at 513. ("[T]he only allegation of injury [plaintiff] offers in the complaint to support this claim is that [plaintiff] is 'adversely affected and aggrieved by the AFSP.' This conclusory allegation merely repeats the elements of a cause of action . . . and thus is not sufficient to establish an injury in fact . . . let alone one that is concrete, particularized, and actual or imminent.") (citations omitted).

44. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). This often-cited Supreme Court decision articulates the judicial framework to test whether a plaintiff has standing to maintain a given legal action before the court.

of the association can satisfy the standing requirements.[45] If a given member of the association has Article III standing, then the association, derivatively, has what is referred to as associational standing and may maintain the action on behalf of its membership. The District Court was unpersuaded by the three arguments proffered by the AICPA. In particular, the Court was not convinced that the AICPA met the requirements for "competitor" standing, a doctrine that recognizes "injury" for standing purposes when government action increases the competitive playing field.[46] The Court found that the assertion of an increase in competition from program participants was "pure conjecture," not fact. Court also noted that "Plaintiff's speculative allegations that customers will utilize Program-participating unenrolled tax preparers instead of CPAs . . . do not bridge the 'gulf between . . . the 'imminent' injury that suffices and the merely 'conjectural' one that does not.'"[47]

But it was the very nature of the increased competition that the D.C. Circuit viewed differently. The creation of a fourth class of tax preparer, the unenrolled participant, to compete against the already established CPAs, attorneys, and enrolled agents who prepared tax returns, would intensify "competition as a result of the challenged government action."[48] It is this increased competitive environment resulting from the AFSP that generated the "injury" that permitted the AICPA to successfully assert standing—and maintain its challenge.

---

45. *AICPA I* explains this test in greater detail:

> When an organization is suing on behalf of its members, it must establish "representational" or "associational" standing. To do so, it needs to show that "(1) at least one of [its] members has standing to sue in her or his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit."

No. 12-1190, 2014 WL 5585334, at *4 (D.D.C. Oct. 27, 2014) (citations omitted).

46. *Id.* at *7 ("Increased competition stemming from governmental action can, under certain circumstances, provide a basis for standing.") (citing Sherley v. Sebelius, 610 F.3d 69, 73 (D.C. Cir. 2010)).

47. *Id.* at *8 (quoting Dek Energy Co. v. FERC, 248 F.3d 1192, 1195 (D.C. Cir. 2001)).

48. *AICPA II,* 804 F.3d 1193, 1194–95, 1197 (D.C. Cir. 2015).

More importantly, the D.C. Circuit dismissed the District Court's concern that the alleged increased competition was too speculative to secure standing. The Circuit court explained that "although the Institute has offered no evidence that the competitive harm has yet occurred, our precedent imposes no such requirement. 'Because increased competition almost surely injures a seller in one form or another, *he need not wait until allegedly illegal transactions hurt him competitively before challenging the . . . governmental decision* that increases competition.'"[49] This would appear to be the more realistic view of the doctrine; if the government changes the playing field as a result of its actions (e.g., increases competition), that is, in and of itself, harmful to the affected participants.

With the Article III standing issue resolved in favor of the AICPA, on remand the District Court took up the IRS's "zone of interests" challenge. Unfortunately, the D.C. Circuit had not reached this issue previously because it had not been raised at the initial hearing.[50] On remand, rather than address the merits of the challenge, the District Court agreed with the IRS that the AICPA was not within the zone of interests the statute sought to protect. Again, the court took an incredibly narrow view of a prudential standing doctrine to dismiss the AICPA's lawsuit.[51] This, in light of the D.C. Circuit reversal, was an unfortunate exercise of judicial economy.

The District Court inexplicitly decided not to revisit its initial conclusion that one of the proffered injuries suffered by the AICPA, the increased supervisory burden of unenrolled preparers who participate in the AFSP, could serve as a basis for meeting the zone-of-interests test. "In particular, the Court in AICPA I carefully considered Plaintiff's supervisory-harm argument and rejected it, concluding that, to the extent Plaintiff suffered any harm at all, it derived not from the AFS Program

---

49. *Id.* at 1198 (citing *Sherley*, 610 F.3d at 72) (emphasis added).

50. *AICPA III,* 199 F. Supp. 3d 55, 60 (D.D.C. 2016) ("[T]he court gave passing mention to an issue raised by the IRS for the first time on appeal—namely, that AICPA's 'grievance does not arguably fall within the zone of interests protected or regulated by the statutory provision it invokes.' But because 'the IRS never presented this argument to the district court,' the D.C. Circuit declined to address it." (citations omitted)).

51. *Id.* at 63 ("[I]t becomes clear that the only 'injury in fact' that has been affirmatively found to exist by either this Court or the D.C. Circuit is AICPA members' competitive injury resulting from brand dilution.").

but from supervisory obligations imposed by Circular 230. AICPA disagrees with that conclusion, but offers no convincing argument for why it must be revised."[52] Instead the District Court, on remand, chose to solely test whether the "competitive-harm-by-dilution" theory satisfied the zone-of-interests test.[53]

The District Court's unusually restrictive view of the zone-of-interests test is puzzling because the "test is not 'especially demanding.'"[54] A unanimous Supreme Court observed that: "It is 'perhaps more accurat[e],' though not very different as a practical matter, to say that the limitation *always* applies and is never negated, but that *our analysis of certain statutes will show that they protect a more-than-usually 'expan[sive]' range of interests.*"[55] Moreover, the Court observed, not only is the test "not especially demanding," but emphasized that "[i]n that context we have often 'conspicuously included the word "arguably" in the test to indicate that *the benefit of any doubt goes to the plaintiff,*' and have said that the test '*forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that"*' Congress authorized that plaintiff to sue."[56]

In applying the zone-of-interests test to the AICPA's proffered injuries, it would seem that that District Court reversed the admonishments the Supreme Court articulated in *Lexmark* and instead adopted a cramped and constricted view of its application to the litigants. The District Court went so far as to exclude consideration of the zone-of-interests analysis that included *persons regulated by the statute*, of which the AICPA's members were squarely within, and singularly focused on those whom the statute sought to *protect*. Despite the District Court's focus, the D.C. Circuit found that the AICPA members

52. *Id.* at 63–64 (citation omitted).

53. *Id.* at 64 ("Given that the zone-of-interests test may only be satisfied by an extant Article III injury, the competitive-harm-by-brand-dilution injury is thus the only relevant "grievance" for determining whether AICPA satisfies the zone-of-interests test.") (citation omitted).

54. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014) (citation omitted).

55. *Id.* at 129–30 (emphasis added) (citation omitted).

56. *Id.* at 130, 134 S. Ct. at 1389 (emphasis added) (citation omitted).

were regulated (albeit indirectly) by the statute[57]—and thus squarely within the zone of interests.[58]

It concluded the standing analysis with the succinct observation that: "Because the AICPA has a grievance that supplies both constitutional and statutory standing, we need not consider its alternative argument that it has statutory standing by virtue of its members' grievance as competitors to unenrolled preparers with a credential issued by the IRS."[59] Although the District Court had concluded that the AICPA had failed to establish that it had standing as a competitor, the D.C. Circuit found it unnecessary to resolve that point.

B. *Statutory Authority to Promulgate the AFSP*

Surprisingly, despite all the attention given to the standing question across four separate decisions, the D.C. Circuit disposed of the merits issue, e.g., whether the IRS, in fact, had the statutory authority to adopt the AFSP, in a scant three pages.[60] The Court relied on 31 U.S.C. § 330(a), which permits the IRS to "'[r]egulate the practice of representatives . . .' and to admit to practice only individuals of good character and good reputation, who have the necessary qualifications and competence."[61] It was this statutory underpinning that supported the voluntary AFSP.

The D.C. Circuit had held, in *Loving*, that this code section did not authorize the IRS to create and implement a mandatory program to regulate unlicensed tax preparers. Predictably, the AICPA argued that the Court's analysis in *Loving*

---

57. *AICPA IV*, No. 16-5256, 2018 WL 3893768, at *7–8 (D.C. Cir. 2018) (D.C. Cir. 2018). By holding that the AICPA members were regulated by the statute, the Court did not reach the District Court's conclusion that the statute did not "protect" the interest of the AICPA. *Id.* at *8.

58. *See id.* ("The IRS argues AICPA members are not regulated by the Program and therefore have no interest in avoiding regulation. We disagree; as we explained when assessing the AICPA's constitutional standing, the Program regulates AICPA members, albeit indirectly, by imposing supervisory duties on them.").

59. *Id.*

60. *Id.*

61. *Id.* at *8. The Court, in addition, noted that IRC section 7803(a)(2)(A) "grants the . . . IRS 'the power to administer, manage, conduct, direct, and supervise the execution of the and application of the internal revenue laws or related statutes,' which obviously includes section 330(a)." *Id.* at *8–9.

also applied to a voluntary program to regulate unlicensed tax preparers. The Court, surprisingly, was unpersuaded that its earlier opinion was relevant to these particular facts. Rather, it argued that nothing in the Program attempted to "resurrect regulations of the type that it enjoined in the *Loving* decisions. Unenrolled tax preparers who participate[d] in the program 'consent[ed] to be subject to the duties and restrictions relating to practice before the IRS in Circular 230,'; they d[id] not consent to be governed by Circular 230 insofar as they [were] engaged in the business of tax preparation."[62] Accordingly, it reached the opposite conclusion with respect to IRS authority where a similar, but *voluntary* program, was promulgated pursuant to the same statute.[63]

But the majority view, *ispo dixit*, that the voluntary nature of participation in the AFSP distinguishes it from the mandatory program considered in *Loving* is far from persuasive. One glaring omission from its analysis was the impact the rulemaking had on tax practitioners who elected not to participate in the Program. It is difficult (if not disingenuous) to argue a program is voluntary if failing to volunteer results in what is effectively punishment.[64] At a bare minimum, under the AFSP, non-participating tax preparers lost the limited practice right that they had previously enjoyed.

The court was on more solid ground upholding the educational objectives of the Program. It reasoned that: "Consistent with its authority under § 330(a) . . . the IRS uses the edu-

---

62. *Id.* at *9 (citation omitted). However, the District Court specifically took note of the similarities between the two programs. *See supra* note 14 and accompanying text. It was somewhat disingenuous for the Circuit Court to find that the programs are similar for standing purposes, but then dissimilar when considering the merits.

63. It should be noted that the three judges who decided *Loving v. IRS (Loving III)*, 742 F.3d 1013 (D.C. Cir. 2014), in 2014 were different from the three judges who decided *AICPA IV* in 2018. *Compare Loving III*, 742 F.3d 1013 (Judges Kavanaugh, Williams, and Sentelle), *with AICPA IV*, 2018 WL 3893768 (Judges Rogers, Griffith, and Ginsburg).

64. *See* Johnson, *supra* note 20, at 228 ("If a return preparer does not voluntarily satisfy the requirements of the AFSP, the IRS will withhold from her a certificate of completion, recognition on the IRS website, and representation privileges. Could those consequences be considered sanctions? The APA defines sanction broadly, to encompass deprivation of freedom, imposition of a fine, seizure of property, denial of a license, or 'taking other compulsory or restrictive action.").

cation, testing, and certification portions of the Program to ensure the unenrolled preparers who participate demonstrate the qualifications and competence necessary to practice before the agency."[65] However, while this observation is correct, and framed in such a manner the AFSP would be within the statutory authority available to the IRS, the court did not address the consequences of having participating unenrolled preparers added to the existing tax preparation marketplace. In other words, the court took a decidedly different view of the IRS's impact on the market than it did in *Loving*.

In *Loving*, the D.C. Circuit considered six factors and held each militated against the IRS's assertion that it had the authority, pursuant to 31 U.S.C. § 330, to impose a mandatory regulatory scheme covering unlicensed tax preparers. It is the fifth factor that is most instructive in reviewing the claimed authority to implement a voluntary program. As the Circuit Court pointed out, "[f]ifth is the nature and scope of the authority being claimed by the IRS. The Supreme Court has stated that courts should *not* lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies."[66]

In addition to the CPA, attorney, and enrolled agent, the IRS has inserted into the mix the participating unenrolled preparer who has earned a Record of Completion and is listed in the IRS database of tax preparers.[67] The D.C. Circuit did not mention what economic impact, if any, this "fifth factor" had in its conclusion that the AFSP was within the IRS's statutory authority.[68]

---

65. *AICPA IV*, 2018 WL 3893768, at *6.

66. *Loving III*, 742 F.3d at 1021 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.")) (emphasis added). *See also supra* notes 10–12 and accompanying text.

67. *See supra* notes 13–14 and accompanying text.

68. In *Loving*, the Court observed: "If we were to accept the IRS's interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority". *Loving III*, 742 F.3d at 1021 (emphasis added). That exact admonition would also seem to apply here, despite the "voluntary" nature of the AFSP.

Separately the Court held that IRC section 7803(a)(2)(A)[69] provided the IRS with the necessary authority to list the participants with a Record of Completion in its database. "Section 7803(a)(2)(A) is, however, relevant to the case because it is what authorizes the IRS to publish the public directory of individuals who hold a Record of Completion, an administrative step analytically distinct from the creation of the published data."[70] Assuming that the IRS can prescribe the educational and testing requirements that lead to a Record of Completion, the economic impact of that credential, if any, should have been considered as part of the Court's own "fifth factor" in determining whether "publicity" is within the IRS's scope of authority.

As the Court observed, publication of the Record of Completion is a distinct step from the requirements to earn the Record of Completion.[71] It can also be argued that the IRS can offer and provide unlicensed tax preparers the educational programs without the AFSP inducements. That would, of course, significantly diminish the attractiveness of the AFSP. However, such a basic continuing educational program would impose a significantly less intrusive impact on the business of tax preparation.

This particular line of inquiry could have been explored on a remand to the District Court. Specifically, the remand could have sought to focus the court's attention on the additional fact-finding needed to determine what degree of economic impact the AFSP has had on the tax preparation business. If its economic impact is minimal, the IRS should continue the program. If, however, the impact on the industry is meaningful, it should be tested against the "fifth factor" articulated in *Loving*.

---

69. The Code provides that "[d]uties The Commissioner shall have such duties and powers as the Secretary may prescribe, including the power to—(A) administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party." I.R.C. § 7803(a)(2)(A) (West 2015).

70. *AICPA IV*, 2018 WL 3893768, at *10.

71. Again, it can be argued that this "distinct" provision of the AFSP can be viewed as a "sanction" against non-participating tax preparers if it results in adverse publicity (vis-a-vis unenrolled agents listed in the database) for not participating in the AFSP. *See* Johnson, *supra* note 20, at 228 n.89 (2015) ("Under some circumstances, adverse publicity can constitute a Sanction.").

C. *Legislative v. Interpretive Rulemaking*

Finally, while the panel agreed that the AICPA had standing and the judges were unanimous that the IRS had statutory authority to adopt the AFSP, Judge Griffith disagreed on whether the notice and comment provisions of the APA applied to the rulemaking. His conclusion that it did apply rested on the belief that the AFSP was more than a simple interpretive rule, as held by the majority. His analysis concluded that the AFSP was legislative in nature and, thus, squarely within the APA's notice and comment requirements for agency rulemaking.[72]

The majority began its analysis with the observation that "an agency action constitutes a legislative rule only if 'the agency action binds private parties or the agency itself with the "force of law"' . . . and 'an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding.'"[73] The majority then concluded that the AFSP did not bind unenrolled agents "at all"—it "merely provides an opportunity for those unenrolled preparers who both choose to participate and satisfy its requirements."[74]

The dissent took issue with the conclusion that it was nonbinding because participants voluntarily opt to comply with the program requirements. Judge Griffith relied on the majority's standing analysis to underscore the impact on practitioners who supervise unenrolled preparers. Specifically, he pointed out that "[e]ven assuming that this voluntary aspect of the Program means that it does not bind participating unenrolled preparers, the majority's analysis overlooks at least two other classes of regulated entities affected by the Program's existence: supervisors and non-participating unenrol-

---

72. Notably, the 2011 program, which was enjoined by *Loving I*, had, in fact, provided for notice and comment pursuant to the requirements of the APA. 917 F. Supp. 2d 67, 71 (D.D.C. 2013). *See* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011) (final rule); *see also* Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,713 (Aug. 23, 2010) (proposed rule).

73. *AICPA IV*, 2018 WL 3893768, at *10 (citations omitted). In his dissent, Judge Griffith articulated the definition of a legislative rule as follows: "Stated most succinctly, the defining characteristic of a legislative rule is that it carries the 'force and effect of law.'" *Id.* at *14 (citations omitted).

74. *Id.* at *14.

led preparers."[75] He then discussed the impact of the AFSP on non-participants, namely revoking the limited practice rights they enjoyed before the program was adopted.

As to supervisory personnel, the majority insisted that the program did not "impose any new or different requirement upon" them.[76] It noted that "Circular 230 bound supervisors and unenrolled agents before the Program took effect and continues to bind them now."[77] In essence, the majority argued that the application of Circular 230, whether to new participants in the AFSP or pre-program unlicensed preparers who enjoyed the newly "restricted" limited practice rights, did not change the obligations imposed on supervisors. Notably, however, the majority did not discuss the increased supervisory responsibilities that it pointed out when it considered the standing issue.[78]

As Judge Griffith countered in his dissent that a participant's "consent" to be bound by Circular 230 "triggers another provision in Circular 230 applying to supervisors, who must then 'take reasonable steps' to ensure that participating unenrolled preparers comply with the Circular. Any supervisor that fails to fulfill that duty 'will be subject to discipline,' including suspension, disbarment, disqualification, or monetary penalties."[79] The imposition of discipline or monetary penalties on supervisors is not inconsequential. The AFSP imposes both obligations and alters the regulatory scheme.[80]

As a consequence of the new obligations and changes to the regulatory framework, Judge Griffith concluded the rulemaking was legislative. He noted that "[s]uch an effect makes the Program a quintessential legislative rule; that unenrolled preparers participate in the Program by choice

---

75. *Id.*

76. *Id.* at *10.

77. *Id.* The majority included a footnote to address Judge Griffith's argument that the AFSP imposed "significant new obligations on unenrolled preparers and their supervisors." *Id.* at *10 n.2.

78. There is a certain degree of irony in the majority's observation that, in the "standing" context, "[s]ome members of the AICPA are injured by the Program because it imposes *new* supervisory responsibilities on them." *Id.* at *14 (emphasis added).

79. *Id.* at *14 (citation omitted).

80. *Id.* at *14–15 ("Legislative rules 'grant rights' or 'impose obligations' on private interests . . . or otherwise 'effect a substantive . . . change to the . . . regulatory regime.'" (citation omitted)).

does not diminish its mandatory regulatory effect on others."[81] Since the AFSP imposes duties on supervisors when a participant "opts in" to Circular 230, it therefore has a "binding" effect on a third party, namely, the individual responsible for supervision of the enrolled preparer.

Judge Griffith also found that the program's impact on non-participating tax preparers was significant. A non-participant no longer enjoys the limited practice rights that had been available to them *before* the adoption of the AFSP. If a non-participating tax preparer were to represent a client at an IRS audit, for example, without AFSP limited practice rights, such representation could result in adverse consequences. Judge Griffith wrote:

> [I]f that preparer proceeds to represent the taxpayer anyway, he will be subject to sanctions under Circular 230. Even though the Program implies that only participating preparers will be subject to the duties and restrictions in Circular 230 . . . that is only because the Program limits the universe of unenrolled preparers who represent taxpayers before the IRS to Program participants. *There is no reason to think the Program exempts from discipline preparers who represent taxpayers without authorization.*[82]

Judge Griffith then described the potential consequences of "unauthorized" practice (e.g., non-participation in the AFSP) by an unenrolled preparer:

> Since at least 1981, the IRS has subjected all unenrolled preparers who appear before the agency to section 10.51[83] of Circular 230. And section 10.51 prohibits the willful representation of taxpayers before the IRS without the Service's authorization. A non-participating preparer who represents a taxpayer after the Program's effective date will violate section

81. *Id.* at *15.

82. *Id.* (emphasis added).

83. Circular 230 provides: "Incompetence and disreputable conduct for which a practitioner may be sanctioned under section 10.50 includes, but is not limited to . . . [w]illfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part." 31 C.F.R. § 10.51 (2017).

10.51 *and be subject to sanctions that include censure, suspension, disbarment, and monetary penalties.*[84]

These adverse consequences would give pause to an unlicensed preparer who wants to represent clients before the IRS, at least in connection with audits of tax returns.

Judge Griffith was unpersuaded by the majority's insistence that the AFSP did not impose "'new or different' requirements because 'Circular 230 bound supervisors and unenrolled [preparers] before the Program took effect.'"[85] He pointedly observed: "[a]lthough unenrolled preparers have had to comply with section 10.51 of Circular 230 since at least 1981 . . . *only* by participating in the Program are unenrolled preparers subject to the entirety of subpart B, which includes a host of additional duties not included in section 10.51."[86] Furthermore, echoing the standing analysis, which explicitly found that the AFSP imposed "new" supervisory duties on employers of participating unenrolled preparers, Judge Griffith wrote: "[a]nd even if those duties in subpart B are voluntarily assumed by participating preparers, they involuntarily change the supervisory obligations imposed on AICPA members."[87]

In other words, "[b]efore the Program, supervisors of unenrolled preparers who did only tax preparation had no Circular 230 supervisory duties. Now, those duties apply to supervisors of all participating unenrolled preparers."[88] Judge Griffith went on to discuss how the denial of limited practice rights to non-participants was essentially a legislative characteristic of rulemaking. Finally, he concluded that the interpretation of "competency" pursuant to the IRS's authority under U.S.C. section 330(b) was, in fact, legislative in nature. By specifically delineating the "requirements" of competent

84. *AICPA IV*, 2018 WL 3893768, at *15 ("In sum, non-participating unenrolled preparers are prohibited from representing taxpayers before the IRS, and that prohibition is backed up by significant penalties.") (emphasis added).

85. *Id.* at *15 (quoting from majority opinion).

86. *Id.* (emphasis in original).

87. *Id.* at *15–16 ("[B]ecause of the Program, AICPA members must supervise unenrolled preparers' adherence to portions of Circular 230 that never before regulated them.").

88. *Id.* at *16.

preparers, the IRS was actually engaged in legislating, not merely interpreting the statute, as the majority concluded.[89]

As a consequence of finding that the AFSP was legislative rulemaking, Judge Griffin would have remanded the case back to the district court with instructions that it enter an order vacating the Program. In some instances, courts can choose to remand the case, without *vacatur*.[90] Since the Court unanimously held, on the merits, that the IRS had the statutory authority to promulgate the AFSP, this case may have presented such an opportunity.[91] But, given the IRS's conduct in promulgating the AFSP, a remand without vacating the rulemaking would not be appropriate. Judge Griffith emphasized the point: "the court typically vacates rules when *an agency 'entirely fail[s]' to provide notice and comment*."[92]

Conclusion

One significant positive outcome from the ruling on the merits is that the IRS can continue to employ the carrot to encourage the improvement of the unlicensed tax preparer's skill set. This undoubtedly works to the overall benefit of taxpayers because they will have access to an expanded database of trained return preparers via the AFSP. In addition to the traditional pool of lawyers, CPAs, and enrolled agents, taxpayers now have a fourth possibility—they can opt for a participant in the AFSP. While not as experienced as the former types of tax preparers, the newly minted AFSP participant

89. *Id.* at *21–22.

90. Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278 (2005).

91. *Cf.* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002) ("Appellants insist that we have no discretion in the matter; if the Department violated the APA—which it did—its actions must be vacated. But that is simply not the law. Instead, '[t]he decision whether to vacate depends on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."'").

92. *AICPA IV*, 2018 WL 3893768, at *22 (quoting Daimler Trucks N. Am. LLC v. EPA, 737 F.3d 95, 103 (D.C. Cir. 2013) (first alteration in original) (quoting Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991))) (emphasis added).

would presumably be a step up from the typical unlicensed tax preparer.[93]

In the wake of *Loving*, which detailed the numerous statutory penalties available to police the practices of unlicensed tax preparers[94] (as well as the potential for civil litigation via malpractice actions), the main incentive to ensure compliance with the tax code was the fear of penalties. By permitting the IRS to continue the AFSP, the D.C. Circuit has ensured that, in addition to the existing statutory framework to punish poorly preforming tax preparers, the voluntary program will increase the pool of better educated tax preparers and result in improved levels of taxpayer compliance.

However, given the D.C. Circuit directly ruled on the merits of the AICPA's challenge to the IRS's statutory authority to promulgate the AFSP, and held that the Program was within the IRS's authority, Judge Griffith's dissent on the applicability of the APA is somewhat puzzling. He makes a compelling argument that the AFSP was legislative rulemaking and subject to the notice and comment requirements of the APA. But he also joined the majority, which unanimously concluded that the IRS had the statutory authority to implement the voluntary Program. Assuming, *arguendo*, that the rulemaking was legislative in nature, as the dissent contended, the court should have remanded with instructions to vacate the AFSP. To not do so, even where the IRS's rulemaking authority was not in question, significantly undermines the public policy imperatives of the APA.

If the Court does not hold the IRS accountable for the basic procedural requirements of the APA, it calls into question the meaningfulness of the legislative–interpretive dichotomy, or the rationale for requiring a notice and comment pe-

---

93. Rev. Proc. 2014-42, 2014-29 I.R.B. 192 ("An unenrolled tax return preparer who successfully completes continuing education courses related to federal tax law will generally have a better understanding of the tax law necessary to represent a taxpayer before the IRS during an examination than an unenrolled individual who has not taken any continuing education courses related to federal tax law.").

94. *Loving I*, 917 F. Supp. 2d 67, 76 (D.D.C. 2013) ("Congress has already enacted a relatively rigid penalty scheme to punish misdeeds by tax-return preparers. Title 26, in fact, has at least ten penalties *specific to tax-return preparers,* each of which targets particular conduct related to preparing and filing tax returns, and each of which comes with a specific fine." (emphasis in original)).

riod at all.[95] Even if the nature of the AFSP was a close question, and given Judge Griffith's compelling analysis it should not be one, the benefit of the doubt should weigh in favor of requiring an administrative agency to provide an opportunity for notice and comment. Moreover, since the APA's default position requires notice and comment, and dispensing with it is an exception to that general rule, the proponent (IRS) should carry the burden of justifying that its adoption of the AFSP without notice and comment is within the exception.

95. Judge Griffith's position, in an elegant nutshell, is as follows: "Because I believe the majority's approach fails to protect one of the APA's key procedural safeguards, I respectfully dissent." *AICPA IV*, 2018 WL 3893768, at *23.