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-RDM

PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Contrary to the Department's characterization, Plaintiffs' case is not based on "misdirection" (Dep't Opp'n at 1), but on fundamental principles of fairness and transparency. Plaintiffs ask this Court to compel the Department to follow the law and honor its prior eligibility determinations on which so many have relied for many years.

In its Opposition to Plaintiffs' Motion for Summary Judgment ("Dep't Opp'n"), the Department seeks to insulate its arbitrary and capricious actions from judicial review. The Department ***does not dispute*** that its prior approvals and determinations of Plaintiffs' eligibility under the Public Service Loan Forgiveness ("PSLF") program were revoked without any justification, notice, or explanation. And the Department ***does not dispute*** that the scope of the Individual Plaintiffs' employment falls within the statutory definition of "public interest jobs." Rather, the Department's defense primarily relies on erroneous contentions and arguments that do not directly address the substance of Plaintiffs' APA claims. As set forth below, and in Plaintiffs' Opening Brief ("Pls.' Mot."), neither the record nor applicable law supports these contentions.

First, the Department's revocations of prior eligibility certifications are appropriately subject to this Court's review under the APA as final agency actions. The Department's position that its Employment Certification Form ("ECF") decisions are merely provisional and tentative—and are not reviewable until the ultimate loan forgiveness decision is made (after at least 10 years)—defies common sense, logic, and the law. Throughout its opposition, the Department inappropriately conflates the predicate determination of eligibility to participate in the PSLF program with the ultimate loan forgiveness decision. Under the Department's view, a denial of an ECF certification would never be, as a practical matter, subject to judicial review. No borrower—after receiving notice that her employment did not qualify for forgiveness—

would then stay in her position until 10 years had passed, her loan balance growing and other career options closing, to challenge the decision and hope, for some reason, for the Department to have a change of heart. Nor, on the other hand, could a borrower who received approval of her ECF fully rely on a "non-final" assurance of eligibility. Subjecting public service employees to this kind of uncertainty on a life-changing financial issue is unconscionable and contrary to the law and policy underlying the PSLF program. Indeed, in light of the established "pragmatic and flexible" standard for assessing the finality of agency action, the Department's revocations are appropriately the subject of this Court's review.

Second, the Department's position that the ABA's claims are not justiciable because the organization, as a non-profit employer of public interest professionals, falls outside of the statute's contemplated "zone of interests" lacks merit. Congress clearly intended for the ABA and other public interest employers to benefit from the PSLF program. In fact, the Department has encouraged public interest employers, such as the ABA, to tout PSLF program eligibility as a recruiting tool, in order to further the provision of public services to the community. Thus, the Department itself understood that decisions impacting the PSLF program would directly—not incidentally—affect the ABA and other employers.

Third, the Department's retroactive actions in stripping Plaintiffs' eligibility and credit for loan payments ***did*** constitute a change in the Department's position. The Department's claims that it never changed its interpretations are simply not accurate. The record demonstrates a very clear change of interpretation, although it is entirely devoid of any underlying rationale or explanation for this change. But the fact that there was a change in position is undeniable. In fact, emails from the Department itself flatly contradict its denial of a changed interpretation.

The Department concedes its case is unsupportable through its failure to engage on the

substance of Plaintiffs' APA claims. Its actions reveal a callous disregard for numerous borrowers and public interest employers who relied in good faith on the Department's representations that they satisfied the requirements of the program—only to have their expectations suddenly and irreparably shattered. The reliance on the Department's original eligibility determinations was not, as the Department contends, just "unfortunate." Dep't Opp'n at 18. Such reliance was reasonable and induced by the Department itself. Nor can the Department simply point the finger at its chosen loan servicer and the purported "occasional errors" made in administering the program. Pronouncements and decisions were communicated directly by the Department—including by high-level Department officials—concerning the eligibility of Plaintiffs to participate in the PSLF program. If allowed to stand, the Department's unannounced and unexplained revocations of its prior decisions will seriously undermine the stated goal of Congress in enacting the PSLF program—namely, to encourage new graduates to pursue and obtain long-term employment in public service. The Court should intervene to right the Department's wrongs and restore its correct original interpretations of the relevant provisions.

ARGUMENT

I. THE DEPARTMENT'S DETERMINATIONS REGARDING PSLF ELIGIBILITY ARE FINAL AGENCY ACTIONS SUBJECT TO THIS COURT'S REVIEW

The Department seeks to avoid this Court's review of its revocation of its earlier ECF approvals by contending that they did not constitute final agency actions under the APA. Dep't Opp'n at 13-20. Under the test put forward in *Bennett v. Spear*, an agency action is considered final when (1) it "mark[s] the consummation of the agency's decisionmaking process" and (2) it is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). The

Department's determinations regarding employer eligibility meet both of these requirements and thus amount to final agency action that merits this Court's review. The Department's argument that its revocations cannot be construed as final agency actions ignores controlling precedent on the issue of finality, which underscores the fact-intensive nature of the final agency action inquiry. *See Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (observing the "pragmatic and flexible nature of the inquiry as a whole") (citation omitted). The Department simply turns a blind eye to the serious practical and legal consequences Plaintiffs have experienced as a direct result of the Department's decisions.

A. The Department's PSLF Eligibility Determinations Were Not Merely "Provisional Guidance" But Constitute Final Agency Actions

As set forth in Plaintiffs' opening brief, courts are to consider finality in a "pragmatic and flexible" manner. Pls.' Mot. at 15 (quoting *Friedman*, 841 F.3d at 541). The Department's approach to finality is excessively rigid and ignores controlling precedent. In arguing that its ECF decisions do not mark the "consummation" of its decision-making process, the Department repeatedly conflates the ultimate decision regarding whether a borrower is entitled to *loan forgiveness* after meeting *all* the requirements (including 10 years of on-time payments) with its discrete, predicate decision as to whether a borrower's *employment* satisfies the requirements of the PSLF program. Plaintiffs, of course, do not—and cannot—challenge the Department's decision on loan forgiveness as no Plaintiffs (and indeed, no borrowers to date) have yet met the 120-month threshold at which they could submit a loan forgiveness application. Instead, Plaintiffs challenge the Department's decisions to deny ECF approval to their employers and thereby revoke their PSLF program eligibility. These are distinct determinations made according to the Department's interpretation of the statutory and regulatory requirements for eligible employment. *See Philip Morris USA Inc. v. FDA*, 202 F. Supp. 3d 31, 46 (D.D.C. 2016)

(holding that "[n]on-legislative agency statements" are sufficiently final for review when the "agency has taken a 'definitive legal position' regarding its statutory authority" and "the case presents a 'purely legal question of statutory interpretation'" (quoting *PhRMA v. HHS*, 138 F. Supp. 3d 31, 42 (D.D.C. 2015))). And, even if these decisions were deemed not to be entirely independent agency actions, such actions "need not necessarily be the very last" in order to be final. *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974); *see* Pls.' Mot. at 18. The Department's contention that its ECF decisions amount to merely "provisional guidance," Dep't Opp'n at 15, lacks merit.

Nor is this conclusion undermined by the Department's curious contention that it "declined" to accept the recommendations it received during the rulemaking process to create a certification process during the 120-month period. *See* Dep't Opp'n at 14-15, 19, 30. The Department appears to rely on this contention to support its arguments that the decision on the loan forgiveness application (after 10 years) was the only agency decision contemplated by the Department through the rulemaking process; and that, as a result, it somehow rejected an approach whereby it would make PSLF eligibility determinations prior to its decision on a borrower's loan forgiveness application. This contention is highly misleading.

First, the Department in its final regulation indicated that it would develop a form containing "an employer certification section and instructions regarding supporting documentation that the Department will need to determine the borrower's eligibility for the forgiveness benefit." 73 Fed. Reg. 63,232, 63,241-42 (Oct. 23, 2008), AR45-46. Importantly, the Department noted that the "borrower will be able to use this form to collect a certification from his or her employer ***either annually*** *or at the close of the 120-payment qualifying period*." *Id.* at 63,242, AR46 (emphasis added). Thus, the Department envisioned the very ECF system it

ultimately enacted, whereby it encourages borrowers to complete and submit the ECF "annually or when [they] change employers," prior to reaching the 120-month mark, "in order to ensure [they are] on the right track to receive forgiveness." Federal Student Aid: Public Service Loan Forgiveness, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service (last accessed Aug. 16, 2017). Upon receipt of an ECF, the Department reviews the form "to ensure that it is complete and to determine whether [the borrower's] loans and employment qualify for the PSLF Program." *Id.* The fact that the Department gave notice of the very system it later enacted does not amount to a declination to incorporate commenters' concerns that borrowers "not be left in the dark regarding whether they [] qualify for loan forgiveness." AR45.

Second, as noted, the Department ultimately *did* adopt a certification process. In so doing, the Department induced reasonable reliance on its ECF decisions, on the part of both borrowers and employers. *See* Pls.' Mot. at 34-35. It is wholly irrelevant to the question of whether an ECF decision constitutes final agency action that, "if a borrower were to make all 120 qualifying monthly payments, and leave her qualifying job before she filed her application, she would not be eligible for PSLF, regardless of any responses to ECFs she may have received informing her that her employer qualified." Dep't Opp'n at 16. Significantly, the borrower's prior ECF approvals would not be reconsidered in this situation such that her past employment would be retroactively stripped of its qualifying status. Rather, in such a scenario, the Department's decision would bear on whether the borrower has met *all* of the final qualifications for loan forgiveness, including being employed in public service at the time she submits the forgiveness application, not whether her prior ECF-approved employer(s) qualified under the statute and regulation. Indeed, the borrower theoretically could re-join qualifying employment and successfully file an application for forgiveness at a later date. *See* AR177 (instructing

borrowers that "[t]o be eligible for forgiveness after making 120 qualifying payments, you must be employed full-time by a qualifying employer at the time you made each qualifying payment, at the time you apply for loan forgiveness, and at the time you receive loan forgiveness"). It is also irrelevant whether Plaintiffs had an opportunity to submit "additional evidence" regarding their employment eligibility after receiving their denials. *See* Dep't Opp'n at 18, 19 n.7, 22, 29. The question is not whether Plaintiffs had a chance to submit additional evidence; it is whether, in light of the evidence received, the Department made final determinations based on its interpretations of the relevant statutory and regulatory provisions.

And, as previously noted (Pls.' Mot. at 18-19 & n.7), the notion that the Department would revisit at the forgiveness stage the fundamental predicate determination of whether an employer qualified, after already having informed the borrower to that effect upon receipt and review of an ECF, is highly implausible. In fact, it would undermine one of the Department's stated rationales in collecting information via ECF ahead of the 120-month milestone, namely, to reduce the burden on borrowers and the Department in processing applications for forgiveness. *See* Supporting Statement for Paperwork Reduction Act Submission at 3 (Nov. 24, 2014), https://www.reginfo.gov/public/do/DownloadDocument?objectID=49230002.

By any objective measure, the Department's decisions to revoke Plaintiffs' employers' eligibility for PSLF marked the consummation of its decision-making process concerning eligibility to participate in the PSLF program. The Department's re-characterization of the ECF process for purposes of this litigation does not change this fact. Its decisions therefore satisfy the first part of the *Bennett* test.

B. Plaintiffs Have Suffered Significant Adverse Practical And Legal Consequences As A Result Of The Department's Arbitrary And Capricious Actions

The second part of the *Bennett* test requires the Court to consider whether the challenged

agency action is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 178 (internal quotation marks and citation omitted). The Department argues that Plaintiffs fail to satisfy this requirement because the Department's ECF decisions are "non-binding and non-preclusive." Dep't Opp'n at 16. Here again, the Department confuses the determination of whether a borrower has met all the requirements to obtain loan forgiveness with the determination of whether the borrower's employment meets the statutory and regulatory qualifications for PSLF. The Department's denials answer the latter question, and very clearly have a binding effect on the affected borrowers and their employers.

The Department cannot validly distinguish *Philip Morris*. *See id.* at 17 n.6. In that case, the court held that FDA policy guidance was sufficiently binding even despite the presence of "boilerplate" language indicating that the guidance "does not establish any rights for any person and is not binding on FDA or the public." 202 F. Supp. 3d at 46. The *Philip Morris* court held as such because: (1) the FDA had taken a definitive legal position; (2) the dispute presented a clear question of statutory interpretation; and (3) the guidance imposed an immediate and significant burden on the plaintiffs. *Id.* While the agency in *Philip Morris* may not have proffered serious arguments that its policy guidance was the "consummation" of its decision-making process, neither has the Department done so here. Instead, the Department focuses its inquiry on entirely the wrong question, arguing that the Department has made no final decision regarding loan forgiveness instead of focusing on the predicate and discrete question of PSLF employment eligibility. And, as explained below, *infra* pp. 16-24, the Department's actions amounted to more than mere "individualized determinations." They announced a shift in policy as a result of changed interpretations of statutory and regulatory terms defining the types of employment that qualify for the PSLF program. Accordingly, they most certainly represented

the Department's "definitive legal position" regarding its authority and involved "purely legal question[s] of statutory interpretation." *Philip Morris*, 202 F. Supp. 3d at 46.

In addition, the denials' retroactive application had the immediate effect of wiping out what Plaintiffs believed in good faith to be years of qualifying payments toward obtaining loan forgiveness. The Department gave Plaintiffs every reason to believe that it had accepted and recorded payments for many years. It is difficult to imagine an agency action that could more clearly "pose[] an immediate and significant practical hardship to [P]laintiffs." *Id.* at 48; *see Abbott Labs. v. Gardner*, 387 US. 136, 152 (1967) (agency action is appropriate for judicial review when its impact "is sufficiently direct and immediate"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The ABA (specifically including its ProBAR project) suddenly faced serious recruiting and retention problems due to the revocation of its status as a PSLF-eligible employer. Pls.' Mot. at 16; Declaration of Kimi Jackson ("Jackson Decl.") ¶¶ 6-7, 9-11, 13-16, 19, attached hereto as Exhibit A. The Individual Plaintiffs found themselves years behind where they thought they were in making progress toward the 120-payment requirement, all while having witnessed their debt balances rise as an effect of the income-driven repayment plans they had entered in reliance on the promise of PSLF. Pls.' Mot. at 16.

The Department dismisses these drastic effects out of hand, claiming that its revocation notices "do not have an immediate or significant practical effect on plaintiffs." Dep't Opp'n at 17 n.6. This position is startling, even galling. The Department itself set up the certification process in order to reassure the Individual Plaintiffs and other borrowers of their progress to loan forgiveness and encouraged the ABA and other employers to tout the existence of the PSLF program. The Department cannot reasonably disavow the serious consequences of its unanticipated and retroactive denials. Moreover, even if one were to accept the argument that

the adverse effects of the Department's denials lack immediacy since the Department has not made final determinations regarding loan forgiveness (as opposed to employment eligibility), again, an agency's actions "need not necessarily be the very last" in order to be considered final. *Fidelity Television*, 502 F.2d at 448.

Moreover, a vague prospect that the agency will reconsider a decision, whether because of external developments or following informal appeals by the aggrieved party, is insufficient to render its actions non-final, precisely because the party will continue to suffer the adverse consequences in the interim. *Id.* at 450; *see* Pls.' Mot. at 15-16; *Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."). No significance can attach to the Department's purported invitation for Plaintiffs to submit additional evidence demonstrating that their employment qualified—especially where, as here, Plaintiffs were already told they qualified and then had those determinations revoked without any adequate warning or explanation, and where, to this day, no guidance or criteria exists as to what evidence, if any, would satisfy the Department's new and undefined eligibility standards.[1] Because "[t]here is no indication that the [Department] intends to reconsider [its] decision[,] . . . [its] decision represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties." *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting *Int'l Union,*

[1] Further, as already explained (Pls.' Mot. at 19-20), even if formal administrative remedies existed, which they do not, exhaustion of administrative remedies is not a prerequisite to finality unless such exhaustion is specifically required by statute or agency rule. 5 U.S.C. § 704; *see Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993). Neither the statute nor the regulation at issue here contains any such requirement or provides any process to pursue an appeal. The Department's opposition does not address, and thus concedes, that no requirement exists here for an exhaustion of administrative remedies.

United Mine Workers of Am. v. Mine Safety & Health Admin., 823 F.2d 608, 614-15 & n.5 (D.C. Cir. 1987)).

For this reason, the Department's attempt to distinguish the D.C. Circuit's opinion in *Friedman* (Dep't Opp'n at 19-20) is also unavailing. In *Friedman*, the court held that, by refusing to issue a final determination regarding the plaintiff pilot's application for a first class medical certificate, the FAA had placed the plaintiff in a "holding pattern" resulting in the "constructive denial" of his application, thereby rendering the FAA's actions ripe for judicial review. 841 F.3d at 541-42; *see* Pls.' Mot. at 19. The Department claims that, unlike the agency in *Friedman*, the Department "has committed explicitly to making a final decision on each of the individual plaintiffs' eligibility for PSLF when he or she files an application" for forgiveness. Dep't Opp'n at 20. But once again, the Department has conflated finality with respect to an ultimate decision on loan forgiveness with finality on a decision regarding employment eligibility. As Plaintiffs have already explained, it is unreasonable and unrealistic to expect that a borrower who has been told that her employment does not qualify will remain in her position for the duration of the required 10 years and then file an application for forgiveness with the hope or expectation that the Department will change its mind. *See* Pls.' Mot. at 18. The Department's claim that it makes no final decision on an employer's eligibility until the borrower submits an application for forgiveness "prevent[s] [any borrower] from obtaining any explicitly final determination" on whether his employment qualifies and "thwart[s] the Court's interest in reviewing those agency actions that, in practical effect if not formal acknowledgement, constitute 'the consummation of the agency's decisionmaking process' and determine 'rights or obligations.'" *Friedman*, 841 F.3d at 542 (quoting *Bennett*, 520 U.S. at 177-78)). By refusing to recognize or appreciate the real consequences of its employment eligibility denials, the

Department seeks to avoid judicial review of its actions.

Contrary to the Department's assertions, then, the practical effect of its denials results in a certain change in Plaintiffs' legal position. *See* Dep't Opp'n at 18 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005)). As explained *supra* p. 9, the ABA and other employers of the Individual Plaintiffs have been suddenly stripped of their eligibility for the PSLF program, and the Individual Plaintiffs are now required to reset the clock on their attempts to meet the required number of payments in order to obtain forgiveness, all while contending with ever-mounting loan balances. Even if the Court were to accept that the Department's notices are not *facially* binding, "[f]inality resulting from the practical effect of an ostensibly non-binding agency proclamation is a concept [the D.C. Circuit] ha[s] recognized in the past." *Norton*, 415 F.3d at 15 (citing *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988)). Unlike the "protocols" at issue in *Norton*, *see id.*, the Department's denials have a direct effect on the Individual Plaintiffs' ability to qualify for loan forgiveness by delaying (or, if the Individual Plaintiffs desired to remain in their public service jobs, closing off completely) their ability to reach the required 10-year threshold. The denials also forever negatively affect the ABA's ability to meet critical public service needs and preclude it from using the PSLF program as a "recruiting opportunity," as the Department had encouraged it to do.

The Department's denials clearly have tremendous legal and practical consequences on Plaintiffs. In revoking Plaintiffs' past eligibility for the PSLF program through its changed interpretations, the Department has significantly altered the legal requirements Plaintiffs must meet in order to satisfy the statutory and regulatory commands. The Department's actions are thus final and ripe for this Court's review under the APA.

II. THE ABA'S CLAIMS ARE JUSTICIABLE AS ITS INTERESTS FALL WITHIN THE STATUTE'S CONTEMPLATED "ZONE OF INTERESTS"

The Department cannot dispose of the ABA's claims on the grounds that the ABA's interests are outside the requisite "zone of interests." Dep't Opp'n at 20-22. As a not-for-profit organization whose employees perform the very public service jobs laid out in the PSLF statute, the ABA is directly—not incidentally—affected by the program, which provides assurances to those employees that they can forgo lucrative salaries in the for-profit sector in exchange for obtaining forgiveness of their student loan obligations. It is clear from both the intent and the operation of the PSLF program that the ABA's claims fall within the zone of interests contemplated by the statute.[2]

The "zone of interests" test is a requirement that the plaintiff demonstrate that "it is within the group intended to benefit from the statute." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.6 (6th ed. 2012). In actions involving the APA, the test is "not 'especially demanding,'" and the "benefit of any doubt goes to the plaintiff." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)). 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." *Id.* (internal quotation marks and citation omitted); *see Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (plaintiffs need only be "arguably" within the zone of interests to be protected by the statute in question).

The Department draws a distinction between the ABA, which it considered under its prior interpretation to be a "public service organization" for purposes of the PSLF program, and the

[2] The Department does not challenge the ABA's Article III standing in this case.

ABA's employees, who sought confirmation that their employment qualified for the program. Dep't Opp'n at 21-22. In so doing, it argues that "[a]ny benefit or harm the ABA derives from this program is incidental to the benefit incurred by the individual borrowers that the ABA employs." *Id.* at 22. Such an argument defies logic. As the Department acknowledges, and as it stated in its regulation, the PSLF program "is intended to encourage individuals to enter and continue in full-time public service employment." *Id.* at 21 (quoting 34 C.F.R. § 685.219(a)). This goal can be realized only if public service *employers* actually employ said individuals. The PSLF program accomplishes this objective by rendering public service employers, like the ABA, more attractive to recent graduates who would otherwise seek higher-paying employment options in the for-profit sector. *See, e.g.*, Burkhart Decl. ¶ 6. The Department's revocation of the ABA's eligibility for the PSLF program necessarily hinders that goal.

Indeed, although "'there need be no indication of congressional purpose to benefit the would-be plaintiff'" for a plaintiff to fall within the zone of interests, *Nat'l Credit Union*, 522 U.S. at 491 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)), it is clear that Congress intended public service employers and the missions they carry out—not only borrowers—to benefit from the PSLF program. *See, e.g.*, 153 Cong. Rec. S9574-02 (July 19, 2007) (statement of Sen. Edward Kennedy) ("[T]here is a value in terms of public service *employment*. . . . We have listed the range of what we consider to be public service fields in this bill, and it is extensive. There is enormous need in America. . . . There are important public responsibilities and services." (emphasis added)); 153 Cong. Rec. S11241-07 (Sept. 7, 2007) (statement of Sen. Hillary Clinton) ("I strongly believe this program will help to fill the void in public service our nation will soon face as our baby boomer generation sets to retire by providing an incentive for college graduates to pursue *lower paying, but vital professions*." (emphasis

added)). It is axiomatic that Congress meant for public service employers to reap the benefits of the enlarged public sector workforce it envisioned when it created the PSLF program.

Moreover, the Department fails to acknowledge the active role that public service employers play in completing employees' ECFs. The form requires the employer to verify and attest to the accuracy of the employer-specific information, which may be supplied by either the borrower or the employer. *See, e.g.*, Jamie Rudert Apr. 1, 2016 ECF, AR268. And, as mentioned earlier, the Department encourages employers to use the knowledge that they qualify for PSLF in recruiting new employees. *See* Compl. ¶ 61. On its website, FedLoan Servicing hosts a dedicated resource center for employers, where it invites them, once they know that they qualify for PSLF, to "use it as a recruiting opportunity" and "[t]alk about PSLF with new hires." Public Service Loan Forgiveness: Employer Resource Center, https://myfedloan.org/borrowers/special-programs/pslf/pslf-employer-resource-center (last accessed Aug. 16, 2017). The ABA did just that, and now, because of the Department's change in interpretation, the ABA has had to inform prospective hires that it no longer qualifies, thereby prompting them to pursue opportunities elsewhere. *See* Rives Decl. ¶¶ 23-25. At the same time, the loss of its qualifying status has caused the ABA to lose several existing employees, thus hampering the organization's ability to carry out its critical public service functions. *Id.* ¶ 26; Jackson Decl. ¶¶ 9, 19. The harm the ABA has experienced as an employer is thus hardly "incidental" to the wrongs suffered by its employees as a result of the Department's actions. Dep't Opp'n at 22. Whether viewed through the lens of the statute or of the program as administered by the Department, the ABA's claims fall squarely within the zone of interests Congress contemplated.

III. THE DEPARTMENT HAS FAILED TO PROVIDE AN ADEQUATE RESPONSE TO PLAINTIFFS' SUBSTANTIVE APA CLAIMS

The Department focuses its opposition briefing primarily on arguments that this Court should not review its actions. As such, the Department gives cursory treatment to Plaintiffs' claims that its actions violate the APA and Plaintiffs' due process rights. *See* Pls.' Mot. at 20-28 (the Department's new interpretations are invalid under the statute and regulation); *id.* at 28-37 (the Department failed to follow adequate process and procedure in changing its interpretations); *id.* at 37-43 (the Department unlawfully imposed retroactive effects on Plaintiffs); *id.* at 43-44 (the Department violated Plaintiffs' due process rights). Instead, the Department simply and flatly asserts—without any support or reference to the administrative record—that it made no changes to its interpretations whatsoever. The Department's claims in this regard strain the bounds of credulity.

The few merit-based arguments the Department does raise are wholly unconvincing.[3] The Department's new interpretations are incompatible with the PSLF statute and were implemented without following required processes and procedures. Its denials have imposed impermissible retroactive consequences on Plaintiffs and deprived them of their constitutional right to due process. The Department's actions therefore should be deemed invalid and vacated.

A. The Department's Revocation Of Previous Eligibility Approvals Reflects A Change In The Department's Interpretation Of The Statute And Regulation

After promising borrowers that their jobs qualified for PSLF, the Department changed its mind. This turnabout came as a result of changes in the interpretation of the PSLF statute and

[3] To the extent the Department seeks to introduce new arguments to refute Plaintiffs' claims in its forthcoming reply brief, such arguments are waived. *See Walker v. PhRMA*, 461 F. Supp. 2d 52, 58 n.9 (D.D.C. 2006) (argument presented for first time in reply is waived) (citing *In re Asemani*, 455 F.3d 296, 300 (D.C. Cir. 2006)). Accordingly, the Court should not permit the Department to introduce, and should refuse to consider, any new arguments in its reply papers.

regulation—changes that were made between the time the Department promised three of the Individual Plaintiffs that their jobs qualified and the time it revoked those promises.

The Department protests that there was no change of interpretation, dismissing Plaintiffs' challenge as "elusive." Dep't Opp'n at 22-23. The Department contends that Plaintiffs' claims amount to "ambiguous" arguments that obscure the "simple fact" that the only interpretations at issue are those that were made in the Department's 2008 final rule. *Id.* at 23. The Department thus argues that any challenge must be time-barred. *Id.* at 24. Other interpretations—including the "primary purpose" requirement used to justify numerous retroactive denials—were supposedly made in mere "individual, informal, interim, nonprecedential adjudications." *Id.* at 25.

The administrative record shows the opposite to be true. Moreover, in compiling that record, the Department omitted documents revealing the very change of interpretation it now denies.

1. Record Evidence Demonstrates that the Department Changed its Interpretations of the Statute and Regulation Long After Promulgating the 2008 Final Rule

Plaintiffs' opening brief explains that the Department made its new interpretations known to Plaintiffs only after issuing denials, and only after Plaintiffs demanded answers as to why the Department had reversed its prior certifications of their employment eligibility. Pls.' Mot. at 31-33. But the Department cannot claim that no change of interpretation ever occurred simply because the interpretation took place on an *ad hoc* basis and in secret.

Contrary to the Department's argument, these new interpretations—introducing a previously unannounced "primary purpose" standard for "public interest law services" and new limiting definitions for "public education" and "public service for individuals with disabilities and the elderly"—were not merely "individualized, non-final determinations." Dep't Opp'n at

28. Nor were they mere "correct[ions]" of the "Department's contractor['s] . . . occasional errors."[4] *Id.* at 2. They were new interpretations of the qualifying criteria for "public service jobs" under the statute and for "public service organizations" under the 2008 regulation.[5]

With respect to the "primary purpose" standard, the record belies the Department's claim that it was applying this standard only in individual adjudications. The Department's communications with the ABA provide an example. In the Department's December 1, 2016 letter to Jack Rives, the Department thanked the ABA for bringing to its attention the lack of information available to borrowers generally regarding employer eligibility criteria, and promised in response to "[u]pdat[e] the public-facing Q & A to *provide more detail about criteria that an employer must meet to be considered an 'eligible employer.*'" AR192 (emphasis added). In other words, the Department acknowledged that it had failed to inform the public of the new standard it was applying in assessing the PSLF eligibility of *all* private organization employers, not just the ABA.[6] Indeed, applying a "primary purpose" standard solely with

[4] With respect to Ms. Voigt, the Department itself originally, and directly, informed her that her employment at AILA qualified under the PSLF program. AR337.

[5] The Department attempts to confuse the Court as to which "interpretation" Plaintiffs challenge, going so far as to suggest that Plaintiffs are challenging the Department's 2008 final rule—which the Department claims embodies its interpretation of the statute—and that such a challenge is therefore time-barred. Dep't Opp'n at 24. This is not the case. Plaintiffs explicitly did *not* challenge the regulation. Instead, Plaintiffs argued that the Department's new interpretations run afoul of the regulation's plain language, which, in line with the statute, encompasses Plaintiffs' employment. *See* Pls.' Mot. at 24-25.

[6] Only *since* the commencement of this action has the Department posted on its website, for the first time, its new "primary purpose" standard. *Compare* Federal Student Aid: Public Service Loan Forgiveness (May 31, 2017) (screen capture of ED's PSLF website containing no indication of a "primary purpose" requirement under the heading "What is qualifying employment?") (attached hereto as Exhibit B) *with* Federal Student Aid: Public Service Loan Forgiveness, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service (last accessed Aug. 16, 2017) (indicating that non-501(c)(3) not-for-profit organizations qualify "if their *primary purpose* is to provide certain types of qualifying public services" (emphasis

respect to the ABA but not with respect to other non-501(c)(3) employers would raise yet another set of serious concerns about the Department's administration of the program. The "primary purpose" requirement was a newly applied standard that resulted in the Department revoking the ABA's previously recognized PSLF eligibility.

Similarly, the Department's *post hoc* invocations of the limiting definitions for "public education" and "public service for individuals with disabilities and the elderly" are indications of the Department's new interpretations of those qualifying services. The Department asserted that employment qualified as providing "public education" only if it occurred in a "school or school-like setting," AR336, and as providing "public service for individuals with disabilities and the elderly" only if such services were "provide[d] . . . outright," AR331. Clearly, Ms. Voigt's and Mr. Rudert's employment qualified for PSLF under the Department's previous correct interpretations of these qualifying service terms, as the Department informed each of them (in Mr. Rudert's case, twice) that their employers provided PSLF-eligible public services. AR245; AR262; AR337. It would be untenable for the Department to assert that it is applying these new interpretations to AILA and VVA but not to other organizations claiming eligibility on the same grounds. And, with regard to its new definition for "public education," the Department has made evident that it intends to apply the definition to all private organizations claiming eligibility under that category by adding the "school or school-like setting" limitation to a new version of

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added)). The same is true of the Department's guidance to borrowers. *Compare* Public Service Loan Forgiveness: Questions and Answers for Federal Student Loan Borrowers, AR174-75 (containing no "primary purpose" requirement for non-501(c)(3) not-for-profit organizations) *with* Federal Student Aid: Public Service Loan Forgiveness Questions and Answers, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions (last accessed Aug. 16, 2017) (describing qualifying non-501(c)(3) not-for-profits as those "whose *primary purpose* is to provide a qualifying public service" and requiring such organizations to "provide one of the following public services as its *primary function*" (emphasis added)).

the ECF which did not exist at the time the Department informed Ms. Voigt that it was revoking AILA's eligibility. *See* Pls.' Mot. at 10-11 n.4.

The sole case on which the Department relies in arguing that its decisions were "individualized" determinations that did not amount to statements of generally applicable policy, *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994), is inapposite. That case involved a challenge to the Maritime Administrator's decision not to enforce a provision of the Merchant Marine Act of 1936. *Id.* at 672. As a threshold matter, the court only assumed for the sake of argument that the Administrator's actions amounted to a non-enforcement action, since the plaintiff's standing was questionable. *Id.* at 674. In addition, as the court noted, non-enforcement decisions involve special considerations of an agency's inherent discretion when it comes to deciding whether to exercise enforcement authority. *See id.* at 677 (analyzing the plaintiff's claims under the Supreme Court's precedent on administrative non-enforcement laid out in *Heckler v. Chaney*, 470 U.S. 821 (1985)). The case did not involve an agency's adverse decision that revoked an aggrieved plaintiff's eligibility for a statutorily mandated benefit, as is the case here. Plaintiffs "are not challenging the manner in which the [Department] has chosen to exercise its enforcement discretion. . . . Instead, [Plaintiffs] are challenging the [Department's] interpretation of [20 U.S.C. § 1087e(m)] and its implementing regulation[]." *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993). The Department has issued new interpretations excluding Plaintiffs from eligibility for the PSLF program. "Clearly, [these] interpretation[s] ha[ve] to do with the substantive requirements of the law; [they are] not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review." *Id.*

The Department cannot evade review simply by proclaiming that it has not adopted new interpretations of the relevant statutory and regulatory terms. The Department's own actions, as documented by the record and its public pronouncements since, belie any such claim by demonstrating its intent to apply these new interpretations broadly and systematically in assessing employers' eligibility for the PSLF program. Its new interpretations are properly before this Court, are not time-barred as the Department claims, and are subject to challenge under the APA and the Constitution.

2. The Court Should Consider as Extra-Record Evidence Documents Showing the Change in Interpretation the Department Denies

As explained in Plaintiffs' Motion to Allow for Extra-Record Review or, in the Alternative, to Allow for Judicial Notice ("Mot. for Extra-Record Review"), since summary judgment briefing commenced in this case, Plaintiffs have uncovered documents that reveal precisely the changes in interpretation that the Department so vehemently denies. The inclusion of these documents will allow the Court to conduct a fully informed review of the Department's actions. *See Calloway v. Harvey*, 590 F. Supp. 2d 29, 38 (D.D.C. 2008) (expansion of record allowed when necessary "to enable judicial review to become effective" (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989))).

Throughout its opposition, the Department claims that its determinations regarding the eligibility of the ABA, AILA, and VVA were informal, individualized decisions that did not purport to establish broader policy on eligibility standards. *See, e.g.*, Dep't Opp'n at 29 ("Neither the Department's notices nor its letters to individual plaintiffs and the ABA delineate a generally applicable policy or purport to speak to a broad class of individuals."). As explained above, the notion that the interpretations provided in the Department's notices to the Individual Plaintiffs and in its letters to the ABA are not meant to represent statements of broader agency

policy is entirely without merit. *See supra* pp. 17-21. Moreover, in addition to the documents provided in the record, communications between the Department and FedLoan Servicing further confirm that the Department actually created and expressly applied these unannounced, new interpretations to broad swaths of borrowers and employers.

For example, in a February 23, 2017 email exchange between the Department and FedLoan Servicing, a FedLoan Servicing employee noted that the Department's response letters to three organizations, one of which was VVA, "referenced that the organization's 'primary purpose' has to be to provide one of the qualifying services." Feb. 23, 2017 Email between ED and FedLoan Servicing, Mot. for Extra-Record Review, Ex. B at 1. The employee continued by explaining that FedLoan Servicing was "now concerned as to whether or not this guidance is directly conflicting with how we have been evaluating certain organizations," focusing in particular on an organization the Department had previously approved as providing public health services. *Id.* In response, a Department employee expressed the Department's belief that, in light of the new "primary purpose" requirement, the organization at issue does not qualify, and that he "think[s] that we need to do a retraction in this case." *Id.* He proceeded to request that the FedLoan Servicing employee "comb through those organizations that we've approved under 'public health' and provide [the Department] a list, *like you've done for public education and public interest legal* [*sic*] *services*." *Id.* (emphasis added). Thus, Plaintiffs' experience was by no means unique to them. The Department's "primary purpose" requirement was indeed a change in interpretation that applied not only to the organizations at issue in this case, and not only with respect to the public services they provide, but to *all* non-501(c)(3) private not-for-profit organizations that provide *any* of the public services enumerated in the statute and regulation.

Another email exchange between the Department and FedLoan Servicing, this time from 2014, reveals the precise moment when the Department created its new limiting definition for "public education." A FedLoan Servicing employee sought guidance as to how to respond to a borrower who wanted to know why the borrower's employer was deemed not to meet the requirements for "public education." 2014 Email between ED and FedLoan Servicing, Mot. for Extra-Record Review, Ex. C at 1. Importantly, the FedLoan Servicing employee noted that she had "reviewed the statute, the regulations, [and] the preamble to both the [Notice of Proposed Rulemaking] and the final rules, and *can't find anything that defines public education*." *Id.* (emphasis added). After a few weeks had passed, the same Department employee responded, stating that the Department, after "run[ning] it by [its] attorney," had "settled . . . on a definition of public education[.] For PSLF, public education services are those that provide educational enrichment or support directly to students or their families in a school or school-like setting." *Id.* Borrowers, including the Individual Plaintiffs, were not informed of this change in interpretation until after they received the Department's denial notices.

These documents demonstrate beyond a shadow of a doubt that the Department was, in fact, "delineat[ing] a generally applicable policy" when it invoked the new interpretations in its letters to Plaintiffs. Dep't Opp'n at 29. That they undermine the Department's claims to the contrary provides no basis for its withholding of such documents from the record. *See Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197, 198 (D.D.C. 2005) (holding that "[an] agency may not skew the record in its favor by excluding pertinent but unfavorable information" and requiring supplementation of the record because the agency "exclude[d] information adverse to its position"); *see also Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978) (remanding an agency action because the agency "skew[ed] the record for review in its favor by

excluding from that record information in its own files which ha[d] great pertinence to the proceeding in question"). These communications should be added to the record to aid the Court's review. They unequivocally show—directly contrary to the Department's claim—that a change of interpretation occurred.

B. The Department's New Interpretations Run Contrary To The Governing Statute And Regulation

20 U.S.C. § 1087e(m)(3)(B) provides no limiting definitions beyond the list of PSLF-qualifying "public service jobs" contained therein. Neither does the Department's regulation, 34 C.F.R. § 685.219, except to specify that borrowers who qualify by providing public interest law services must be employed by an organization that receives at least part of its law services funding from a government source, a limiting definition that is not at issue in this case. Since the Department issued the regulation and started approving borrowers' ECFs, however, it has applied new interpretations of the statute's and the regulation's public service provisions. These new interpretations are all inconsistent with the statutory and regulatory text. The new interpretations are thus contrary to law and invalid under the APA.

1. The Department's Interpretations are Not Entitled to Any Deference

The Department does not contest that its new interpretations are not entitled to *Chevron* deference, since it plainly did not engage in notice-and-comment rulemaking or meet other requirements that would merit such deference. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002); Pls.' Mot. at 25-26. Instead, it argues that it is entitled to *Skidmore* deference because, in the Department's view, its new interpretations are "reasonable." Dep't Opp'n at 25. This argument misstates the applicable standard. To merit *Skidmore* deference, an agency must demonstrate "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to

persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Despite the Department's best efforts at *post hoc* rationalizing of the its new interpretations of the statutory requirements, it points to *no* evidence in the record demonstrating that it adopted these interpretations through thorough consideration, valid reasoning, consistency with prior interpretations, or any other persuasive factors, and with good reason: no such evidence exists.[7] The Department's sudden shifting of the goal posts, of which Plaintiffs learned only upon receiving their denial notices, occurred without any acknowledgment whatsoever that the Department was, in fact, applying new interpretations to the public service terms laid out in the statute, much less with any explanation for the deviations. Such an impactful change in course lacking any semblance of notice or reasoned decision-making is ineligible for *Skidmore* deference.

Having failed to satisfy the requirements for either *Chevron* or *Skidmore* deference, the Department's new interpretations of the relevant statutory provisions must be reviewed *de novo* without affording the Department any formal deference. *Aftergood v. Nat'l Reconnaissance Office*, 441 F. Supp. 2d 37, 45-46 (D.D.C. 2006). The Department's protestations that its interpretations are "reasonable" therefore should have no bearing on the Court's determination of the correct interpretation of the statute.

2. The Department's Interpretations are Inconsistent with the Statute and Regulation

Even if the Department had displayed the necessary careful consideration in its adoption of the new interpretations, they are flatly inconsistent with the commands of the PSLF statute. The Department first attempts to justify its adoption of a new "primary purpose" standard that

[7] In fact, evidence that the Department omitted from the administrative record *confirms* that it met none of these requirements when it invented its new interpretations. *See supra* pp. 21-24.

employers must meet to qualify as a public service organization. Dep't Opp'n at 25-27. It does so by arguing that a narrowing construction of the qualifications to be a public service organization is required, lest a "loophole" exist whereby "all the employees of a public service organization who have Direct Loans, no matter their level of pay or job function, rather than just those doing 'public service jobs,'" stand to benefit from PSLF. *Id.* at 26.

In an attempt to convince the Court of the purported need for its exclusionary "primary purpose" standard, the Department raises two hypothetical situations. In the first, it speculates that all employees of a "private law firm" might claim PSLF eligibility as providers of "public interest law services" if only one employee coordinates the firm's *pro bono* program and qualifies. *Id.* In the second, it raises the fear that all employees of a "company" that has a subsidiary that provides emergency management services might claim PSLF eligibility. *Id.* The Department fails to mention, however, that in order to qualify under the PSLF program, any "private organization" (*i.e.*, non-501(c)(3) and non-governmental entity) must be *not-for-profit*. 34 C.F.R. § 685.219(b). This limitation undoubtedly and substantially reduces the likelihood that an organization that is not truly in the business of providing public services would qualify.

In any event, the narrowing requirement the Department has adopted through its new interpretation is impermissible because it entirely *excludes* from PSLF eligibility certain borrowers who clearly and certainly are eligible under the statute. Ms. Quintero-Millan is an example of just such an individual. In her work for ProBAR, she provided free, full-time direct legal services to vulnerable immigrant children along the U.S.-Mexico border. Quintero-Millan Decl. ¶ 5. In addition, her work was almost entirely funded by federal government sources, thus meeting the government funding requirement for public interest law services specified in the regulation at 34 C.F.R. § 685.219(b). Rives Decl. ¶ 12; Jackson Decl. ¶ 4. Under the

Department's newfound "primary purpose" standard, however, Ms. Quintero-Millan and all of her former ProBAR colleagues are deemed, in the sole opinion of the Department, ineligible. The Department cannot promulgate new interpretations of its regulation that would create a direct conflict with the underlying statute.[8] *See PhRMA*, 138 F. Supp. 3d at 48 ("[I]t is elementary that 'no deference is due to agency interpretations at odds with the plain language of the statute itself.'" (quoting *Smith v. City of Jackson*, 544 U.S. 228, 266 (2005))). To the extent the Department was over-inclusive in drafting the regulation, it is within the Department's purview to correct any such over-inclusiveness by amending the regulation—following proper notice-and-comment procedures—as it sees fit.[9,10] *See Clean Air Council*, 862 F.3d at 8-9 ("Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the [APA], including its requirements for notice and comment."). But it could not promulgate a regulation that defies the statute, and it surely cannot issue an interpretation of that regulation that, as to some borrowers, is *narrower* than what the statute commands, as it has done here.

With respect to the public service definitions at issue in this case, the Department fails to

[8] In addition to being in conflict with the statute, the Department's new "primary purpose" limitation remains entirely undefined. Nowhere does the Department explain the criteria that it uses, or that borrowers and employers may use, to determine whether an organization's "primary" function (assuming "function" equates to "purpose") is to perform one (or several) of the enumerated services.

[9] Plaintiffs take no position as to whether employees of currently qualifying non-501(c)(3) not-for-profit organizations who relied on the current statutory and regulatory scope would have cause to seek credit for past qualifying payments in the event the Department alters the PSLF program's regulatory terms.

[10] As the Department acknowledges, it already has used proper procedures to amend the regulation three times, in ways that do not affect the issues involved in this case. Dep't Opp'n at 7 n.5. It chose not to do so here, thereby rendering its new interpretations invalid.

grapple in any serious way with Plaintiffs' contention that these terms—"public interest law services," "public education," and "public service for individuals with disabilities and the elderly"—plainly encompass the Individual Plaintiffs' employment and the ABA's functions, beyond simply denying, once again, that the Department issued new interpretations of them. *See* Pls.' Mot. at 22-25; Dep't Opp'n at 24. To the extent it does address these arguments, the Department contends that it was "reasonable" for it to deny eligibility to AILA on "public education" grounds "merely because [AILA] claims generally to educate the public and its members about its mission."[11] Dep't Opp'n at 27. Again, "reasonableness" is not the applicable standard, as the Department merits no deference for its changed interpretations. *See supra* p. 25. Moreover, the Department misrepresents the information it had before it: as Plaintiffs argued and as AILA explained to the Department, AILA educates the public "on immigration law and policy" by providing on its website "the latest immigration news and information" and a series of resources for the public and members alike. Pls.' Mot. at 23; AR342-44. Such services clearly fall within the definition of "public education," especially in light of the broad scope Congress intended.[12]

Similarly, the Department parrots its "reasoning" for why it deemed VVA not to qualify

[11] The Department misrepresents its change of course with respect to AILA by stating that the Department only became aware that AILA was not a 501(c)(3) organization when an employee filed an ECF in 2014. Dep't Opp'n at 10. In fact, Ms. Voigt's initial inquiry in June 2012 explicitly stated that AILA was a 501(c)(6), and the Department's response reflected its clear understanding that AILA "meets the definition of public service organization [under the regulation] because it is a *private organization that provides public services*." AR337-39.

[12] Further evidence of this broad intended scope is contained in the list of eligible public service jobs that appears in the statute. Alongside "public education," the statute lists separately as qualifying public services "school-based library sciences and *other school-based services*." 20 U.S.C. § 1087e(m)(3)(B)(i) (emphasis added). Had Congress intended for "public education" to encompass only those services provided "directly to students or their families in a school or school-like setting," the additional listing of "school-based services" would have been redundant.

as a provider of "public service for individuals with disabilities and the elderly," stating that "[VVA's] claim to eligibility was based on the fact that it facilitated the provision of disability-related services to Vietnam Veterans, rather than provide them directly. The Department also considered VVA's funding source." Dep't Opp'n at 28. How providing "direct representation to veterans seeking benefits from the Veterans Administration before the Board of Veterans' Appeals"—a service for individuals who are elderly and in many cases suffering from service-related disabilities (Pls.' Mot. at 23)—does not qualify as "directly" providing a "public service for individuals with disabilities and the elderly" remains a mystery. And, it bears repeating that nowhere in the statute or the regulation does there appear a requirement that such services be provided "directly" (however that may be defined), or that the funding for such services come from a particular source. The Department's narrowing is arbitrary and is inconsistent with the statute.

With respect to "public interest law services," the Department does not even attempt to explain how the ABA's work, including that of Mr. Burkhart and Ms. Quintero-Millan, does not meet the statutory or regulatory definitions. It does not respond to Plaintiffs' arguments on this point. *See* Pls.' Mot. at 22-25 (explaining that Mr. Burkhart "has worked to advance the cause of access to justice for the poor in both criminal and civil settings"; that Ms. Quintero-Millan provided "free direct legal representation to unaccompanied, undocumented immigrant children near the Mexican border, frequently appearing in immigration and state courts, representing children in removal proceedings, and filing applications for immigration relief"; that the "ABA's ProBAR initiative supports direct legal representation of historically underrepresented communities"; and that the "ABA's Young Lawyers Division . . . is . . . responsible for coordinating Disaster Legal Services, a public assistance program for low-income disaster

survivors under the Robert T. Stafford Disaster Relief and Emergency Assistance Act"). The Department repeats its *post hoc* explanation for denying eligibility to AILA on this basis, but Plaintiffs do not argue that AILA should qualify as a provider of public interest law services.

The Department may not punish individuals and employers who meet the employment eligibility requirements for the PSLF program by applying artificially narrow interpretations of those requirements that run afoul of the statutory parameters. Its new interpretations are unlawful and must be set aside.

C. The Department Failed To Follow Adequate Process And Procedure In Changing Its Interpretation Of The Statute And Regulation

"A central principle of administrative law is that, when an agency decides to depart from [established] past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *American Wild Horse Prevention Campaign v. Perdue*, No. 15-5332, 2017 WL 3318750, at *5 (D.C. Cir. Aug. 4, 2017). As Plaintiffs explained at length in their opening brief, when the Department changed its interpretation of the statute and regulation to revoke the ABA's and the Individual Plaintiffs' eligibility for the PSLF program, the Department departed from past practice without notice or explanation and failed to consider Plaintiffs' settled reliance interests. Pls.' Mot. at 28-37. The Department departed from its previous practice of approving Plaintiffs' employment under its prior correct interpretations without providing a reasonable explanation, and it ignored Plaintiffs' settled reliance interests in changing its interpretations of the statutory and regulatory terms. *Id.* Remarkably, the Department mounts no defense to this charge except, once again, to baldly proclaim that "the Department's interpretation of the statute and the regulation has been consistent and unchanged." Dep't Opp'n at 30. For reasons explained at length above, *see supra* pp. 16-24, this assertion is simply untrue. The Department also takes issue with Plaintiffs' characterizations of its prior

issuance of ECF approvals as having "certified" Plaintiffs' eligibility for the PSLF program. *Id.* Whether or not the Department "certified" Plaintiffs as qualifying (although it is admittedly curious that an affirmative response to an "Employment *Certification* Form" would not result in a certification), the fact remains that the Department "t[old]" Plaintiffs that their "employment and payments qualif[ied] for PSLF." AR178. Plaintiffs relied on these representations to their detriment in recruiting new staff (ABA) and in taking lower paying jobs while making minimal loan payments (Individual Plaintiffs) on the promise of PSLF eligibility, Pls.' Mot. at 33-37, a fact that the Department failed to consider when it changed its interpretations without any prior notice. Its actions were therefore arbitrary and capricious in violation of the APA.

D. The Department Has Unlawfully Imposed Retroactive Consequences On Plaintiffs

Once again, when it comes to the Department's unauthorized retroactive actions, the Department does not engage with the substance of Plaintiffs' claims. *See* Pls.' Mot. at 38-43. Instead, it simply dismisses these arguments as "also premised on the erroneous assertion that the Department changed its policy." Dep't Opp'n at 30. Again, as already explained, ample evidence shows that the Department did implement a change in policy, namely, by adopting new interpretations of key qualifying provisions in the PSLF statute and regulation. *See supra* pp. 16-24. The Department also quotes language from an ECF response form, which notes that "[a] final determination of [a borrower's] eligibility for forgiveness will occur upon receipt of [the borrower's] application." *Id.* at 30-31; *see, e.g.*, AR204. However, once again, the Department confuses its decisions regarding employer eligibility for the PSLF program with its decisions as to whether a borrower has met *all* of the requirements to obtain loan forgiveness (including making all 120 payments and being employed in a public service job at the time of forgiveness). These are distinct questions for purposes of final agency action, *see supra* pp. 4-5, and—as

Plaintiffs argued at length in their opening brief (Pls.' Mot. at 37-43)—the Department's denial notices, which explicitly retract the Individual Plaintiffs' past qualifying payments, result in retroactive effects. By revoking the Individual Plaintiffs' employment eligibility, the Department impaired their vested rights in their accrued progress toward obtaining loan forgiveness. In the same vein, it also altered the legal consequences of their past actions and unlawfully deprived them of settled reliance interests. Its issuance of denials was clearly inconsistent with the Department's past practice. All of these factors indicate that the Department acted retroactively. Because it did so without statutory authorization, these retroactive actions must be overturned.

E. The Department Has Deprived Plaintiffs Of Their Due Process Rights

The Department asserts that Plaintiffs have no "legitimate claim of entitlement" to a protected property interest, relying on its self-appointed "discretion to look to 'appropriate considerations' to determine whether an organization is a qualifying organization." Dep't Opp'n at 32. However, the case on which the Department relies, *NB ex rel. Peacock v. District of Columbia*, 794 F.3d 31 (D.C. Cir. 2015), only bolsters Plaintiffs' position. As the Department acknowledges, the court in *NB* held that "[a] 'legitimate claim of entitlement' means that a person would be entitled to receive the government benefit *assuming* she satisfied the preconditions to obtaining it." *Id.* at 41. Observing that the law at issue used "mandatory, non-discretionary terms," the court held that the plaintiffs had a protected property interest that the District could not negate through any discretionary action. *Id.* at 42. So too here, where the statute provides that the "Secretary *shall* cancel the balance of interest and principal due . . . on any eligible Federal Direct Loan not in default for a borrower who [meets the PSLF eligibility criteria]." 20 U.S.C. § 1087e(m)(1) (emphasis added).

Plaintiffs were not provided notice and an opportunity to be heard prior to being stripped

of their property interests. *See* Pls.' Mot. at 44; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). An offer to submit "additional evidence" after the fact, particularly without any guidance to assist Plaintiffs in determining what "additional evidence" would satisfy the Department's opaque new eligibility criteria, hardly amounts to adequate due process.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for summary judgment and order their requested relief.

Dated: August 21, 2017

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 21st day of August, 2017, 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