**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AMERICAN BAR ASSOCIATION, *et al.*,<br>Plaintiffs,<br>v.<br>UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,<br>Defendants. | Civil Action No. 16-2476-TJK |

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL MOTION TO ALLOW FOR EXTRA-RECORD REVIEW OR, IN THE ALTERNATIVE, TO ALLOW FOR JUDICIAL NOTICE**

The Department's opposition to Plaintiffs' supplemental motion to allow for extra-record review ("Dep't Opp'n") is significant for what it lacks: *any* attempt whatsoever to refute the relevance of the extra-record email evidence at issue. Indeed, the glaring failure of the Department to address, let alone dispute, the probative value of the additional email evidence militates in favor of this Court's review. To be sure, the Department resorts to invoking technicalities in seeking to shield the Court from reviewing these probative emails. But, as set forth below, and in Plaintiffs' opening memorandum, the extra-record evidence supplements and further confirms what is reflected in the sparse administrative record certified by the Department—*i.e.*, that the Department applied new interpretations of the PSLF statute and regulation in violation of the APA and the U.S. Constitution. As set forth below, this Court's review and consideration of this evidence is manifestly appropriate.

In this action, Plaintiffs contend that the Department unlawfully applied changed interpretations of the PSLF statute and regulation in denying—and retroactively stripping—PSLF program eligibility. The Department in this case has certified an administrative record documenting the interactions it had with each Plaintiff and the materials it considered in

determining Plaintiffs' eligibility for PSLF. Pls.' Reply in Supp. of Pls.' Mot. to Allow for Extra-Record Review ("Pls.' Reply") at 6 (ECF No. 32). The record demonstrates that the Department based its denial, and retroactive revocation, of Plaintiffs' PSLF eligibility determinations on changed interpretations of the statutory and regulatory terms at issue. *See* Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. ("Pls.' Opp'n") at 17-21 (ECF No. 25). Instead of attempting to explain or defend the legal basis of its changes of interpretation, however, the Department simply persists in its *ipse dixit* that it never changed its interpretation of the PSLF statute and the regulation. The Department claims that it simply corrected errors its contractor (FedLoan Servicing) made in applying the Department's consistent interpretation. Documents in the limited administrative record certified by the Department contradict this claim.

Moreover, the extra-record emails at issue here specifically relate to instructions and guidance FedLoan Servicing received from the Department concerning interpretation changes. Confronted with highly probative extra-record evidence, the Department seeks to exclude this evidence because the evidence supposedly does not meet the "high bar" for supplementation of the administrative record. Dep't Opp'n at 2. In other words, the Department argues that the administrative record sufficiently addresses all aspects of this case, flatly denies that the administrative record reflects any change of interpretation, and now attempts to thwart this Court's effective review of extra-record evidence that further confirms the Department's interpretation changes. In effect, the Department asks this Court to dispense with a full review and just take the Department at its word. The Court should not do so.

The Department claims that the extra-record emails should not be considered because they were not before the Department when it made its determinations regarding Plaintiffs' PSLF eligibility. But this is not the issue. The issue is whether the Department changed its

interpretations of the relevant statutory and regulatory eligibility criteria—in contravention of regulatory, statutory, and constitutional mandates. By failing to address the plain language, and substantive import, of the emails, the Department effectively concedes what is reflected therein: that it did indeed unlawfully change its interpretations.

To be clear, Plaintiffs believe that even the sparse administrative record certified by the Department amply reflects the Department's unlawful actions. *See* Pls.' Opp'n at 17-21; Pls.' Mem. in Supp. of Pls.' Mot. to Allow for Extra-Record Review ("Pls.' Initial Mot.") at 2 n.1 (ECF No. 24); Pls.' Reply at 8. Thus, whether the Court decides to supplement the administrative record or to consider the extra-record emails as probative to a relevant question outside the administrative record, the effect is the same. Either way, the Court should not entertain the Department's efforts to shield from review probative evidence of a decisionmaking process that contravened both the letter and the spirit of the APA and Plaintiffs' constitutional due process rights.

## I. THE EXTRA-RECORD EVIDENCE IS PROPERLY BEFORE THE COURT

By the Department's own logic, the Court should consider the extra-record evidence that Plaintiffs seek to introduce. After all, the Department has taken the position that the sparse administrative record it certified does not show how the Department changed its interpretations of PSLF eligibility criteria when it denied and retroactively stripped Plaintiffs' PSLF eligibility determinations. *See* Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. at 22-25 (ECF No. 22); Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. at 17-18 (ECF No. 31). If so, then the Court may construe the record as "so deficient as to preclude effective review" of the Department's actions.[1] *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013). The extra-record

[1] As stated, Plaintiffs continue to believe that the administrative record sufficiently shows that the Department changed its interpretation of the PSLF eligibility criteria. *See* Pls.' Opp'n at 17-21; Pls.' Initial Mot. at 2 n.1; Pls.'

emails reflect communications and guidance from the Department that had to have occurred during the same time period covered by the certified administrative record. However, the Department did not include in the administrative record any documents reflecting the communications to FedLoan Servicing that led to FedLoan Servicing's understanding—as clearly reflected in the extra-record emails—that there had, in fact, been a change of interpretation by the Department.

The Department seeks to portray this case as one in which Plaintiffs have mounted a limited challenge to the Department's actions—one that contests only the individual PSLF eligibility determinations at issue. But this is not the case. Plaintiffs have mounted a broad and consequential challenge and have *additionally* sought review of the procedural validity of the Department's entire decisionmaking process that led to these new interpretations. *See* Compl., ¶¶ 183-92 (ECF No. 1) (alleging arbitrary and capricious agency action in changing interpretations without notice or explanation); *id.* ¶¶ 193-200 (alleging failure to provide required notice of changed interpretations); Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J. at 28-37 (ECF No. 17); Pls.' Opp'n at 30-31. It appears that the Department turned a blind eye to the expansive nature of Plaintiffs' challenge and made a decision to certify—and proffer to this Court—a more limited administrative record. As noted, even this limited record independently confirms the Department's change of its interpretations. The Court should not, however, permit the Department to use its strategic certification of a limited administrative record to prevent this Court's full and effective review of probative extra-record evidence that further undermines the Department's arguments.

Nor should the Court credit the Department's assertion that the emails attached to the

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Reply at 8. Plaintiffs seek to introduce extra-record evidence only to the extent the Court is not satisfied that this is the case and the Court is therefore unable to conduct effective review of the Department's actions without such consideration.

present motion are of no significance because they do not "purport[] to include any employees of the Department." Dep't Opp'n at 4. As the Department's loan servicer charged with administering the PSLF program, FedLoan Servicing adhered closely to *the Department's* instructions, as the plain language of the emails demonstrates. Similarly unpersuasive is the Department's argument that the emails should not be considered because they "postdate[] the December 2016 commencement of this case by more than six months." *Id.* This is a red herring. Plaintiffs do not claim that the emails were before the Department when it decided to revoke Plaintiffs' PSLF eligibility. Plaintiffs submit the emails to further demonstrate that the Department's purported reason for its retroactive revocations—that its contractor simply erred in applying the Department's consistent interpretation—is patently false. *See* Pls.' Reply at 9 n.3. The Department maintains that its about-face can be attributed solely to its desire to correct "errors" committed by its chosen PSLF contractor, FedLoan Servicing. The emails, however, show multiple FedLoan Servicing employees citing "*recent guidance*" from the Department introducing a "*new concept*" into FedLoan Servicing's review of employment certification forms, namely, that private not-for-profit public service organizations are to be evaluated according to their "primary purpose." Pls.' Mem. in Supp. of Pls.' Supplemental Mot. to Allow for Extra-Record Review ("Pls.' Suppl. Mot.") at 4-5 (ECF No. 35). It is therefore not surprising that the Department now wishes to suppress communications among FedLoan Servicing employees that discuss the Department's instructions for determining PSLF eligibility. Far from exculpating the Department from any improper action, the emails show employees of its chosen contractor discussing candidly (i) the new standard the Department itself instructed FedLoan Servicing to apply, (ii) the fact that this standard marked a deviation from past guidance, and (iii) the revocation of PSLF eligibility that the application of the new standard necessitated. *Id.* at 4-

5.

It is telling that the Department has offered no serious explanation for why the extra-record email evidence uncovered by Plaintiffs does not bear directly on the issue of the Department's changed interpretations. It cannot do so because the significance of the emails is stark and clear: the emails confirm that the Department altered its interpretations of the statutory and regulatory terms. But, instead of accepting this fact and attempting to defend the soundness of its practices, the Department asks the Court to look the other way. By engaging in secretive policy changes and then pretending that no such changes occurred, the Department comes dangerously close to crossing the line into the "bad faith or improper behavior" that may serve as an alternative ground for allowing extra-record review. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998)). Plaintiffs leave this determination to this Court's discretion. But it is clear that the Department simply cannot be allowed to arbitrarily limit the scope of review to hide from the Court certain agency actions that are directly implicated by Plaintiffs' claims. *See* Pls.' Reply at 7.

The Department's position that the Court should disregard the extra-record evidence perhaps could have held at least some weight had the Department been forthright about its actions by including in the administrative record a wider scope of materials—beyond those related to the individual eligibility determinations involving Plaintiffs—more fully demonstrating how it changed its interpretation. It is the agency that "bear[s] the responsibility of compiling the administrative record, which must include all of the information that the agency considered 'either directly or indirectly.'" *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 151 F. Supp. 3d 1, 12 (D.D.C. 2015) (quoting *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C.

2010)). When an agency fails to designate a record that addresses all relevant aspects of its actions, however, a plaintiff "may seek to supplement the record with 'extra-judicial evidence *that was not initially before the agency* but [which] the party believes should nonetheless be included in the administrative record.'" *Id.* at 13 (quoting *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 n.4 (D.D.C. 2009)) (emphasis added).

Such evidence may be considered when a plaintiff demonstrates the existence of one of three "unusual circumstances": (1) when "the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,'" (2) when "background information [is] needed 'to determine whether the agency considered all the relevant factors,'" or (3) when "the 'agency failed to explain administrative action so as to frustrate judicial review.'" *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Notably, this formula applies in "circumstance[s] in which a party seeks to add extra-record or extra-judicial information to the record that was concededly *not* before the agency." *Univ. of Colo. Health*, 151 F. Supp. 3d at 13 (citing *Cape Hatteras Access Pres. Alliance v. Dep't of Interior*, 667 F. Supp. 2d 111, 113 (D.D.C. 2009)).[2]

Here, the Department attempts to avoid Plaintiffs' challenge of its underlying change of interpretation by simply denying that any change ever took place. The Department does so despite the existence of overwhelming evidence (in the administrative record and elsewhere) to the contrary. The Department has entirely "failed to explain administrative action so as to frustrate judicial review." *Dania Beach*, 628 F.3d at 590. In addition, to the extent that the administrative record does not adequately reflect the Department's actions, the emails provide

[2] As this Court explained in *University of Colorado Health*, such circumstances differ from those in which "a party argues that the administrative record does not actually reflect the materials that the agency had before it when it made its decision." 151 F. Supp. 3d at 13. Plaintiffs make no such argument here. Thus, contrary to the Department's contention (Dep't Opp'n at 3), Plaintiffs need not demonstrate that the emails were "before" the Department when it made its decisions regarding Plaintiffs' eligibility.

"background information" regarding the guidance the Department issued to FedLoan Servicing for assessing PSLF eligibility. *Id.* The emails Plaintiffs seek to introduce with both the current motion and the earlier motion unquestionably expose the Department's "correction of errors" explanation for the ruse that it is. The Department makes no attempt to address or rebut the emails' plain import in this regard. Its actions in this case unfortunately reflect the type of unaccountable agency action that the APA specifically proscribes.

## II. THE COURT MAY TAKE JUDICIAL NOTICE OF THE EMAILS

Once again, the Department concedes that the Court may take judicial notice of an adjudicative fact that is not part of the administrative record where the document is properly submitted as extra-record evidence. Dep't Opp'n at 6. For reasons articulated above, the evidence Plaintiffs seek to introduce here meets the standard for consideration of extra-record evidence. The Court accordingly may take judicial notice of the contents of the emails if it so chooses.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their supplemental motion to allow for extra-record review or, in the alternative, to allow for judicial notice.

Dated: December 29, 2017

Respectfully submitted,

*/s/ Chong S. Park*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of December, 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