FUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BAR ASSOCIATION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

Civil Action No. 16-2476-TJK

DEFENDANTS' OPPOSITION TO PLAINTIFF AMERICAN BAR ASSOCIATION'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff the American Bar Association ("ABA") brought this suit, along with four individual lawyers, alleging its employees should qualify for participation in the Public Service Loan Forgiveness Program ("PSLF" or "PSLF Program"). The PSLF Program, which was enacted in 2007, forgives the remaining balance of a borrower's Federal Direct student loans if the borrower has made 120 qualifying payments after October 1, 2007 towards their student debt while employed at a qualifying public service organization. The ABA believes it is such an organization, and now, at the eleventh-hour, demands preliminary relief.

The ABA filed its complaint in December 2016 and litigated this case in the ordinary course for more than a year-and-a-half. The Department prepared an administrative record, and the parties completed summary judgment briefing on September 8, 2017. Since that time, the ABA filed various motions to prod a ruling on the summary judgment motions from the Court, but at no point did it seek preliminary injunctive relief.

After twenty months of litigating this case, the ABA filed this motion, claiming, for the first time, that a preliminary injunction is required to prevent imminent harm. However, the ABA has failed to satisfy the high bar required for this extraordinary relief.

For the reasons fully explained in the parties' summary judgment motions, the ABA is unlikely to succeed on the merits. The ABA challenges provisional guidance provided by the Department or its PSLF servicer, but these determinations are not final for the purposes of a challenge under the Administrative Procedure Act ("APA"). The Department's interpretation of its 2008 Final Rule regarding PSLF, among other things,

reasonably cabins the definition of public service organizations to exclude organizations for which public service is only a small part of their operations. And the ABA's claims of a changed interpretation or retroactive application are unavailing because the ABA cannot point to these non-final determinations as a prior interpretation by the Department.

In addition to its merits-related shortcomings, the ABA's motion is flawed because it does not demonstrate that the ABA will suffer imminent irreparable harm in the absence of preliminary injunctive relief. Though the ABA focuses on the alleged harm suffered by one of its projects, it never asserts that the organization as a whole is suffering irreparable injury. Moreover, since the very inception of this case, the ABA has alleged that uncertainty as to its status under the PSLF Program harms certain of its projects' ability to recruit and retain qualified attorneys. The ABA does not explain why, then, it litigated this case for more than 20 months before it first suggested that preliminary injunctive relief was required.

Further, there is no reason to believe that a preliminary injunction at this stage, when summary judgment motions are fully briefed and pending, would materially alleviate this uncertainty because, even with an injunction, prospective and current ABA employees still would lack clarity as to how the Court will ultimately rule. And, in fact, an injunction would impose substantial burdens on the Department's administration of the PSLF program, without giving the ABA the "guarantee" it is seeking for its employees. Accordingly, the Court should deny the ABA's motion for a preliminary injunction.

STATUTORY AND REGULATORY BACKGROUND

A. The Statute and Regulation

The College Cost Reduction and Access Act of 2007 ("CCRAA") amended the Higher Education Act of 1965 to create a new Public Service Loan Forgiveness Program ("PSLF") as part of the William D. Ford Direct Loan ("Direct Loan") Program.[1] Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 37,694, 37,695 (proposed July 1, 2008), AR 4. Specifically, the CCRAA amended 20 U.S.C. § 1087e(m) to include language directing the Secretary of Education to "cancel the balance of interest and principal due . . . on any eligible Federal Direct Loan not in default" for borrowers who meet certain eligibility criteria. Among these eligibility criteria is a requirement that a borrower be employed in a "public service job" at the time of the application for forgiveness, at the time of forgiveness, and at the time each of 120 monthly payments were made. The statute defines a "public service job" as "a full-time job" in certain, defined categories including government, military service, law enforcement, public health, public education, public interest law services, social work in a public family service agency, and other types of jobs typically associated with serving the public interest. 20 U.S.C. § 1087e(m)(3)(B).

The Department subsequently developed a proposed regulation to "implement the basic statutory framework for" PSLF. 73 Fed. Reg. 37,704, AR 13. The proposed

[1] Defendants' Memorandum in support of their Motion for Summary Judgment (ECF No. 22) describes the statutory and regulatory background of the PSLF program. Defendants refer the Court to that document, which they incorporate here, for a full explanation of the relevant background.

regulations were developed using a negotiated rulemaking committee, which included representatives of organizations and individuals that have an interest in the Direct Loan Program. *Id.* The committee and the Department concluded that rather than "defin[ing] specific job types that might qualify" as a public service job, "it would be clearer and more efficient to define the types of organizations that would qualify as eligible employers" for purposes of PSLF. *Id.* The Department determined that the PSLF program would "base eligibility for [loan] forgiveness on the type of organization that employs the borrower," rather than on whether a specific employment position or job duties met the definition of "public service jobs." *Id.* (emphasis added); *see also* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232, 63,242 (Oct. 23, 2008), AR 46 (explaining that the definition of "public service organization" "is intended to identify broad categories of eligible jobs rather than define specific jobs under those categories"). Accordingly, it proposed defining "public service job" as full-time employment within certain defined "public service organizations." *Id.* at 37,704-05, AR 13-14.

The resulting Final Rule, codified at 34 C.F.R. § 685.219, sets forth the eligibility criteria for the PSLF program. A borrower may obtain loan forgiveness if she is not in default on the loan, has made 120 payments after October 1, 2007 under certain payment plans, and "is employed full-time by a public service organization" at the time each of the 120 payments are made, at the time of applying for loan forgiveness, and at the time of forgiveness. *Id.* § 685.219(c). The rule defines "public service organization" to include, in relevant part, a "private organization that [p]rovides" certain enumerated "public services"—including "public service for individuals with disabilities and the elderly,"

"public interest law services," and "public education"—and that it is "not a business organized for profit, a labor union, a partisan political organization, or an organization engaged in religious activities." *Id.* § 685.219(b). "Public interest law" was further defined as "legal services provided by a public service organization that are funded in whole or in part by a local State, Federal, or Tribal government." *Id.*

In issuing the Final Rule, the Department recognized that it might need to make individual determinations regarding the eligibility of some private organizations that might receive government funding in exchange for providing some public services. The Department emphasized that it "continue[d] to believe that the term 'public sector jobs' does not encompass every job." 73 Fed. Reg. 63,243, AR 47. Rather, the "nature of the employer and the funding source of salaries are appropriate considerations." *Id*. As the agency further explains in its Frequently Asked Questions on the PSLF, "[t]he specific job that [a borrower] perform[s] does not matter," because eligibility turns on whether the borrower is "employed by an eligible public service organization." AR 175.

After making the 120 qualifying payments, a borrower may apply for loan forgiveness. 34 C.F.R. § 685.219(e)(1). At that time, the Secretary determines if "the borrower meets the eligibility requirements for loan forgiveness under this section," *id.* § 685.219(e)(2), including whether the borrower was employed at a qualifying public service organization at the time the 120 payments were made, *id.* § 685.219(c)(1)(ii)(A). If the Secretary determines the borrower has, she "[n]otifies the borrower of this determination;" if she determines the borrower has not, she "notif[ies] the borrower that the application has been denied, provides the basis for the denial, and informs the borrower that the Secretary will resume collection of the loan." *Id.* § 685.219(e)(2)-(3).

B. The ECF Process

During the rulemaking process for the Final Rule, the Department declined to accept the recommendation of some of the negotiated rulemaking committee members and certain commenters that it create a process to provide early certifications during the 120-month payment period. 73 Fed. Reg. 37,705, AR 14; 73 Fed. Reg. 63,241-42, AR 45-46. These committee members and commenters pushed the Department to incorporate into the regulations a system to certify eligibility along the way to ensure that borrowers would "not be left in the dark regarding whether they would qualify for loan forgiveness by applying and documenting their eligibility after 10 years of service and repayment" and because "ongoing information is important for the borrower's career and financial decisions." *See* 73 Fed. Reg. 63,241, AR 45.

The Department declined to adopt the suggestion and instead committed to "continue to examine ways to assist borrowers who are interested in, or already employed in public service, to determine and document their eligibility for the loan forgiveness program." *Id*. The Department discussed how it would develop an application form to be used by borrowers at the time they apply for loan forgiveness that would document all the necessary information to establish eligibility, including employer information. *Id*. The Department further made clear that it "expects the borrower to collect and retain the necessary records that support the borrower's eligibility for this benefit." 73 Fed. Reg. 63,242, AR 46.

In lieu of an early certification process, the Department set up a process by which a borrower can request guidance prior to the end of the ten-year period on whether she has performed qualifying public service and made qualifying payments by submitting a

PSLF Employment Certification Form ("ECF"). AR 178. The Department encourages borrowers to submit an ECF annually while working towards making the full 120 payments, so that they may "receive feedback on the eligibility of [their] employment and payments on an ongoing basis." AR 178.

Upon submission of an ECF, the Department's PSLF servicer—FedLoan Servicing—reviews the ECF and "tell[s] [the borrower] how many qualifying payments . . . have [been] made toward PSLF." *Id*. The PSLF servicer also evaluates whether a borrower's employer is a qualified employer for PSLF purposes "based on the information provided on the [ECF]." *Id*. The servicer tells the borrower that if it is unable to make that determination based on the information provided, it may request "additional documentation about your qualifying employment." *Id*. The Department advises that borrowers should be able to "demonstrate that [their] employer[s] meet[] the definition of [] public service organization[s]." *Id*.

ECFs are optional, however, and a borrower is not required to submit ECFs to ultimately qualify for loan forgiveness. Nor is FedLoan Servicing's response to an ECF a determination of qualification loan forgiveness. The ECF form itself asks each borrower to certify that she understands that the "Department will only determine whether I have fulfilled all of the requirements to be eligible for PSLF after I have made all 120 qualifying payments and have submitted my loan forgiveness application" and that "I may only qualify for [PSLF] after I have made 120 separate, on-time, qualifying monthly payments . . . ." *See, e.g.*, AR 195.

FACTUAL BACKGROUND

The ABA is a voluntary organization for legal professionals in the United States. The ABA believes that it is a qualifying public service organization for the purposes of

the PSLF Program as an organization providing "public interest law services." *See* Pl. ABA's Mem. of P. & A. in Supp. of its Mot. for Prelim. Inj. ("Pl.'s Mem.") at 16, ECF No. 41. Certain ABA employees—including Plaintiff Mr. Burkhart—regrettably received ECF responses from FedLoan Servicing that incorrectly advised them that the ABA was a qualifying employer for purposes of PSLF. *E.g.*, AR 212. The Department subsequently corrected this earlier mistake and notified those borrowers that, based on the evidence available at that time, the ABA was not a qualifying employer under PSLF. *E.g.*, AR 214.

Beginning in April 2016, the ABA met and corresponded with Department staff to discuss the provisional determination that the ABA was not a qualifying public service organization. AR 188. The Department advised the ABA's representative that, based on the facts then presented to the Department, the ABA did not qualify. AR 190. The Department explained that "[t]o date, no documentation from the ABA or from a PSLF applicant demonstrates that the primary purpose of the ABA is to provide 'public interest law services' [as] the term is defined in the PSLF regulations." AR 190-91.

Staff from the ABA and the Department met again on September 19, 2016 "to discuss [the ABA's] concerns with the Department's administration of the PSLF Program." AR 192. As a result of these discussions, the Department agreed to provide more detailed information on the PSLF webpage that would be helpful to borrowers and to revise borrower notifications to provide more detailed written explanations of adverse or changed decisions. *Id*. The Department again reconsidered the ABA's eligibility as a qualifying employer, but found that the evidence supported its previous decision. *Id*.

The ABA claims that as a result of the Department's determination, its ability to recruit and retain attorneys has been adversely affected. *See* Pl.'s Mem. at 10.

PROCEDURAL BACKGROUND

The ABA's preliminary injunction motion does not arise in the typical procedural context. Plaintiffs, including the ABA, filed their Complaint on December 20, 2016 bringing claims under the APA and the Due Process Clause of the Fifth Amendment. The parties agreed to a briefing schedule for anticipated cross-motions for summary judgment. *See* Minute Entry, May 3, 2017. The parties subsequently submitted four summary judgment briefs (ECF No. 17, 22, 25, and 31) and completed briefing on September 8, 2017. This case was reassigned to the Honorable Timothy J. Kelly on September 15, 2017.

Since summary judgment briefing has been completed, Plaintiffs have filed various motions, like clockwork, at three-month intervals: a supplemental motion to permit extra-record review filed on December 8, 2017 (ECF No. 35), a motion for a hearing on the summary judgment motions filed on March 2, 2018 (ECF No. 38), and a motion requesting a status conference filed on June 15, 2018 (ECF No. 40). Three months after the last of those motions—and over a year after summary judgment briefing was completed—the ABA filed this motion for preliminary relief.

LEGAL STANDARD

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). An interim injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "a plaintiff seeking a preliminary injunction must establish that he is likely to

succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in in the public interest." *Id.* at 20, 24. A plaintiff cannot prevail without some showing on each of those four factors. *See id.* at 23-24, 31-32 (holding that "proper consideration of" balance of equities and public interest "alone requires denial of the requested injunctive relief" and thus finding no need to address likelihood of success).[2]

ARGUMENT

The ABA cannot make the clear showing necessary to warrant the extraordinary relief of a preliminary injunction. As set forth in the Department's summary judgment briefs, the ABA cannot demonstrate a likelihood of success on the merits. Moreover, the ABA fails to demonstrate that it is likely to suffer imminent irreparable harm absent an injunction, given its delay in seeking preliminary relief and the inability of the requested relief to redress the alleged irreparable harm. Finally, the balance of the equities and public interest weigh in favor of maintaining the status quo until this Court resolves the motions for summary judgment.

I. THE ABA CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

For the reasons set forth in Defendants' summary judgment briefs, which are fully incorporated and applicable here, the ABA cannot demonstrate any likelihood of success on the merits. *See* Defs.' Mem. of P. & A. in Supp. of Mot. for Summ. J. ("Defs.'

[2] The D.C. Circuit "has, in the past, followed a "sliding scale" approach to evaluating preliminary injunctions . . . . The continued viability of the sliding scale approach is highly questionable, however, in light of the Supreme Court's holding in *Winter* . . . ." *Singh v. Carter*, 185 F. Supp. 3d 11, 16 (D.D.C. 2016) (citing *In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013) for the proposition that all four prongs of the preliminary injunction standard must be met before injunctive relief can be granted). Regardless of which approach is followed, preliminary injunctive relief is inappropriate here.

Mem."), ECF No. 22; Defs.' Reply in Supp. of Mot. for Summ. J. ("Defs.' Reply"), ECF No. 31. Briefly restated, the ABA's claims fail for four reasons.

First, the ABA cannot prevail on any of its APA claims because they have not challenged final agency action. *See* Defs.' Mem. at 13-20; Defs.' Reply at 3-6. The APA permits review only of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. An action is final if it satisfies two separate conditions: "[f]irst, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (citation omitted).

The ABA challenges certain interim responses provided by the Department regarding the ABA's status as a qualifying employer. These responses do not mark the consummation of the Department's decisionmaking process. *See* Defs.' Mem. at 14-16; Defs.' Reply at 3-6 As the ABA concedes, under 34 C.F.R. § 685.219(e), the Department makes a final determination that a borrower has satisfied the eligibility criteria for loan forgiveness only once an application is submitted after the borrower has made 120 qualifying payments. *See* Defs.' Reply at 3-4. Whether or not a borrower's private employer qualifies as a public service organization is one of those criteria. *See* 34 C.F.R. § 685.219(c)(1)(ii); Defs.' Reply at 3-4. The Department declined to adopt recommendations to create a process for borrowers to obtain formal determinations of eligibility prior to filing an application, and nothing in the statute or the regulation provides for any such early certification. *See* Defs.' Reply at 3-5. Moreover, the

Department has made clear that these provisional determinations are only based on the evidence at the time, and borrowers may submit additional evidence before a final determination is made. *Id.* at 6.

In addition, the challenged provisional determinations do not determine *legal* consequences. *See* Defs.' Mem. at 16-20; Defs.' Reply at 7-8. They do not bind or preclude in any way the Secretary's ultimate determination of the borrower's eligibility for PSLF, and borrowers may submit additional supporting evidence upon an application for loan forgiveness. *See* Defs.' Mem. at 16-18; Defs.' Reply at 7-10. Though the provisional determinations certainly have practical effects, the existence of practical consequences does not necessarily establish the "certain change in the legal obligations of a party" that characterizes final agency action. *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005); Defs.' Reply at 7-8.

Second, the ABA's APA claims also fail for the threshold reason that the ABA's alleged injuries do not fall within the zone of interests of the CCRAA. *See* Defs.' Mem. at 20-22; Defs.' Reply at 10-12. The zone of interest inquiry requires that a plaintiff must "establish that the injury he complains of (*his* aggrievement or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statut[e or constitutional guarantee] whose violation forms the legal basis for his complaint." *Air Courier Conference of Am. v. Postal Workers*, 498 U.S. 517, 523-24 (1991).

The PSLF program was created to provide student debt relief to borrowers who work full-time in public service organizations, not for the organizations themselves. Defs.' Mem. at 21-22. The relevant statutory provision, 20 U.S.C. § 1087e(m), makes no

mention of public service organizations, and any effect on the interests of the ABA from the PSLF program is merely incidental. *See* Defs.' Reply at 11-12.

Third, even if the challenged actions constituted final agency actions, the ABA still could not establish a likelihood of success on the merits because the Department's interpretation of 34 C.F.R § 685.219 is reasonable. *See* Defs.' Mem. at 22-31; Defs.' Reply at 12-20. The Department's Final Rule interprets "public service job" in terms of the nature of the employer rather than the specific types of positions or specific duties that might qualify. 73 Fed. Reg. 37, 704, AR 13; *see also* Defs.' Mem. at 23-24; Defs.' Reply at 13-14. Though the ABA suggests that this interpretation conflicts with the statute because it may exclude certain ABA employees whose particular employment positions involve public service, that is, in essence, a challenge to the 2008 Final Rule, which is untimely. *See* Defs.' Mem. at 24-25; Defs.' Reply at 13-14.

Under the PSLF regulatory scheme, all employees of a qualifying public service organization may claim credit for loan payments, regardless of whether any particular employee's duties actually involve public service. *See* Defs.' Mem. at 25-26; Defs.' Reply at 15-16. The Department reasonably decided to look to the primary purposes of private organizations that purport to "provide[] . . . public services," rather than to interpret its regulation to qualify private organizations for which public service is only a small portion of their operations. *See* Defs.' Mem. at 25-26. Under that reasonable interpretation, which is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *see* Defs.' Mem. at 25, Defs.' Reply at 14-15, the Department determined, on the basis of the evidence presented to it, that the ABA's primary purpose was not the provision of public services. *See* Defs.' Mem. at 27.

The ABA's contention that the Department changed its interpretation of the Final Rule is misplaced because the ABA has not identified a prior conflicting interpretation. *See* Defs.' Mem. at 28-30; Defs.' Reply at 15-18. The ABA has only pointed to provisional guidance provided in non-final and individualized determinations, not formal statements of Department policy. *See* Defs.' Mem. at 28-29; Defs.' Reply at 16-18. Nor, for similar reasons, is there any merit to the claim that the Department has retroactively applied a new interpretation of the regulation. *See* Defs.' Mem. at 30-31; Defs.' Reply at 19-20. Because these interim determinations are non-binding, Plaintiffs are legally in the same position they were prior to the issuance of any responses—awaiting a final determination on loan forgiveness when and if they apply for PSLF.

Fourth, the ABA's Due Process claim fails because the ABA cannot establish either a protected property interest or a deprivation of process. *See* Defs.' Mem. at 31-33; Defs.' Reply at 20-22. Under the Final Rule, the Department is afforded the discretion to consider "appropriate considerations," 73 Fed. Reg. at 63,243, AR 47, which precludes the ABA from establishing a legitimate claim of entitlement to a determination that it is a qualifying employer. *See* Defs.' Reply at 20-21. Moreover, the Department's administration of the PSLF program affords the ABA sufficient process. *See id.* at 21-22. The ABA—which is, of course, not an individual borrower for whom the PSLF Program was designed—met and corresponded with the Department over months regarding its qualification as an eligible employer. *See* AR 187-93. The Department notified the ABA of its interim determination and offered, and continues to offer, the ABA an opportunity to submit additional evidence in support of its claim to be a qualifying public service organization. *See* Defs.' Mem. at 33.

II. THE ABA CANNOT SHOW THAT IT WILL BE IRREPARABLY HARMED BY WAITING FOR THE COURT'S DECISION ON SUMMARY JUDGMENT.

The ABA has also failed to establish that it "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Here, the ABA does not seek to "preserve the status quo," as is normally the case on a motion for preliminary injunction, *see Chapman v. Heath*, 288 F. Supp. 3d 215, 218 (D.D.C. 2018), *appeal docketed*, No. 18-5169 (D.C. Cir. May 31, 2018), but to change it. The ABA cannot show that it is imminently and irreparably harmed by the status quo—waiting for the Court to resolve the pending summary judgment motions.

The "high standard for irreparable injury" in this Circuit requires a two-fold showing by the ABA: First, because an irreparable injury "must be both certain and great," the ABA "must show 'the injury complained of is of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Second, "the injury must be beyond remediation." *Id.* It is a "well known and indisputable principle[]" that an "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wisc. Gas*, 758 F.2d at 674.

The ABA characterizes the alleged imminent harm it purports to suffer alternatively as an impairment of the South Texas Pro Bono Asylum Representation Project's ("ProBAR") ability to fulfill its mission, ProBAR's loss of reputation among other member of the legal community, and strain on ProBAR's current employees. *See* Pl.' Mem. at 20-26. Despite these varying descriptions, each of these alleged harms

sprouts from the same kernel—the ABA's assertion that the uncertainty regarding its status as qualifying employer for PSLF purposes negatively impacts ProBAR's ability to recruit and retain attorneys. *See id.* at 22 (arguing that "long-term vacancies" restrict ProBAR's "capacity to fulfill its mission"); *id.* (arguing that ProBAR has been forced to divert resources to "employee retention and recruitment"); *id.*at 23 (alleging reputational harm due ProBAR's reduced "ability to respond adequately to the family separation policy, a direct result of the employee recruitment and retention issues"); *id.* at 24 (alleging increased strain on current employees caused by unfilled vacancies). This alleged irreparable harm cannot support the ABA's motion.

A. The ABA Has Not Established That It, as Opposed to ProBAR Is Suffering Irreparable Injury.

The ABA focuses its entire discussion of irreparable injury solely on the alleged harm to a single ABA project, ProBAR. *See* Pl.'s Mem. at 20-26. However, the ABA itself—not merely ProBAR—is the actual employer claiming to be a qualifying public service organization for PSLF purposes, and the ABA has not explained how *it* is suffering irreparable injury.

The ABA cannot rely on the alleged irreparable injury suffered by one of its subdivisions to establish irreparable injury to the ABA as a whole. The PSLF regulatory scheme bases eligibility for loan forgiveness on whether a borrower is "employed . . . *by* a public service organization," 34 C.F.R. § 685.219(c) (emphasis added), and defines "public service organization" in terms of the nature of the organization, not the nature of the borrower's position. *See supra* pp. 4-5. ProBAR "employees" are, in actuality, employed by the ABA. *See* AR 234 (W-2 for Ms. Quintero-Millan listing ABA as employer). It is the ABA, and not merely ProBAR, that seeks to be deemed a qualifying

employer, and, if qualified, all of the ABA's employees, and not merely ProBAR's "employees," would be entitled to claim credit for payments made while employed with the ABA. The ABA may not, then, confine the Court's focus to only one of its projects, and then claim that injury to that project establishes the *ABA*'s entitlement to relief.

Moreover, the cases on which the ABA relies also suggest that it is injury to an organization as a whole that matters. *See, e.g.*, *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016) (focusing on alleged irreparable harm to organization's mission and holding that mission of affiliated organizations could be considered because they were "components of a single unit working in concert"); *Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148, 177 (D.D.C. 2017) (recognizing that irreparable harm may occur from obstacles to an organization's "*primary* mission" (quoting *League of Women Voters*, 838 F.3d at 9) (emphasis added)). The ABA does not argue, let alone offer facts, establishing that it, as a whole, is unable to fulfill its primary mission or has suffered reputational harms. Accordingly, its preliminary injunction motion should be denied.[3]

[3] The ABA's motion contains a brief footnote asserting in a cursory fashion that the alleged irreparable harms "extend to other sections of the ABA." Pl.'s Mem. at 25 n.2 The ABA cites no testimony from any individual who is assigned to or sought to be assigned to those sections, and instead offers only the claim by a ProBAR attorney that she "would be glad" to be assigned to "other human rights-related projects at the ABA." Pl.'s Mem. Ex. D ¶ 9, ECF No. 41-4. Without any evidence of actual effects to these other sections, the ABA's assertions cannot establish irreparable harm. *See Wisc. Gas*, 758 F.2d at 674 (holding that "unsubstantiated and speculative" harm cannot support preliminary injunction). Further, even if this testimony did suffice, it still would not establish that the ABA as a whole is suffering the alleged harm—just that certain of its sections, comprising an unspecified portion of the ABA's total organizational efforts, may be. And, in any event, the harms to certain ABA sections still do no support a preliminary injunction for the reasons discussed below. *See infra* Pts. II.B-C.

B. The ABA's Delay in Seeking Preliminary Relief Is Inconsistent with Its Claim to be Suffering Imminent Harm.

Even assuming the alleged harms to ProBAR can establish irreparable harm to the ABA, the ABA cannot show that these harms are imminent. "Courts have found that '[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.'" *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (quoting *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005).

According to the ABA, the Department advised ABA employees that the ABA was not a qualifying public service organization "[b]eginning in 2015." *See* Pl.'s Mem. at 8. Although the ABA spent some time pursuing non-litigation options with the Department, by December 1, 2016, the Department had advised the ABA twice that, on the facts available, the Department could not determine that the ABA was a qualifying employer for PSLF. *See* AR 190-91, 192-93. The ABA then filed suit on December 20, 2016, and the alleged injury to the ABA's ability to retain and recruit employees was front and center in the complaint. *See, e.g.*, Compl. ¶ 15, ECF No. 1 (alleging that the Department's interpretation affects the ABA's "ability to attract and retain high-caliber employees"); *id.* ¶ 88 (alleging that "the uncertainty surrounding the ABA's PSLF eligibility" has adversely impacted ability to recruit potential employees); *id.* ¶¶ 89-90 (alleging that same uncertainty threatens ABA's ability to retain current employees).

Yet the ABA did not seek preliminary relief then. Nor did it seek preliminary relief when it agreed to a summary judgment briefing schedule in May 2017. Or in July 2017 when they opposed an extension motion because of the "severe harm to [the] ABA's public interest mission." Pls.' Opp'n to Defs.' Mot. for Extension at 2, ECF No.

21. Instead, only some 20 months after this case was commenced and 12 months after summary judgment briefing was completed has the ABA, for the first time, asserted that a preliminary injunction is necessary to prevent "imminent" harm. *See* Pl.'s Mem. at 10. This delay—which the ABA makes no attempt to explain—should be fatal to its motion. *See, e.g.*, *Open Top*, 48 F. Supp. 3d at 90 ("The D.C. Circuit has found that a delay of forty-four days before bringing action for injunctive relief was 'inexcusable,' and 'bolstered' the 'conclusion that an injunction should not issue,' particularly where the party seeking an injunction had knowledge of the pending nature of the alleged irreparable harm." (quoting *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975)); *Brown v. Dist. of Columbia*, 888 F. Supp. 2d 28, 32-33 (D.D.C. 2012) (11-month delay in seeking preliminary injunction after being notified of denial of tenure application "directly undercuts any argument that her injury is of such imminence that there is 'clear and present need for equitable relief.'" (citation omitted)); *Biovail Corp. v. U.S. Food & Drug Admin.*, 448 F. Supp. 2d 154, 165 (D.D.C. 2006) ("The delay in filing this suit further undermines any showing of irreparable injury."); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (two-month delay in seeking preliminary injunction "militates against a finding of irreparable harm").

The ABA cannot excuse its delay by attempting to tie this litigation to the so-called "family separation" policy of the Department of Homeland Security. *See* Pl.'s Mem. at 19. The ABA's claims of a changing immigration policy landscape that "has exacerbated" ProBAR's staffing concerns, *see* Pl.'s Mem. at 3, are not new. Indeed in March, the ABA cited the change in the "political climate" as "rapidly increasing" the demand for ProBAR's services and making "the harms to the ABA . . . even more acute."

See Pls.' Mem. in Supp. of Mot. for Sched. Status Conf. ("Pls.' Status Conf. Mem.") at 4, ECF No. 38; *see also id.* Ex. A, Declaration of Kimi Jackson ("Mar. 1 Decl.") ¶ 16, ECF No. 38-1. The ABA also fails to explain why it waited until September to move for a preliminary injunction, rather than in June when litigation regarding the alleged policy was ongoing[4] the President signed an Executive Order addressing the policy,[5] and the strain on ProBAR's workload allegedly began, *see* Pl.'s Mot. for Leave to file Suppl. Decl., Ex. A ¶ 10, ECF No. 43-1.

C. The ABA Cannot Show That a Preliminary Injunction Would Alleviate the Uncertainty of Its Status under the PSLF Program.

The ABA also cannot establish that it "need[s] . . . equitable relief to prevent" the alleged irreparable harm. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (citation omitted). A plaintiff seeking a preliminary injunction must demonstrate that granting the requested injunctive relief will redress the alleged harm. *See Mott Thoroughbred Stables, Inc. v. Rodriguez*, 87 F. Supp. 3d 237, 247 (D.D.C. 2015) (denying preliminary injunction as "ill-suited" where requested relief "would not necessarily redress the alleged irreparable harm"); *Hunter v. FERC*, 527 F. Supp. 2d 9, 15 (D.D.C. 2007) (denying preliminary injunction where plaintiff could not show that injunction would "alleviate the threat of irreparable harm"). Here, there is no reason to believe the ABA's requested relief would remedy the harm of which it complains.

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[4] *See Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (granting preliminary injunction on June 26, 2018), *appeal docketed*, No. 18-56151 (9th Cir. Aug. 27, 2018); Compl., *Mariana de Jesus Mejia-Mejia v. U.S. Immigration & Customs Enforcement*, No. 1:18-cv-1445 (D.D.C. June 19, 2018), ECF No. 1; Compl., *Washington v. United States*, No. 2:18-cv-939 (W.D. Wash. June 26, 2018), ECF No. 1.

[5] *See* Executive Order, Affording Congress an Opportunity to Address Family Separation § 1, 2018 WL 3046068 (June 20, 2008).

As discussed above, the alleged irreparable harm to the ABA stems from its ostensible recruiting and retention difficulties while its PSLF status is uncertain. The ABA argues that prospective employees are unwilling to accept offers and certain current ABA employees are unwilling to remain in their positions without a "guarantee" that the ABA qualifies as a public service organization for PSLF purposes. Pl.'s Mem. at 3 (alleging that actual or prospective attorneys have advised ProBAR that they cannot "work for the organization without a guarantee of eventual loan forgiveness"); *id.* at 2 (alleging that harm arises from "the uncertainty regarding ABA employees' eligibility for the PSLF program").

But the ABA never explains how *preliminary* relief would provide that guarantee, and in fact it would not. A decision on a preliminary injunction motion is not a final decision on the merits, and "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Texas v. Camenish*, 451 U.S. 390, 394-95 (1981) (rejecting argument that preliminary injunction decision was "tantamount to [a] decision[] on the underlying merits"). With or without the injunction, then, current ABA employees and prospective employees would lack certainty as to the ABA's status as a qualifying employer and, indeed, would be in the same position they are right now—awaiting a final judgment on the merits.

In this manner, the ABA's claims resemble those rejected in *Association of Flight Attendants-CWA v. Pension Benefit Guaranty Corp.*, 372 F. Supp. 2d 91 (D.D.C. 2005). There, the plaintiff, an association of flight attendants, sought to preliminarily enjoin the Pension Benefit Guaranty Corporation ("PBGC") from instituting proceedings to involuntarily terminate a bankrupt airline's pension plan. *Id.* at 93. The plaintiffs

alleged that, absent an injunction, "flight attendants may make significant life choices that cannot easily be reversed" in reliance on expectations of lower pension income. *Id.* at 100-01. However, this Court declined to find irreparable injury because, even if the involuntary termination process was enjoined, "the uncertainty regarding the [pension] Plan will continue as long the bankruptcy is ongoing and other avenues for termination of the Plan . . . remain." *Id.* at 101.

Similarly in *Hunter*, the plaintiff moved to enjoin Federal Energy Regulatory Commission ("FERC") enforcement proceedings, claiming that absent the injunction, he would suffer irreparable harm to his business reputation, employee departures, and a loss of funding. 527 F. Supp. 2d at 15-16. The Court denied the motion. *Id.* Because the plaintiff was, at the same time, also subject to an ongoing Commodity Futures Trading Commission investigation, the requested injunction would "not necessarily provide [the plaintiff] with the relief he seeks. Simply stated, the threat that a FERC action poses to his business . . . will not be removed until this Court makes its final adjudication." *Id.*; *accord Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 34 (D.D.C. 2016) (refusing to issue preliminary injunction where plaintiff "cannot demonstrate that the temporary relief it seeks here . . . can prevent the harm" complained of).

So too here. As with the plaintiff in *Flight Attendants*, the uncertainty regarding the ABA's status under the PSLF Program will remain while the summary judgment motions are pending. Like the plaintiff in *Hunter*, the potential for a final ruling in the Department's favor—on motions that are fully briefed and pending—means that the injunction will not provide the ABA's current or prospective employees with a

"guarantee of eventual loan forgiveness." Pl.'s Mem. at 3. Accordingly, preliminary relief is unwarranted.

The ABA may argue that a preliminary injunction would allay its employees' concerns by providing an indication of how the Court may ultimately rule. Any such argument would make little sense given that the summary judgment motions are already teed up for resolution. And it is difficult to see how preliminary relief would suddenly convince reluctant potential hires or current employees to ignore the possibility that the Court may rule in the Department's favor on summary judgment, given the ABA's assertion that anything less than a "guarantee" is insufficient. *See* Pl.'s Mem. at 2-3. Indeed, any such argument would reveal this motion for what it is—a request by the ABA for an early "resolution" of the summary judgment motions. But "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits," *Camenish*, 451 U.S. at 394-95, and here, where dispositive motions are already pending with the Court, it is an inefficient use of judicial resources for the Court to grant *preliminary* relief when it can resolve the pending summary judgment motions. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.").

D. The ABA Has Not Adequately Established a Threat to ProBAR's Ongoing Operations.

Finally, the ABA alleges that, absent a preliminary injunction, ProBAR's continued operations will be threatened because it "is on the verge of losing funding from a long-time and substantial donor if it cannot recruit attorneys to fulfill the terms of a grant." Pl.'s Mem. at 25 (citing Mar. 1 Decl. ¶ 13); Declaration of Kimi Jackson ("Sept.

10 Decl.") ¶ 14, ECF No. 41-2. This alleged injury does not justify the ABA's demand for a preliminary injunction.

As a threshold matter, these assertions yet again echo claims the ABA made six months ago. In March, the ABA argued—in seeking a status conference—that the ongoing uncertainty as to the ABA's status under the PSLF Program "threatened" ProBAR's "ability to function and its very existence." Pls.' Status Conf. Mem. at 3. Yet the ABA did not seek preliminary relief at that time, and that delay is inconsistent with an "imminent" injury. *See supra* Pt. II.B.

Moreover, the testimony on which the ABA relies does not adequately establish an actual threat to ProBAR's existence. Testimony that ProBAR's "reputation with funders" has been harmed, Mar. 1 Decl. ¶ 13, or that funding for certain positions may be jeopardized, Sept. 1 Decl. ¶ 13, does not suggest impending insolvency. Nor do unsubstantiated "concern[s] about the continuing viability of ProBAR's operations and existence." *See* Sept. 10 Decl. ¶ 8; *see also Brown*, 888 F. Supp. 2d at 32 ("[W]hen contemplating injunctive relief, '[b]are allegations of what is likely to occur are of no value.'" (quoting *Wisc. Gas Co.*, 758 F.2d at 674)). Similarly, while the ABA has offered testimony that one ProBAR funder "warned" ProBAR that it would "adjust" its contract with ProBAR if it did not fill a longstanding vacancy, that same testimony explains that an individual has been hired for that position, *see* Sept. 10 Decl. ¶ 14, presumably abating the threat to funding. And, of course, there is no assertion that the *ABA*'s ongoing operations are threatened.

III. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES FAVOR DENYING THE ABA'S REQUEST FOR EXTRAORDINARY RELIEF.

The final two factors in considering a motion for preliminary injunction, which are merged when the Government is the non-movant, are "the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (observing that the Government's "harm and the public interest are one and the same, because the government's interest *is* the public interest"). In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).

Although the injunction the ABA seeks is limited to the ABA and its employees, *see* Pl.'s Prop. Order, ECF No. 41-5, such an injunction may have broader implications on how the Department administers the PSLF program. *See Nat'l Propane Gas Ass'n v. DHS*, 534 F. Supp. 2d 16, 20 (D.D.C. 2008) ("[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct an agency to develop and enforce."). Moreover, even a limited injunction could put the Department in the position of having to make final determinations on loan forgiveness for borrowers claiming credit for payments made while employed by the ABA. If the injunction required the Department to treat the ABA as a qualifying employer, it is not clear that the Department would have any mechanism to restore forgiven debt if the Court subsequently upheld the Department's interpretation of the Final Rule. Similarly, an injunction may require the Department to tentatively credit

borrowers for payments made while employed with the ABA. If the Court were to ultimately rule in the Department's favor, these borrowers would lose credit for those periods—thereby inviting the very concerns about retroactivity that the ABA complains of in this suit.

By comparison, a preliminary injunction would do little for the ABA's employees, who would not have any "guarantee" about the ABA's status until final resolution of this case. *See supra* Pt. II.C. Granting preliminary relief to the ABA, then, would disrupt the Department's administration of the PSLF Program while keeping the ABA, its employees, and its prospective employees still waiting on a final resolution.

Finally, though the ABA argues that its employees "deserve to have their PSLF credits restored," Pl.'s Mem. at 27, the ABA does not explain how a preliminary injunction would do that. Rather, any such remedy to individual borrowers could only come after a final resolution of this action.

Dated: September 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Chetan A. Patil
CHETAN A. PATIL