UNITED 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

PLAINTIFF AMERICAN BAR ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

In its Opposition to Plaintiff American Bar Association's ("ABA") Motion for Preliminary Injunction (the "Motion"), the Department of Education ("Department") displays a callous indifference toward the plight of public servant student loan borrowers and their employers and to the ABA's inability to provide crucial public interest legal services to a vulnerable population of immigrants—including children—in immigration proceedings. In this regard, the Department gives back-of-the-hand treatment to the impact on the ABA's ProBAR project of the border crisis, precipitated by the federal government's policy of forcibly separating immigrant children from their families at the border.

Because the Department simply shrugs off the ABA's claims, many of the ABA's key arguments and evidence remain unanswered. The Department's claim that the ABA will not likely succeed on the merits is based almost entirely on the Department's position that its decisions on Public Service Loan Forgiveness ("PSLF") eligibility should be entirely immune from judicial review—*i.e.*, that borrowers should have to wait at least ten years to hold the Department accountable for its denials and retroactive revocations of PSLF employment eligibility. In arguing that the ABA is not at risk of imminent irreparable harm, the Department gives short shrift to the significant evidence the ABA has presented to demonstrate the state of affairs at ProBAR. That evidence shows that the border crisis has pushed an already struggling organization to the breaking point, as highlighted by the two attorney resignations in recent weeks. It shows that the remaining staff members are being stretched to capacity, covering the responsibilities of multiple positions and working crushing hours. It shows that ProBAR's ability to provide assistance to immigrants caught up in the border crisis has been severely constrained because of its resource limitations. As things currently stand, *more than half* of ProBAR's attorney positions will soon be vacant. A majority of the recent departures have been the result, in large part, of the ABA's lack of PSLF

eligibility, and vacancies have remained open for long stretches as a result of that ineligibility. Without urgent intervention, ProBAR will be unable to fulfill its core mission, its funding will be jeopardized, and it may no longer be able to function.

The Department simply discounts the ABA's showing of imminent and irreparable harm to ProBAR and, instead, argues that the administrative burden of complying with the statute and the regulation tips the balance of the equities and the public interest in the Department's favor. However, the Department has not substantiated its position that certifying PSLF employment eligibility for borrowers employed by the ABA would involve any significant burden. Indeed, such administrative costs pale in comparison to the institutional and human harms ProBAR, its employees, and its vulnerable clients currently face. A preliminary injunction will allow ProBAR to continue to serve those key constituents and the public at large.

The Department correctly notes that a preliminary injunction will be unnecessary if the Court first resolves the pending cross-motions for summary judgment, and the ABA certainly hopes that the case will soon be resolved. However, given the urgency of the situation, the challenges facing ProBAR, and the time it may take to issue a final resolution after oral argument, the ABA asks that the Court grant the requested preliminary injunction pending the final resolution of this case.

ARGUMENT

I. THE ABA IS LIKELY TO SUCCEED ON THE MERITS

The ABA is likely to succeed on the merits of its claims for all the reasons discussed in its Motion and in the briefing on the parties' summary judgment motions. *See* Mot. at 14-19; Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Mot. Summ. J."), ECF No. 17; Pls.' Reply in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Reply"), ECF No. 27. The Department's Opposition adds

nothing new to these issues. Many of the key issues the ABA has raised on the merits have remained entirely unaddressed throughout all the Department's briefing in this case. Notably:

- The Department has repeatedly taken the position that its new interpretations of the PSLF statute and regulation are not final agency actions but mere "interim responses." In doing so, it has failed to confront the authorities holding that a decision may still be final even if an agency can later revise it. *See* Mot. at 14; Pls.' Mot. Summ. J. at 15-16 (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)). Under the Department's view, an agency decision would evade judicial review until a borrower has already devoted ten years of her career to public service and has staked her financial future on her eligibility for forgiveness under the PSLF program. Defs.' Opp'n to Pl. ABA's Mot. for Preliminary Injunction ("Opp'n"), ECF No. 44, at 11-12.
- The Department has continued to claim that it has not adopted a new interpretation that can be challenged. Opp'n at 13-14. It has admitted only that it reached individual interim decisions based on the regulation that it adopted in 2008. Opp'n at 13. The Department's position, however, is contradicted by evidence of deliberate, considered reversals of interpretations long after 2008, including emails explicitly referencing these changes. Pls.' Reply at 16-24.
- The Department has *never* squarely addressed the question of whether the Department adopted the correct interpretation of the PSLF statute and regulation. It has instead insisted that its interpretation is entitled to deference, Opp'n at 13, even though the Department cannot support or establish any entitlement to any deference, Mot. at 16-17.

II. THE ABA WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION

The Department's Opposition seeks to minimize the harm ProBAR faces, but the Department ignores the realities of the precarious situation in which the Department's actions and the border crisis have placed ProBAR. As set forth in the ABA's Motion, ProBAR faces imminent and irreparable harm.

A. The ABA's Evidence Establishes the Imminent Threat of Irreparable Harm

The Department claims that "the testimony on which the ABA relies does not adequately establish an actual threat to ProBAR's existence," but its argument relies on cherry picked snippets of the declarations submitted by the ABA. Opp'n at 24. The Department turns a blind eye to the portions of these declarations that detail and establish injuries to ProBAR's retention and recruitment efforts, funding, reputation, and continued viability.

The ABA has explained in great detail, and supported with evidence, the specific impact of the PSLF eligibility issues and the border crisis. The ABA has also explained and demonstrated how these problems inhibit ProBAR in the performance of its institutional mission, jeopardize its funding, and threaten its viability. *See* Mot. at 19-26. No need to reiterate all of those details exists here.

B. The ABA Need Not Establish that Every Aspect of the ABA's Operations Would Suffer, or that ProBAR Is Likely to Become Insolvent

Having failed to overcome the fact that the ABA will likely suffer irreparable harm in the absence of a preliminary injunction, the Department next attempts to adjust the irreparable harm standard itself. It does so in two ways, but both are illogical and unsupported by the law.

First, the Department inserts the unsupported requirement that "[t]he ABA cannot rely on the alleged irreparable injury suffered by one of its subdivisions to establish irreparable injury to the ABA as a whole." Opp'n at 16. But there is no need for the proponent of a preliminary

injunction to show that it is likely to suffer irreparable injury "as a whole." It is not even clear what this would mean in practice, or how courts would apply this requirement. For example, suppose the government adopted an interpretation of the immigration laws that would subject many of Microsoft's non-citizen employees to removal from the United States, and that the government had imminent plans to remove certain key employees who worked on Microsoft's Xbox product. If Microsoft then sought a preliminary injunction to prevent the employees' removal and demonstrated that its Xbox division would suffer irreparable harm in the employees' absence, it would be nonsensical for the court to deny the interim relief because the claimed interim relief was to the Xbox division rather than to Microsoft "as a whole." Similarly, if the Department itself were to seek a preliminary injunction in the course of litigation, it would not expect to have to show imminent irreparable harm to the federal government—or even to the entire Department—"as a whole."[1]

So too here, where the ABA has demonstrated irreparable harm to one of its critical public service initiatives. One of the ABA's significant purposes is to provide for public-focused services like those ProBAR provides. *ABA Mission and Goals*, American Bar Association, https://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Sept. 23, 2018). ProBAR's inability to perform the services that lie at the core of the ABA's mission is a failure for the ABA as a whole. Moreover, as the Department acknowledges, Opp'n at 16, ProBAR is a

[1] In this case, the impact of the harm certainly reaches beyond ProBAR itself. Moreover, as the ABA has previously explained, other entities—including the Commission on Homelessness and Poverty, the Commission on Disability Rights, the Center on Children and the Law, and the Commission on Domestic & Sexual Violence, among others—are also suffering significant harm as a result of the PSLF eligibility issues. Mot. at 25 n.2; Decl. of Jack Rives, ¶¶ 5-26, ECF No. 17-1; Decl. of Vivian Huelgo, ¶¶ 6-9, ECF No. 38-2. The Motion focuses on ProBAR because the border crisis has directly affected ProBAR's mission, causing it to suffer irreparable harm.

part of the ABA and its employees are ABA employees. The Department has provided no reason for artificially separating the two entities for the purpose of the ABA's Motion.

Second, the Department argues that the imminent harm to ProBAR may not be sufficient because the ABA has supposedly failed to show "a threat to ProBAR's ongoing operations," or to establish "impending insolvency." *Id.* at 23-24. The ABA disagrees. It has certainly demonstrated a threat to ProBAR's ongoing existence, but—in any event, and as discussed below—courts have recognized injuries far short of extinction as constituting irreparable harm.

The ABA's Motion describes in detail why ProBAR's continuing operations are under threat. Mot. at 24-26. Thirteen of its 28 attorney positions are currently vacant. *Id.* at 24. There will soon be fifteen vacancies, as two of its most important remaining attorneys are soon due to depart. The Director of its Children's Project, who has also been fulfilling the role of Legal Director, is due to leave shortly. *Id.* at 24-25. And, in an unfortunate coincidence, on the day the ABA filed its Motion, it received a notice of resignation from the Director of its Adult Project. Decl. of Julie Pasch ("Pasch Decl."), ¶¶ 1-2, ECF No. 43-1. As described in detail, the ABA has struggled to fill any of the vacant positions at ProBAR, largely because of applicants' concerns about PSLF eligibility. Mot. at 22-25. The Department overlooks all of this, implying that ProBAR's operations would be under threat only if it faced "impending insolvency." Opp'n at 24. The ABA has detailed ProBAR's serious financial concerns, which may well threaten its operations. Mot. at 25-26. But even if ProBAR somehow retained its funding at current levels, the lack of employees would be fatal to its ability to function. A legal services organization cannot operate without attorneys, even if well-funded.

Moreover, the Department's Opposition overlooks the several other species of irreparable harm that the ABA faces, even if ProBAR does continue to exist. Courts have recognized the

realities of the harm that may be inflicted on a non-profit organization as a result of unlawful government policies. In *Doe v. Trump*, for example, refugee assistance agencies sued the administration over new refugee policies that would "leave[] the organizations unable to operate or plan effectively, further deteriorating goodwill and adding to their harms." 288 F. Supp. 3d 1045, 1082-83 (W.D. Wash 2017), *reconsideration denied*, 284 F. Supp. 3d 1182 (W.D. Wash 2018). The court found that the resulting loss of goodwill, threat to services, and inability to carry out its organizational mission would constitute irreparable harm. *Id.* This is consistent with the well-settled principles that the loss of goodwill, employees, or future business suffices for a finding of irreparable harm as threatening a movant's business.[2]

The Department failed to confront the distinct harms the ABA identified, each of which, standing alone, is sufficient to establish irreparable harm. First, ProBAR's likely losses of funding are irreparable in and of themselves, even if ProBAR continues operating, as damages are not recoverable in an APA case. *Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017); *see* Mot. at 25-26. Second, the Departnent's actions surrounding PSLF eligibility, combined with the impact of the border crisis, have inhibited ProBAR's ability to fulfill its primary

[2] "Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001); *see Navigant Consulting, Inc. v. Milliman, Inc.*, No. C18-1154JLR, 2018 WL 3751983, at *4 (W.D. Wash. Aug. 8, 2018) (finding irreparable harm when an organization presented evidence that it had already "lost two high-performing employees" and noting that loss of customers, employees, and goodwill constitutes irreparable harm); *Dynamic Aviation Grp. Inc. v. Dynamic Int'l Airways, LLC*, No. 5:15-CV-00058, 2016 WL 1247220, at *28 (W.D. Va. Mar. 24, 2016) ("The loss of goodwill or industry reputation 'is a well-recognized basis for finding irreparable harm.'" (citation omitted)); *Marsh USA Inc. v. Karasaki*, No. 08 CIV. 4195 (JGK), 2008 WL 4778239, at *14 (S.D.N.Y. Oct. 31, 2008) ("As with the loss of its client relationships, the loss of [plaintiff's] employees also constitutes irreparable harm."); *McGregor Printing Corp. v. Kemp*, No. CIV. A. 91-3255(GHR), 1992 WL 118794, at *5 (D.D.C. May 14, 1992) ("[I]rretrievable monetary loss . . . in combination with the loss in employment to its employees constitutes a sufficient showing of irreparable harm . . . .").

mission: providing legal representation to those seeking asylum at the border. Mot. at 20-22. This constitutes irreparable harm. *Open Communities All.*, 286 F. Supp. 3d at 177-78; *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8-9 (D.D.C. 2016). Finally, the reputational damage to ProBAR constitutes irreparable harm even if it does not result in ProBAR's extinction. *See* Mot. at 22-24.

By claiming that the ABA must be affected "as a whole" and by suggesting that harms short of ceasing to exist cannot be sufficient, the Department attempts to raise the bar for showing irreparable harm. The Court should reject these attempts. Applying the long-established standards for assessing irreparable harm, the ABA's evidence is more than sufficient.

C. The Timing of the Motion Does Not Detract from the Claim of Irreparable Harm

First, the Department claims that the timing of the ABA's filing is suspect, twice saying that the ABA "does not explain why" it did not seek a preliminary injunction soon after filing this action. Opp'n at 2, 19. But the ABA's Motion explains in great detail when and why the threat of imminent irreparable harm arose. Since filing the complaint in December 2016, the ABA has been suffering serious harm, and that harm has only worsened since then, as many of its employees have watched their loan balances increase. But the border crisis has further exacerbated the problems ProBAR is facing. The crisis has increased the scope and intensity of the threat to ProBAR's vulnerable client base beyond any level seen before. *See* Mot. at 10-12. The ABA explained precisely how the crisis strained ProBAR's already scarce resources. It further damaged its ability to perform its mission—in an environment now more challenging than ever—and threatened its reputation, its ability to obtain funding, and its ability to recruit and retain employees. *Id.* at 19-26.

The ABA's concern about imminent threats to ProBAR's workforce has sadly been borne out in recent weeks. The Motion explained that a ProBAR attorney left the organization on September 4 due to concerns related to PSLF, while another informed ProBAR she does not intend to continue working at ProBAR after her fellowship expires. Mot. at 12; *see also* Decls. of Carlos Hernandez ("Hernandez Decl."), ECF No. 41-3; Decl. of Natalie Cadwalader-Schultheis ("Cadwalader-Schultheis Decl."), ECF No. 41-4. On the day the ABA filed its Motion, it received notice of the resignation of one of its most important remaining attorneys, the Director of its Adult Project. Pasch Decl. ¶ 2. She cited the absence of PSLF eligibility as a major reason for her departure, and explained how the border crisis had exacerbated the strain on the attorneys in her department. *Id.* ¶¶ 9-10, 12.

The confluence of the PSLF issues and the border crisis has created the perfect storm for ProBAR. As the ABA's Motion explained, "[t]he project is no longer just in a precarious position; its very existence is threatened." Mot. at 1-2. The filing of the Motion at this juncture—as the potentially ruinous impact of this perfect storm became clear—is perfectly appropriate.

The Department's authorities on this point are inapposite. A gap between the filing of a lawsuit and a motion for preliminary injunction cannot provide a basis, in and of itself, for the denial of the preliminary injunction. *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). To be sure, a court may consider the timing of a motion for preliminary injunction, just as it must consider all relevant factors to determine whether irreparable harm is likely to occur imminently. But in all the cases the Department cites, there was no material change of circumstances between the filing of the suit and the motion for preliminary injunction. Thus, in those cases, any threat of irreparable harm that existed at the time of the motion had already existed for an extended period of time—years in some cases. The principle in those cases is that an "*unexcused* delay . . . *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) (emphasis added). In all of the Department's cases, the court found that the delay was due to a lack of urgency on the part of the moving party; in none of them did an intervening factor or change of circumstances create the irreparable harm necessitating the preliminary injunction.[3]

Here, the ABA filed its Motion as the impact of the border crisis and the PSLF eligibility denials pushed ProBAR to the very edge of its ability to function. The Department's suggestion that the ABA should have filed its Motion in June instead of September, Opp'n at 20, misses the point. ProBAR's employees responded to the best of their ability when the administration's policy came into being, and it naturally took time for the effects of the increased workload on its attorneys to manifest into accelerated departures and for its less-than-optimal response to the crisis to hurt its reputation. *See* Mot. at 2 (explaining that, although ProBAR "has so far attempted to reunite 300 parents with their children," its "lack of resources has severely constrained its impact," it "currently has vacancies in critical positions throughout the organization," and that "[a]ttorneys continue to leave, and signal their intent to leave, at an alarming rate"). The timing of the Motion therefore weighs in favor of the ABA's irreparable harm argument, not against it.[4]

---

[3] *See id.* (finding that the movants lacked urgency as evidenced by their motion to continue the hearing on the preliminary injunction motion by 95 days); *Brown v. Dist. of Columbia*, 888 F. Supp. 2d 28, 32-33 (D.D.C. 2012) (denying movant's motion for preliminary injunction because the eleven-month delay since the alleged start of the irreparable harm showed movant had "plenty of notice" that her employment would end and on several occasions delayed taking action despite this notice); *Biovail Corp. v. F.D.A.*, 448 F. Supp. 2d 154, 165 (D.D.C. 2006) (finding a delay when the plaintiff knew of the circumstances that gave rise to the alleged irreparable harm for more than a year); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (denying a preliminary injunction when movant filed a lawsuit eight months after the circumstances that gave rise to the claim of irreparable harm).

[4] The Department's claim that Plaintiffs have filed motions "like clockwork," Opp'n at 9, serves only to highlight questions concerning the Department's conduct in litigating this case. The Department correctly notes that Plaintiffs moved the Court to consider extra-record evidence in

D. A Preliminary Injunction Would Prevent the ABA from Suffering Irreparable Harm

Despite the Department's claims to the contrary, a preliminary injunction would prevent the ABA from suffering the irreparable harms discussed above. At the outset, the Department misstates the purpose of the ABA's claim for interim relief. The Department repeatedly points to the fact that the summary judgment motions are "fully briefed and pending," Opp'n at 2, 22, and are "teed up for resolution," *id.* at 23, implying that it is too late for a preliminary injunction to make any difference. The ABA agrees the resolution of the summary judgment motions would moot the ABA's request for a preliminary injunction, and certainly hopes that the summary judgment motions will soon be resolved. But the ABA is entitled to a preliminary injunction in the meantime, until the Court issues a final judgment. *See Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (recognizing that a preliminary injunction usually preserves the status quo "pending the *outcome* of litigation" (emphasis added) (internal quotation marks omitted)).

December 2017, around three months after briefing was complete on the cross-motions for summary judgment. *See* Pls.' Mot. to Allow Extra-Record Review, ECF No. 35. Plaintiffs moved at that time because they had recently received additional evidence demonstrating that the Department's reversal of PSLF employer eligibility decisions constituted a new interpretation of the relevant statutory and regulatory provisions. *See* Decl. of Kate Voigt, ¶ 11 (ECF No. 35-1); Decl. of Edward Roche, ¶ 7 (ECF No. 35-2). That is evidence that (1) the Department initially refused to provide to Plaintiff Kate Voigt in response to a FOIA request and that was obtained from the Department's contractor through a state public records request; and (2) conclusively demonstrates that the Department's ongoing protestations that there was no new interpretation are patently false. Pls.' Mot. to Allow Extra-Record Review at 1-2, 4-8. The filing of this new evidence in December was necessitated by the Department's obstructive approach, not by any strategic goal of Plaintiffs. With respect to Plaintiffs' subsequent motions seeking a hearing on the pending cross-motions for summary judgment or a status conference, ECF Nos. 38, 40, Plaintiffs reasonably sought to set a workable schedule for the Court to consider the merits of the pending cross-motions for summary judgment and motions for extra-record review, the original hearing date for which (October 6, 2017) was vacated upon the case's reassignment. *See* Minute Order (Sept. 15, 2017). Despite Plaintiffs' overtures to the Department to move jointly for a hearing date or status conference, the Department steadfastly refused to do so.

Next, the Department claims that that an interim ruling will not remedy the harm to the ABA because it will not necessarily predict the outcome of the litigation, leaving borrowers in a state of uncertainty. Opp'n at 20-23. This Court has previously recognized that a preliminary injunction may redress harm by providing reassurance as to the likely outcome of litigation. In *Esch v. Lyng*, the Court granted a preliminary injunction, declaring that a group of farmers would likely prevail in showing that they were eligible for certain federal support programs. 665 F. Supp. 6, 11 (D.D.C. 1987), *aff'd as modified sub nom. Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989). The Court recognized that the situation would not be finally resolved until the Court issued its final decision. *Id.* But the preliminary injunction's declaration of eligibility "would also have the immediate and undeniably valuable effect of allaying the concerns of their various creditors, who would, according to plaintiffs, cease their collection efforts on the strength of such a ruling." *Id.*

The ABA is in much the same position as the plaintiffs in *Esch*. A preliminary injunction in the ABA's favor would allay the fears of the remaining ProBAR employees, preventing further losses of attorneys.[5] Those that have recently submitted their resignations have noted that they were willing to wait for a period of time for the PSLF eligibility situation to be resolved, but were ultimately unable to stay because they faced uncertainty for an indefinite period of time. *See, e.g.*, Pasch Decl. ¶ 12; Hernandez Decl. ¶¶ 9-10. Current employees have voiced similar concerns when informing ProBAR that they may soon leave. Decl. of Kimi Jackson ¶¶ 18-20, ECF No. 41-2 ("Third Jackson Decl."); Cadwalader-Schultheis Decl. ¶¶ 8-10. All of ProBAR's attorneys are committed to the organization and the cause it serves, and there would be few departures—at least

[5] The Department seizes on the notion that a preliminary injunction would not give ABA employees a "guarantee" of future eligibility. Opp'n at 2, 21. The ABA acknowledges that a preliminary injunction does not guarantee the outcome of the case. But, as discussed, it would allay the concerns of employees and other stakeholders, which would be sufficient relief pending the final resolution of the case.

pending final resolution of the case—if a preliminary injunction provided some reassurance. The resulting stability in the staffing situation, combined with the assurance that ProBAR may soon be able to fill its remaining vacancies, would likely allay the fears of prospective funders as well. As was the case with the plaintiffs in *Esch*, a preliminary injunction will redress the ABA's injuries-in-fact—the threat to ProBAR's mission, reputation, and ability to function—in a tangible and significant way by its impact on third-party stakeholders, namely employees and funders.

The Department's authorities on this point are inapposite. In both cases the Department cites, the court emphasized that other significant, extraneous factors not at issue in the case would cause the alleged harm even if the court granted the preliminary injunction. In *Association of Flight Attendants-CWA, AFL-CIO v. Pension Benefit Guaranty Corp.*, the plaintiff employees initiated a lawsuit seeking to enjoin a pension company, PBGC, from involuntarily terminating the employees' pension plan. 372 F. Supp. 2d. 91, 95-96 (D.D.C. 2005). The employees argued that the termination was based on an unlawful agreement with their employer, United Airlines, and that a preliminary injunction would bring some certainty to the employees as to the status of the pension plan. *Id.* The court recognized that uncertainty would remain even with the injunction, but *not* due to the possibility that PBGC could ultimately win on the merits. Rather, the uncertainty would remain because two other significant threats to the pension plan, not at issue in the case, would still exist: United's bankruptcy proceedings, and the possibility that United could itself terminate the plan. *Id.* at 100-101.

The court reasoned similarly in *Hunter v. F.E.R.C.*, 527 F. Supp. 2d 9, 15-16 (D.D.C. 2007). There, two separate agencies—the Federal Energy Regulatory Commission ("FERC") and the Commodity Futures Trading Commission ("CFTC")—both began enforcement actions against the plaintiff. *Id.* at 13. The plaintiff filed a lawsuit only against FERC, arguing that it had no

authority to institute an enforcement action against him and seeking an injunction against this enforcement action, which the plaintiff contended had caused harm in the form of employee departures and risk to his business's existence. *Id.* at 13-14. The court rejected the notion that an injunction against FERC alone would alleviate these harms because there was a second action pending from the CFTC. *Id.* at 15. The court found that the plaintiff failed to "parse the fallout between the CFTC action and [the] FERC enforcement action," preventing the plaintiff from demonstrating causation, and found that the plaintiff's "belief" that the employees resigned because of the FERC action was "insufficient." *Id.*

Here, in contrast, removing the uncertainty of ABA employees' PSLF employment eligibility status would prevent ProBAR from suffering the irreparable harm it faces. The border crisis would still present a challenging situation for ProBAR, but if the border crisis were the only remaining challenge, ProBAR would be well placed to retain employees and funding. This is not based on a mere "belief," as in *Hunter*, but on evidence from the ABA that the Department has failed to confront. It may take some time, and it may take a final ruling in this case, before ProBAR is truly thriving again. But it is extremely likely that a preliminary injunction would stem the tide of departures and allow ProBAR to continue functioning and serving its target population, at least to a satisfactory degree, while its employees await a final ruling.

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH IN THE ABA'S FAVOR

The Department largely ignores the substance of the ABA's arguments on the balance of hardships and public interest factors of the preliminary injunction. The Department has not shown why an "injunction that merely ends an unlawful practice" would cause hardship to the Department, *Open Communities All.*, 286 F. Supp. 3d at 179, nor can the Department rebut the fact that "there is a substantial public interest in having governmental agencies abide by the federal

laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12 (internal quotation marks and citation omitted). Although the Department argues that there would be "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," Opp'n at 25 (citation omitted), the ABA does not ask that the Department not be permitted to develop and enforce these regulations. Rather, the ABA requires only that the Department properly administer the PSLF program in accordance with the governing statute and its own implementing regulation.

The Department hypothesizes that it could be forced to make final determinations on forgiveness under the proposed injunction. Opp'n at 25. But it fails to demonstrate that any ABA employee could reach the point of forgiveness while this case remains pending and, in any event, does not even consider that there would be workable ways to resolve this situation if it occurred.[6]

The preliminary injunction, therefore, does not impose any significant hardship on the Department. Granting the preliminary injunction would be in the public interest as it would require the Department to follow the law while protecting ProBAR during the pendency of this lawsuit and ensuring that ProBAR can continue its crucial public interest work.

[6] If a borrower employed by the ABA reached the ten-year mark while the preliminary injunction was in place but before the final resolution of the case, the Department would not be required to immediately forgive the borrower's loan balance. Instead, between the time the borrower reached ten years and the time of the final judgment, the Department could take the same course of action as it currently takes in the interim period after a borrower reaches the ten-year mark but before the Department has processed the borrower's PSLF forgiveness application. *See Do You Have Unanswered Questions About the Public Service Loan Forgiveness (PSLF) Program?*, U.S. Dep't of Educ., https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions (last visited Sept. 24, 2018). Specifically, in that situation, the borrower is not required to continue making payments on her loan, but may continue making payments if she wishes. If her forgiveness application is granted, any payments made in the interim will be treated as overpayments and will be refunded to her in full. If her forgiveness application is denied, she must resume making payments, and any interest that accrued during the interim period could be capitalized.

CONCLUSION

For the foregoing reasons, Plaintiff ABA respectfully requests that the Court grant its Motion and order the requested relief.

Dated: September 24, 2018

Respectfully submitted,

/s/ Chong S. Park

Chong S. Park (D.C. Bar No. 46050)
John T. Dey (D.C. Bar No. 1029475)
Edward F. Roche (D.C. Bar No. 1029012)
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 508-4600
Chong.Park@ropesgray.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all Counsel of Record.

/s/ Chong S. Park

Chong S. Park