UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., *Defendants.*	C.A. No. 1:20-cv 00119-BAH
BREAD FOR THE CITY, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE et al., *Defendants.*	C.A. No. 1:20-cv-00127-BAH

STATE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiffs the District of Columbia, the State of New York, the State of California, the State of Connecticut, the State of Colorado, the State of Hawaii, the State of Illinois, the State of Maine, the State of Maryland, the Commonwealth of Massachusetts, Attorney General Dana Nessel on behalf of the people of Michigan, the State of Minnesota, the State of Nevada, the State of New Jersey, the State of New Mexico, the State of Oregon, the Commonwealth of Pennsylvania, the State of Rhode Island, the State of Vermont, the Commonwealth of Virginia, and the City of New York (collectively, "Plaintiffs" or the "States") respectfully move for summary judgment.

Plaintiffs seek an order vacating the final agency action, *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, 84 Fed. Reg. 66782 (Dec. 5, 2019) (the "Rule"), by U.S. Department of Agriculture ("USDA" or the "agency") and George Ervin Perdue III, Secretary of USDA (collectively with the United States, "Defendants") and declaring that the Rule violates the Administrative Procedure Act ("APA").

As demonstrated in the accompanying Memorandum of Points and Authorities, Plaintiffs are entitled to relief because the Rule was promulgated without observance of procedure required by law, 5 U.S.C. §§ 701-706, is substantively not in accordance with law, 5 U.S.C. §§ 701-706, and is arbitrary and capricious, 5 U.S.C. §§ 701-706. In support of this motion, Plaintiffs submit the attached memorandum of law and the declarations of Edward Bolen, Catherine Buhrig, Alexis Carmen Fernández, Joshua Rivera, and Laura Zeilinger. Also attached is a proposed order. Oral argument is requested on this motion because of the complex legal arguments involved in this case.

Dated: June 24, 2020

Respectfully submitted,

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INTRODUCTION

The Supplemental Nutrition Assistance Program ("SNAP") has been the country's primary weapon against hunger for more than 40 years. The Rule dramatically alters long-standing aspects of SNAP applicable to unemployed adults who are not disabled or raising minor children ("ABAWDs"). It imposes stringent restrictions on states' ability to continue benefits to these individuals contrary to Congress' mandate that benefits should continue if there are insufficient jobs for SNAP recipients where they reside and despite strong evidence that these individuals cannot reasonably replace their benefits with income. The restrictions would result in approximately 700,000 SNAP recipients losing their lifeline to food. Especially now, as our nation reels from the COVID-19 pandemic, state flexibility to provide for the nutritional needs of our residents is essential.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "PRWORA" or "Statute") conditioned continued SNAP benefits for ABAWDs on their meeting certain work requirements. However, because the time limit was not designed to penalize individuals who are willing but unable to find work, the law provides that states can seek waivers to suspend the work requirements for any group of ABAWDs if the area where they reside lacks sufficient jobs for them. Congress also allotted a limited number of exemptions that allow states to temporarily extend SNAP benefits to individual ABAWDs who otherwise would be denied those benefits.

The Rule is procedurally flawed. USDA deprived commenters of a meaningful opportunity to address material aspects of the Rule, including the removal of a state's qualification for extended unemployment benefits as a readily approvable basis for a work requirement waiver. All but two states now qualify for extended unemployment benefits in the wake of the COVID-19 crisis. Bolen

Supp. Decl. ¶ 14.[1]

The Rule also substantively contravenes the SNAP statute by effectively eliminating the insufficient jobs inquiry and the indefinite carryover of exemptions mandated by statutory language and clear statements of congressional intent. The Rule arbitrarily and capriciously upends more than two decades of agency rules and factual findings with no supported justification.

In short, USDA has retreated from the purpose of the Statute in favor of a new goal, nowhere supported in the congressional or administrative record, to reduce the overall number of ABAWD SNAP recipients and "address the problem of States' manipulative usage" of waiver standards "to maximize waived areas." 84 Fed. Reg. at 66795. The Rule furthers this goal by unlawfully rewriting the Statute and arbitrarily reducing the inquiry to a question solely of general unemployment rates. Those rates undisputedly fail to capture the ABAWD experience, which includes the hallmarks of poverty: limited education, limited work experience, unstable housing, lack of access to reliable transportation and childcare, and mental and physical challenges.

In 2018, Congress rejected a proposal to impose restrictions nearly identical to those found in the Rule. USDA cannot impose by Rule restrictions that Congress has expressly refused to impose by legislation. The Rule is unlawful and should be vacated.

STATEMENT OF FACTS

A. Congress Enacted SNAP to Effectively Alleviate Hunger.

Formerly referred to as food stamps, SNAP has provided vital food assistance since 1977. Its goal is to "promote the general welfare" by "raising levels of nutrition among low-income

[1] Plaintiffs refer throughout to supplemental declarations submitted with this Motion by the last name of the declarant, followed by "Supp." and the pertinent reference to the paragraph of that declaration. Declarations that were previously submitted and are part of the record also include the Electronic Case File ("ECF") number.

households." 7 U.S.C. § 2011.

In 1996, Congress enacted PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, with the purpose to engage more individuals in the workforce and promote self-sufficiency. Under PRWORA, ABAWDs may not receive SNAP benefits for more than three months in any 36-month period (the "ABAWD time limit") unless they meet certain work-related requirements. 7 U.S.C. § 2015(o). However, Congress expressly made the time limit inapplicable when ABAWDs reside in an area with insufficient jobs for them. 142 Cong. Rec. 17,782 (1996). The co-author of the provision, Rep. John Kasich (R-Ohio), made clear "[i]t is *only* if you are able-bodied, if you are childless, and if you live in an area where you are getting food stamps and *there are jobs available*, then it applies." *Id.* (emphases added).

PRWORA allows states to request waivers for "*any* group of individuals" when the "area in which the individuals reside (i) has an unemployment rate above 10 percent; or (ii) does not have a sufficient number of jobs to provide employment *for the individuals.*" 7 U.S.C. § 2015(o)(4) (emphases added). The dual bases for the waivers—high unemployment or insufficient jobs for ABAWDs—reflects Congress's recognition that "the unemployment rate alone is an imperfect measure of the employment prospects of individuals with little work history and diminished opportunities." ABAWD00000168.

Congress's provision for a specific inquiry into the availability of jobs for ABAWDs is meaningful. Most ABAWDs face significant barriers to finding steady employment even in strong economic times. Bolen Decl. ¶ 12, ECF No. 3-2. Many ABAWDs have at most a high school education, which limits their job prospects. *Id.* ¶ 15. ABAWDs also disproportionately struggle with minimal work history, physical and mental illnesses, lack of access to reliable transportation and childcare, and homelessness or unstable living situations. Bolen Decl. ¶¶ 12, 17-22, ECF No.

3-2; ABAWD00110215; Gifford Decl. ¶ 18, ECF No. 3-9; Storen Decl. ¶ 11, ECF No. 3-17.

These challenges result in unemployment rates for ABAWDs that are significantly higher than, and often twice as high as the national average. *See* Bolen Decl. ¶¶ 15, 20, ECF No. 3-2. Additionally, a substantial percentage of ABAWDs are racial minorities or women that disproportionately lack job opportunities. ABAWD00168815. As the Center on Budget and Policy Priorities ("CBPP") noted, "[o]ver one-quarter of childless adult SNAP participants targeted by the time limit are African American and approximately 20 percent are Latino. These groups, particularly African Americans, have higher unemployment rates than white Americans and are more affected by recessions." ABAWD00110135.

Congress additionally recognized that, in times of swift economic downturn or declining employment opportunities, like the current public health crisis, states may not be able to obtain waivers quickly enough to maintain food security for those in need. Thus, in the Balanced Budget Act of 1997 ("BBA"), Pub. L. No. 105-33, 111 Stat. 251, 252, Congress allowed states to exempt 15 percent of their ABAWDs who would otherwise be subject to the time limit. Each exemption enables a state to extend benefits for one additional month to one SNAP recipient. 7 U.S.C. § 2015(o)(6). Unused exemptions may be carried forward to subsequent years. *Id.* § 2015(o)(6)(G). These exemptions and the ability to carry them over give states the flexibility to quickly respond to changing economic circumstances. In the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 ("2018 Farm Bill"), Congress reduced the number of exemptions accrued each year to 12 percent of ABAWDs, but it simultaneously rejected proposals to eliminate carryover of unused exemptions altogether. 132 Stat. 4632; *see also* H.R. Rep. No. 115-1072, at 615-16 (2018) (Conf. Rep.).

B. USDA Maintained Regulations for Decades that Accorded States Flexibility in Requesting Waivers.

For more than two decades, USDA recognized the unique challenges faced by ABAWDs and that states are best suited to define the scope of their waiver requests. In 1996, USDA published guidance acknowledging "that the law provided authority to waive these provisions in recognition of the challenges that low-skilled workers may face in finding and keeping permanent employment." ABAWD00000166 ("1996 guidance"). USDA recognized that states should have "broad discretion in defining areas that best reflect the labor market prospects of program participants and administrative needs." *Id.*

The 1996 guidance recognized that factors other than general unemployment rates are relevant to whether there are sufficient jobs for ABAWDs. USDA therefore permitted states to submit whatever data they deemed appropriate to support their requests "[b]ecause there are no standard data or methods to make the determination of the sufficiency of jobs" for ABAWDs. ABAWD00000168.

A 2001 rule codified the waiver procedures in the 1996 guidance (the "2001 rule"). ABAWD00000123-24. The rule includes a "non-exhaustive list" of information that states could submit to demonstrate a lack of sufficient jobs, including that an area "(1) [w]as designated as a Labor Surplus Area [("LSA")] by the Department of Labor's ["DOL"] Employment and Training Administration (ETA); (2) was determined by the [DOL's] Unemployment Insurance Service as qualifying for extended unemployment benefits; (3) has a low and declining employment-to-population ratio; (4) has a lack of jobs in declining occupations or industries; or (5) has a 24 month average unemployment rate 20 percent above the national average for the same period." ABAWD00000123; *see also* 7 C.F.R. § 273.24(f)(2)(ii). The 2001 rule also recognized that "State agencies have *complete discretion* to define the geographic areas covered by waivers so long as

they provide data for the corresponding area." ABAWD00000124 (emphasis added). These regulations remained unchanged until the Rule.

USDA implemented the BBA's discretionary exemptions in a rule issued in June 2002 ("2002 rule"). ABAWD00000146-47. The 2002 rule recognized that "State agencies have *maximum flexibility* to apply the exemptions as they deem appropriate." ABAWD00000146 (emphasis added). The 2002 rule stated that "[i]f the State agency does not use all of its exemptions by the end of the fiscal year, FNS [Food and Nutrition Service] will increase by the remaining balance the estimated number of exemptions allocated to the State agency for the subsequent fiscal year." *Id.* The 2002 rule did not limit this carryover from each year to the next, and this rollover of discretionary exemptions enabled states to maintain a safety net for times of sudden economic downturn like the current pandemic.

C. Congress Rejected Limits Like Those the Rule Seeks to Implement.

Congress has reauthorized SNAP four times since PRWORA's enactment without materially altering the flexible framework for state waiver requests and exemption carryover.[2] In its most recent reauthorization, the 2018 Farm Bill, Congress rejected the proposals that USDA adopted in the Rule.

The House version of the 2018 Farm Bill proposed to eliminate the statutory language permitting a waiver based on a lack of "sufficient jobs for the individuals" and replace it with more restrictive language, including a 7 percent unemployment floor for the area for which a waiver would be requested. Agriculture and Nutrition Act of 2018, H.R. 2, 115th Cong. § 4015 (as passed

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[2] *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651; Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 64; Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

by the House, June 21, 2018) ("House Bill"). The House proposed to limit the ability of states to combine individual jurisdictions in a waiver request unless the jurisdictions were designated as a Labor Market Area ("LMA") by the DOL. *Id.* The House also proposed to terminate states' ability to carry over unused exemptions. *Id.* In contrast, the Senate version of the 2018 Farm Bill did not make any changes to the waiver or exemption requirements. S. 3042, 115th Cong. § 4103 (as reported by S. Comm. on Agric., Nutrition, & Forestry, June 18, 2018).

The Conference Committee adopted the Senate's proposal, maintaining the "sufficient jobs" language and imposing no new restrictions on state waiver requests. Congress made only a minor change to the exemption provision, reducing the percentage of ABAWDs a state may exempt annually from 15 percent to 12 percent beginning in fiscal year 2020. H.R. Rep. No. 115-1072, at 616 (2018) (Conf. Rep.) ("Conference Report"). President Trump signed the 2018 Farm Bill into law on December 20, 2018.

D. The Rule Upends Decades of Agency Policy and Adopts Strict Requirements that Congress Rejected.

One month later, USDA proposed a rule "intended to move more able-bodied recipients of [SNAP] benefits to self-sufficiency through the dignity of work." *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, Notice of Proposed Rulemaking, 84 Fed. Reg. 980 (Feb. 1, 2019) ("Proposed Rule"). The Proposed Rule sought to do what Congress had rejected: (1) restrict states' discretion to define the geographic scope of waiver requests based on characteristics of local labor markets and economic conditions, (2) impose new data restrictions that effectively narrow the "insufficient jobs" for ABAWDs inquiry to a question of general unemployment levels, and (3) limit the carryover of ABAWD discretionary exemptions. The Proposed Rule asserted that these new restrictions were necessary because USDA's "operational experience" demonstrated that states had manipulated the waiver

criteria to request waivers for areas where it was "questionable" whether there were insufficient jobs for ABAWDs. 84 Fed. Reg. at 981. The Proposed Rule expressly stated that USDA would maintain state qualification for extended unemployment benefits as a basis for waiver and would continue to allow states to seek waivers for single jurisdictions. 84 Fed. Reg. at 985-86.

USDA received more than 100,000 comments on the Proposed Rule. 84 Fed. Reg. at 66783. 99.5 percent of those comments opposed its adoption. ABAWD00008225 (noting that 102,410 of 102,945 commenters opposed aspects of the Proposed Rule). Commenters, including Plaintiffs, provided evidence demonstrating that the proposed changes would result in hundreds of thousands of ABAWDs who lack job opportunities losing vital food assistance that they could not reasonably replace with income. Commenters made clear that this result would lead to detrimental health outcomes and other harms, the costs of which would be borne by states. Nevertheless, USDA adopted a final Rule on December 5, 2019, that made the following changes:

Limiting the Criteria for Waiver to High General Unemployment. Prior regulations allowed states to seek waivers based on several criteria relevant to the ABAWD-specific inquiry. *See* 7 C.F.R. § 273.24(f)(2)(ii). The Rule reduces this nuanced inquiry to a cursory assessment of general unemployment. A state now qualifies for a waiver under the "sufficient jobs" language only if an LMA has an unemployment rate that is 20 percent above the national average and at least six percent. 84 Fed. Reg. at 66785. The Rule also eliminates state qualification for extended unemployment benefits as a basis for a waiver, 84 Fed. Reg. at 66789, despite the Proposed Rule's assurances to the contrary. These changes were scheduled to go into effect on April 1, 2020.

Imposing a Strict Definition for Waiver "Area." The Rule imposes a "strict definition" of "area" to mean only an LMA. 84 Fed. Reg. at 66793. Thus, states may no longer request a waiver for ABAWDs in a single jurisdiction, such as a county or town; again, despite the Proposed Rule's

assurances to the contrary. The unemployment rate for the entire LMA must meet the Rule's thresholds, even when a state requests a waiver for only its intrastate portion of an interstate LMA. This change was scheduled to go into effect on April 1, 2020.

Eliminating Carryover of Exemptions. The Rule bars the carryover of exemptions beyond one year and removes states' remaining balances of carried-over exemptions on October 1, 2020. 84 Fed. Reg. at 66803. Combined with the other changes under the Rule, this is a one-two punch against ABAWDs: the limits on waivers will deny more ABAWDs SNAP benefits, and these exemption restrictions will reduce states' ability to provide the remaining recipients with even temporary continued nutritional assistance.

On March 13, 2020, the Court issued an order preliminarily enjoining USDA from implementing the Rule's changes to the waiver provisions. The Rule's changes to the carryover of exemptions were not enjoined and are scheduled to go into effect on October 1, 2020.

STANDARD OF REVIEW

The APA imposes both procedural and substantive requirements on agency actions. The APA's procedural requirements demand that an agency publish "notice" in order to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). "Notice is sufficient 'if it affords interested parties a reasonable opportunity to participate in the rulemaking process,' and if the parties have not been 'deprived of the opportunity to present relevant information by lack of notice that the issue was there.'" *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citation omitted). If notice is inadequate, the "regulation must fall on procedural grounds, and the substantive validity of the change accordingly need not be analyzed." *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985).

If an agency action complies with the APA's procedural requirements, a court assesses

whether an agency action is substantively deficient. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At *Chevron* step one, a court employs all the "traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004). These tools include evaluation of the statute's text, structure, purpose, and legislative history. *See, e.g.*, *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014). If the application of those tools reveals "that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

Where a statute is silent or ambiguous on the question presented, the agency's construction will still fail if its interpretation of the statute is unreasonable. *Guedes v. Bur. of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 28 (D.C. Cir. 2019). An agency's construction is unreasonable under *Chevron* step two if it rests on a construction of the statute that is "arbitrary and capricious in substance," *see* P.I. Op. at 32 n.13 (quoting *Judulang v. Holder*, 565 U.S. 42, 53 n.7 (2011)), considering the statute's language and purpose, *see Good Fortune Shipping SA v. Comm'r of Internal Revenue*, 897 F.3d 256, 261-62 (D.C. Cir. 2018).

Agency action is arbitrary and capricious if it "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). To change its policy, an agency must "show that there are good reasons for the new policy," including a reasoned explanation for disregarding factual findings that underlie prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Nat'l Lifeline Assoc. v. FCC*, 921 F.3d 1102, 1112 (D.C. Cir. 2019). When an agency has failed to "give adequate

reasons for its decisions," to "examine the relevant data," or to offer a "rational connection between the facts found and the choice made," the regulation must be set aside. *State Farm*, 463 U.S. at 43 (citation omitted); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

ARGUMENT

I. USDA'S PROPOSED RULE FAILED TO PROVIDE SUFFICIENT NOTICE OF THE CHANGES THAT THE RULE IMPOSES.

The Rule violates the APA because key provisions were not subject to notice and comment. Such notice deficiencies alone can render a rule unlawful *see, e.g., Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014), and in this case, they do.

First, the Proposed Rule explicitly assured commenters that USDA would "continue" its long-standing practice of "approv[ing] a State's waiver request that is based upon the requesting State's qualification for extended unemployment benefits . . . because [such qualification] has been a clear indicator of lack of sufficient jobs . . . ." 84 Fed. Reg. at 985. Contrary to this clear statement, the Rule eliminates this waiver basis. 84 Fed. Reg. at 66789-90. The APA prohibits such a "surprise switcheroo." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see Allina Health Servs.*, 746 F.3d at 1107-08 (an agency violates notice and comment requirements when it enacts the opposite of what it proposed to the public); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005).

Second, the Proposed Rule stated that USDA would allow *grouping* of substate jurisdictions like cities and towns if the combined jurisdictions constituted an LMA. But it did not purport to disturb a state's existing ability to seek a waiver for *individual* substate jurisdictions, such as one city or town. 84 Fed. Reg. at 986. The Rule obliterates that ability: it defines "area" as *only* an LMA and eliminates states' ability to seek a waiver for individual substate jurisdictions. The result is, for example, the entire District of Columbia, which shares an LMA with parts of

Maryland, Virginia, and even West Virginia, can qualify for a waiver only if *that entire LMA* meets the Rule's general unemployment thresholds. 84 Fed. Reg. at 66794-96. The Proposed Rule "nowhere even hinted" that USDA was considering this drastic change. *CSX Transp.*, 584 F.3d at 1082; *see Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012). "The gap between the [Proposed Rule] and the final Rule is particularly gaping here inasmuch as the final Rule, without advance notice, overcomes a longstanding statutory framework" permitting states to define the geographic scope of their waiver requests. *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 559-60 (S.D.N.Y. 2019).

Finally, USDA denied the opportunity for meaningful comment by relying on vague and undefined bases. USDA cited its "operational experience" no fewer than five times in the Proposed Rule, but it never defined this term or explained how it supported the changes. USDA claimed that its "operational experience" demonstrated that states have manipulated the waiver system, 84 Fed. Reg. at 981, but it provided no evidence of abuse or of any waiver that had been improperly obtained because the area had sufficient jobs for ABAWDs. USDA's failure to provide such evidence denied commenters a meaningful opportunity to justify the propriety of state waiver applications and dispute USDA's accusations of gamesmanship. *See* ABAWD00008240, -8255; *see, e.g.,* ABAWD00168808, ABAWD00182270, ABAWD00110259-66. An agency's notice and comment obligations are not met by vague, conclusory assertions (indeed, accusations) that cannot be meaningfully tested or addressed. "[T]he notice required by the APA . . . must disclose in detail the thinking that has animated the form of a proposed rule *and the data upon which that rule is based*." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasis added).

USDA's procedural failures deprived Plaintiffs and the public of the chance to comment on key provisions of the Rule. These failures alone require that the Rule be vacated.

II. THE RULE VIOLATES THE APA BECAUSE IT IS CONTRARY TO LAW.

The Court has already found that USDA's near-total reliance on unemployment rates cannot be squared with Congress' mandate that waivers be available for areas that lack jobs for ABAWDs. P.I. Op. at 32-33. Similarly, USDA's strict definition of a waiver area as only an LMA, a geographic designation that may cross state boundaries and encompass dozens of counties, contravenes the Statute's mandates that waivers be permitted for "any group of individuals" and that the inquiry focus on the experience of ABAWDs, not the general populace. Finally, the agency's elimination of carryover of exemptions contravenes the plain text, purpose, and history of the Statute. The Rule is contrary to its authorizing statute and must fall under *Chevron*.

A. USDA's Near-Total Focus on General Unemployment Data to Evaluate Lack of Sufficient Jobs for ABAWDs Is Contrary to Law.

The Statute commands USDA to ask a simple question: are there insufficient jobs to provide employment for a group of ABAWDs in the area where they reside? *See* 7 U.S.C. § 2015(o)(4). The text is clear. A state may seek a waiver for "*any group of individuals* in the State" where "the area in which the individuals reside" does not have sufficient jobs "to provide employment *for the individuals*." 7 U.S.C. § 2015(o)(4)(A)(2) (emphases added). USDA has not disputed that "the individuals" refers to ABAWDs. March 5, 2020 Hr'g Tr. at 78:5-79:2.

The Statute makes clear that the answer to Congress's question—whether there are enough jobs *for the ABAWDS who reside in a particular area*—cannot be found in a *general* unemployment rate alone. P.I. Op. at 32-33; *see Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686, at *6 (U.S. June 15, 2020) (the use of the word "individual(s)" in the statute requires an assessment for the specific individuals at issue, not generally or even for an entire class). Congress already made the general unemployment rate the sole criterion for a waiver under one prong of the waiver inquiry, *id.* § 2015(o)(4)(i), and expressly provided a second, separate

prong of inquiry in the subparagraph at issue here, *id.* § 2015(o)(4)(ii). "Had Congress intended to restrict" the sufficient-jobs language in the manner USDA asserts, "it presumably would have done so expressly as it did in the immediately [preceding] sub[paragraph]." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). Moreover, as the Court explained at the preliminary injunction stage, "[b]y making both prongs of § 2015(o)(4)(A) dependent on unemployment rate, USDA has arbitrarily written this distinction out of the [statute]." P.I. Op. at 33.

Recent action confirms that Congress did not intend for a general unemployment rate to govern the lack of sufficient jobs language. P.I. Op. at 35-36. During the legislative process that led to the 2018 Farm Bill, Congress considered a House proposal to eliminate the sufficient jobs language and adopt a 7 percent unemployment floor. P.I. Op. at 35 (citing House Bill, § 4015(a)(1)). As the Court noted, "Congress's recent rejection of waiver criteria less stringent than those ultimately adopted by USDA is probative of congressional intent to maintain flexibility in the waiver system." P.I. Op. at 36. The Conference Report expressly endorsed state flexibility by noting that "neither the Department nor Congress can enumerate every ABAWD's situation as it relates to possible exemption from the time limit, and subsequently, the work requirement." Conference Report at 616. Congress's intent to foreclose USDA's near-total reliance on a general unemployment rate is clear under *Chevron* step one.[3]

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[3] As the Court alluded to previously, the Statute's grant of some discretion to USDA to grant or deny a waiver does not allow USDA to ignore the question Congress plainly directed it to ask in setting the allowable criteria. P.I. Op. at 32 n.2 (referencing "*may waive*" in the Statute but finding that USDA's discretion is not unfettered). USDA's decision to grant sufficient-jobs waivers based only on general unemployment rates is "flatly inconsistent with Congress' clear message on this precise issue." *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 222 (D.C. Cir. 1986).

The Rule similarly cannot survive *Chevron* step two because USDA's interpretation is unreasonable. P.I. Op. at 32 n.13. As the Court rightly observed, the statutory requirement that USDA ask whether there are sufficient jobs to provide employment *for ABAWDs where they reside* "is a guardrail on USDA's discretion." P.I. Op. at 34. USDA ran afoul of this limitation by ignoring the common-sense proposition (not to mention "[v]oluminous evidence") that "general unemployment rates alone cannot measure" whether the statutory standard keyed to ABAWDs has been met. P.I. Op. at 29-30. Similarly, as the Court noted, it would make little sense to conclude that Congress intended a general unemployment rate to be the near-sole arbiter of a sufficient jobs waiver when Congress specified a general unemployment rate as a separate basis for waiver. P.I. Op. at 29, 32-36.

B. USDA Acted Contrary to Law by Imposing a Strict Definition of Area.

USDA's "strict definition," 84 Fed. Reg. at 66783, 66795-97, of the "area" for which a state may seek a waiver similarly contravenes the statute and for that reason the Rule must be set aside. "Area" as used in the Statute necessarily refers to where the "group of individuals" for whom the state requests a waiver "reside[s]"—not a statistical area covering multiple states and tens of counties.

A straightforward reading of the text proves this point. First, a waiver may be granted for "*any* group of individuals" in a state. 7 U.S.C. § 2015(o)(4)(A). The word "any" generally gives an expansive meaning to the word it modifies. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1173 & n. 3 (2020). Indeed, the Supreme Court has stated that the phrase "any . . . group of individuals associated in fact" is "obviously broad" and "has a wide reach." *Boyle v. United States*, 556 U.S. 938, 944 (2009) (citation omitted). Thus, when section 2015(o) refers to "*any* group of individuals in the state," the phrase is not limited to only all ABAWDs living in the expansive boundaries of a particular statistical designation.

Second, the waiver for "any group of individuals" is triggered only "[o]n the request of a State agency." 7 U.S.C. § 2015(o)(4)(A). The Statute thus gives states the responsibility for designing the request, including selecting for what "group of individuals" to request a waiver. *Cf. Miller v. Casey*, 730 F.2d 773, 776-77 (D.C. Cir. 1984). The Court recognized that the prior regulation, unlike the Rule, was consistent with the statutory design: it gave states discretion to define what areas would be covered by a waiver request, "because States are more familiar with the reality of employment challenges confronting ABAWDs in particular areas." P.I. Op. at 42. Section 2015(o)(4) limits the term "area" in the immediately following phrase "in which the individuals reside," with "*the* individuals" referring to the "group of individuals" for whom the state chose to request a waiver. Thus, the term "area" necessarily refers to where the "group of individuals" for whom a single state requests a waiver "reside[s]" in that state, not a statistical area covering multiple States and tens of counties.

Reading "area" to refer to *only* an LMA renders the phrase "any group of individuals" largely meaningless. This is an "implausible" result that fails at *Chevron* step one. P.I. Op. at 33. If Congress had intended to restrict the broad term "any group of individuals" to only those groups of individuals fitting within a predefined (and expansive) statistical area, it would have done so as it has in other statutes. *See, e.g.*, 29 U.S.C. § 3121 (state identification of workforce development areas, which may include areas that are LMAs across two or more states or other appropriate contiguous subareas of more than one state).[4] The Statute's language forecloses USDA's use of a

[4] More generally, in neighboring subsections enacted at the same time as subsection (o)'s work requirement, Congress required the creation of programs to help SNAP recipients find employment. 7 U.S.C. § 2015(d)(4); P.I. Br. 32. These programs eschew rigid statistical boundaries and instead require *state-designed* programs responsive to "State or local workforce needs." *Id.* § 2015(d)(3).

rigid federal statistical area—one that may cross numerous state and county boundaries—to the exclusion of all other metrics.

Finally, consistent with the plain reading of the Statute, USDA has recognized for more than two decades that "States may define areas to be covered by waivers." 7 C.F.R. § 273.24(f)(6). "[T]he government's early, longstanding, and consistent interpretation of a statute" can be "powerful evidence of its original public meaning." *Kisor v Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment).

Moreover, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Over the years, Congress re-authorized, revamped, and renamed the SNAP program and amended the work requirement subsection at issue here, but it expressly declined as recently as 2018 to adopt a series of changes nearly identical to those imposed in the Rule.[5] All of these congressional acts are "persuasive evidence" that USDA's longstanding prior interpretation of "area" is the one Congress intended. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-75 (1974); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (amending a statute while leaving certain statutory provisions intact "is [] evidence that Congress affirmatively intended to preserve that" context).

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[5] The Statute expressly requires congressional action to continue SNAP's operation beyond certain fiscal years. Specifically, 7 U.S.C. § 2027(a)(1) requires Congress to authorize funding "[t]o carry out this chapter" (referring to each of the SNAP provisions) in certain fiscal years. This authorization would have expired in fiscal years 2002, 2008, 2014, and 2018 without congressional action expressly reauthorizing funding. *See* Pub. L. No. 107-171, § 4122(c), 116 Stat. 134, 324 (2002); Pub. L. No. 110-246, § 4406(a), 122 Stat. 1651, 1902 (2008); Pub. L. No. 113-79, § 4024, 128 Stat. 649, 809 (2014); 7 U.S.C. § 2027(a)(1).

C. USDA's Elimination of Unused Discretionary Exemptions is Contrary to Law.

USDA's elimination of carryover for exemptions beyond one year also contravenes the statutory text and Congress's clearly articulated intent. Section 2015(o)(6) sets the number of exemptions allotted for a state in each year. Initially, that number is based on a percentage of "covered individuals," meaning those ABAWDs that are subject to the time limit in the state. That number must then be adjusted in a number of ways, including the one applicable here:

> the Secretary shall increase or decrease the number of individuals who may be granted an extension under this paragraph to the extent that the average monthly number of exemptions in effect in the State for the preceding fiscal year under this paragraph is lesser or greater than the average monthly number of exemptions estimated for the State agency for such preceding fiscal year under this paragraph.

Id. § 2015(o)(6)(G).

This required adjustment is governed by a comparison between two figures: (1) "the average monthly number of exemptions *in effect*" during the preceding fiscal year, and (2) "the average monthly number of exemptions *estimated for the State agency* for such preceding fiscal year *under this paragraph*." *Id.* (emphases added). If the former is "less[]" than the latter, then USDA "shall increase" the state's exemptions for the present fiscal year by the difference. *Id.*; *see also* P.I. Op. at 7. The number *in effect* plainly refers to exemptions used, so the only question is whether the number "estimated . . . *under this paragraph*" includes the number of carryover exemptions that also were available in the preceding fiscal year. In other words, from the vantage point of year three, does the number "estimated . . . *under this paragraph*" for year two include exemptions that were usable in year two because they were carried into year two from year one?

The statute's plain language demonstrates that it does. Paragraph (6) of subsection 2015(o) is structured so that the number of exemptions is computed based on the statutory percentage, and then adjusted upward or downward in several ways (including via the carryover language in

subparagraph (G)). Thus, when the statute refers to the number of exemptions estimated "under this paragraph," it is referring to the number computed under *all* of paragraph (6). *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (noting Congress's "ordinar[y] adhere[nce] to a hierarchical scheme in subdividing statutory sections" into, *inter alia*, paragraphs and subparagraphs). That number includes the number of exemptions carried into the year from the preceding year by operation of subparagraph (G) of paragraph (6). Neighboring provisions within section 2015 demonstrate that Congress's reference in subparagraph (G) to "this paragraph," meaning all of paragraph (6), was intentional. 7 U.S.C. § 2015(o)(6)(F) (referring to estimate "under subparagraph (C), (D), or (E)"); *id.* § 2015(o)(3) (exempting from "Paragraph (2)" individuals meeting certain criteria). *See MacLean*, 135 S. Ct. at 919.

This ordinary meaning is confirmed by longstanding, consistent agency interpretation. *See Kisor*, 139 S. Ct. at 2426. USDA guidance and rules have consistently provided for an initial estimate of exemptions, adjusted as described in the various subparagraphs of section 2015(o)(6). For example, the 2002 rule referred to USDA's estimate, adjusted it to reflect "[t]he State agency's caseload," as require under subparagraph (D),[6] adjusted it again for a greater-than-ten percent variation between SNAP recipients and caseload, as required by subparagraph (F), and finally adjusted it again to reflect subparagraph (G)'s carryover adjustment. *Food Stamp Program: Work Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Food Stamp Provisions of the Balanced Budget Act of 1997*, 67 Fed. Reg. 41589, 41619 (June 19, 2002). Describing the last step, USDA stated: "If the State agency does not use all of its exemptions

[6] For ease of reference, the text refers to paragraph (6)'s subparagraphs as they exist today after the 2018 Farm Bill added a new subparagraph applying the 12 percent figure for fiscal years 2020 and following.

by the end of the fiscal year, FNS will increase the *estimated number of exemptions* allocated to the State agency for the subsequent fiscal year *by the remaining balance*." *Id.* at 41619 (codifying 7 C.F.R. § 273.24(h)) (emphases added). That standard, under which states have consistently carried forward all of their unused exemptions (including those carried over from prior years), has been USDA's consistent approach for nearly two decades.

In 2018, Congress extended SNAP's authorization and made a "conscious choice" to reject a House proposal that would have eliminated exemption carryover. *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 505 (D.C. Cir. 2013). The regular reauthorization process that SNAP undergoes in the Farm Bills—distinct from some other statutory schemes—makes clear that "Congress revisits the [SNAP statute] with purpose." *Id.* Instead of adopting the House's drastic revision, the full Congress made a more measured change. It preserved the existing exemptions language in section 2015(o)(6) but reduced the accrual percentage of exemptions from 15 to 12 percent starting in fiscal year 2020. Pub. L. No. 115-334, § 4005(b)(3), 132 Stat. 4490, 4632 (2018). Thus, Congress acted with a "scalpel, not a cudgel," to address any perceived concern that states had too many exemptions, foreclosing USDA from imposing that cudgel on its own. *Hearth, Patio & Barbecue Ass'n,* 706 F.3d at 505.

This process clearly demonstrates congressional intent to maintain the status quo for exemption carryover. And the Conference Committee confirmed that intent, explaining that states will "continue to accrue exemptions and retain any carry-over exemptions from previous years, consistent with current law." Conference Report at 616; *Public Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003) (citing Conference Report as evidence of congressional intent).

That language confirms Plaintiffs' reading in several ways. Its reference to "*any*" carryover

exemptions conveys the breadth of the retention provision. *See Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 218-19 (2008). Its reference to "previous years" conveys that exemptions would carry over from more than one previous year. Finally, the Report's reference to "consistent with current law" shows that Congress sought to maintain the existing carryover of exemptions. For more than twenty years, over four different reauthorizations that made other amendments to the SNAP program,[7] Congress left the carryover language intact. *See Public Citizen*, 332 F.3d at 668 (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (according weight where "Congress has frequently amended or reenacted the relevant provisions without change")).[8]

At the preliminary injunction stage, this Court noted that Plaintiffs had "point[ed] to no case in which a court has used legislative history to deem ambiguous statutory language clear." P.I. Op. at 21 n.9. But the Supreme Court itself has said that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *see Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (indicating that "clear legislative history" can sometimes "illuminate ambiguous text" (citation omitted)). And it can certainly show that Congress had a precise intent at *Chevron* step one. *See, e.g.*, *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 271 (D.C. Cir. 2001). Moreover, Plaintiffs do not

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[7] For example, in the 2008 Farm Bill, Congress overhauled numerous aspects of the program and changed its name from the Food Stamp Program to the Supplemental Nutrition Assistance Program. *See* Pub. L. No. 110-246, §§ 4001-4142, 122 Stat. 1654, 1853-1882. That bill also amended the work requirements under 7 U.S.C. § 2015. *See* Pub. L. No. 110-246, § 4131, 122 Stat. at 1875.

[8] The 2018 Farm Bill amended the Statute, including the waiver and exemptions provisions, in several respects. Pub. L. 115-334, §§ 4005(a) (amending employment and training program provision), 4005(b)(1) (amending what satisfies work requirement), 4005(b)(2) (requiring "support of the chief executive officer of the State" for a waiver request), (b)(3) changing 15 percent exemptions to 12 percent exemptions), 4005(c) (amending employment-and-training requirement for state plan).

point merely to a statement in a committee report, but instead present evidence of conscious decision-making to enact a narrowly tailored change to the provision at issue (from 15 to 12 percent) and to reject harsher limits on carryover in a statutory reauthorization of the entire program. "[A] statute may foreclose an agency's preferred interpretation despite . . . textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque." *Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009). That is what occurred here. *See Hearth, Patio & Barbecue Ass'n*, 706 F.3d at 504-05 (statute barred the agency's regulation where Congress had left a contrary interpretation in place for several decades, had revisited the relevant statute "with purpose," and had "tak[en] to the statutory scheme a scalpel, not a cudgel").

The Rule acknowledges that commenters pointed USDA to the pertinent Conference Report language and argued that USDA's proposal was "out of line with Congressional intent." 84 Fed. Reg. at 66803. But, as with other responses, USDA "waved away these commenters' concerns and their supporting evidence in a few sentences of defective argument." P.I. Op. at 30. Indeed, the only statutory justification cited by USDA for the Rule's complete reversal on the carryover point is Congress's purported "decision to limit the number of exemptions available to States in a given fiscal year, as expressed by sections 6(o)(6)(C), (D), and (E) of the Act." 84 Fed. Reg. at 66802. Congress' other restrictions are fully consistent with indefinite carryover of those otherwise limited exemptions, and USDA's remark fails to "grapple with" the statutory text explained above. *See BP Energy Co. v. FERC*, 838 F.3d 959, 965-66 (D.C. Cir. 2016). USDA improperly "reads . . . out of the Conference Report entirely" the report's specific references to "*any*" exemptions, "previous years," and "consistent with current law," *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222-24 (2015).

Finally, even if USDA's new interpretation may be applied to affect exemptions first

accumulated on or after its effective date, it may not be applied to extinguish exemption balances accumulated under prior law. In *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), the D.C. Circuit evaluated a rule governing companies' future baseline allowances of production and consumption of certain chemicals. The circuit concluded that an EPA regulation, operative in the future, could not extinguish baseline allowances accumulated within that system under prior regulation when EPA itself had recognized the accumulation of those allowances. *Id.* at 1-10. Here too, states have accumulated significant baseline balances usable within an agency-run regulatory scheme under clear prior regulation with the agency's repeated assurance and recognition of those balances.[9] Those balances represent millions of dollars in vital food assistance to state residents that cannot be summarily extinguished by a Rule enacted well after their accumulation. *See Arkema*, 618 F.3d at 8.

III. THE RULE VIOLATES THE APA BECAUSE IT IS ARBITRARY AND CAPRICIOUS.

This Court already found based on Plaintiffs' arguments for a preliminary injunction (State Pls.' Mot. 25-28, ECF No. 3, hereby incorporated by reference) that Plaintiffs are "highly likely" to succeed in showing that the Rule runs afoul of the requirement of reasoned decision-making. P.I. Op. at 18, 27-45. The Rule radically rewrites longstanding rules governing ABAWD waivers and exemptions based on unsupported justifications contradicted by the evidence and in disregard of significant burdens to states and individuals. USDA attempts to justify the Rule's overly narrow criteria by asserting that states "manipulated" the prior criteria to obtain "questionable" waivers and that states' accumulation of unused discretionary exemptions was an "unintended"

[9] USDA has acknowledged as much not only in the Rule (84 Fed. Reg. at 66,802) but also in other publications. For example, in fiscal year 2019, USDA described the agency's prior "unlimited carryover and accumulation" approach and listed each State's outstanding exemption balance. https://fns-prod.azureedge.net/sites/default/files/SNAP-ABAWD-Percentage-Exemption-Totals-FY2019.pdf.

consequence of the Statute. 84 Fed. Reg. at 66783. The administrative record does not support these assertions.

Moreover, USDA ignored evidence that the Rule's new waiver criteria are poorly suited to determining which areas lack sufficient jobs for ABAWDs, will greatly increase costs to states, and will have a disparate impact on minorities. The agency similarly dismissed the negative impact that the Rule's removal of exemptions will have on states' ability to effectively administer SNAP in times of rapid economic downturn. Before the current economic crisis, USDA estimated that 688,000 people would lose access to critical SNAP benefits under the Rule. 84 Fed. Reg. at 66809. Current evidence indicates that number could be much greater given the steep increase in unemployment caused by the COVID-19 pandemic and the likelihood that unemployment will persist, particularly for ABAWDs well after the public health emergency is lifted.[10] *See* Bolen Supp. Decl. ⁋ 22; Fernández Supp. Decl. ⁋ 4; Rivera Supp. Decl. ⁋ 5; Zeilinger Supp. Decl. ⁋⁋ 4, 11.[11]

A. The Rule's Reduction of the Sufficient Jobs Inquiry to General Unemployment Rates Is Arbitrary and Capricious.

USDA's decision to limit the "sufficient jobs" inquiry to an examination of an area's 24-month average unemployment rate and impose an unemployment rate floor is contradicted by both the agency's own prior factual findings and evidence provided by commenters that unemployment

[11] As set forth in the Court's Order, P. I. Op. at 32-45, and for the reasons discussed herein, USDA's overly narrow interpretation of the sufficient jobs prong both fails under the *Chevron* analysis and is arbitrary and capricious because it ignores "relevant factors" and amounts to "a clear error of judgment." *State Farm*, 463 U.S. at 43. Further, for the reasons discussed herein, the agency's flawed definition of "area" and reading of the statutory requirements for carryover exemptions fail under both tests. As the Court has noted, "there is little distance between *Chevron*'s step two and arbitrary and capricious review under the APA," *see* P.I. Op. at 32-33 n. 13.

levels alone are not an adequate measure of sufficient jobs for ABAWDs. This Court previously found that the Rule fails to provide valid reasons for drastically changing waiver standards in the face of overwhelming contrary evidence and failed to respond meaningfully to commenters' legitimate objections. *See* P.I. Op. at 29-45.

For more than twenty years, USDA recognized the shortcomings of general unemployment rates as a measure of job availability for ABAWDs, and the importance of other economic indicators to this evaluation. In its 1996 guidance, USDA observed that "[t]he statute recognizes that the unemployment rate alone is an imperfect measure of the employment prospects of individuals with little work history and diminished opportunities," and that states could thus use other evidence to make that showing "in recognition of the challenges that low-skilled workers may face in finding and keeping permanent employment." ABAWD00000166. The USDA's 1999 proposed rule likewise stated that "there are no standard data or methods to make the determination of the sufficiency of jobs" for ABAWDs. ABAWD00000090. USDA's 2001 rule made clear that the agency interprets the "lack of sufficient jobs" inquiry as encompassing a broad range of metrics and not exclusively tied to demonstrating high general unemployment. ABAWD00000123-24. USDA maintained a consistent position in 2006 guidance, ABAWD00000212, and 2016 guidance, ABAWD00000330-31.

Commenters provided extensive evidence that doing away with USDA's longstanding waiver criteria in favor of a single, limited, and concededly imperfect measure, as the Rule does, will prevent states from securing waivers for areas that lack sufficient jobs for ABAWDs.[12]

[12] *See, e.g.,* ABAWD00110124-93, ABAWD00168808-09, -168812; ABAWD00078131-32; ABAWD00079165-69; ABAWD000168348-49; ABAWD00158908-13; ABAWD00167078-79; ABAWD00084261-63; ABAWD00181824-34; ABAWD00068066-67; ABAWD00173990-92.

According to USDA, "many" commenters presented evidence that general unemployment rates do not reflect the reality of jobs for ABAWDs "because of factors affecting the availability of jobs to ABAWDs that unemployment rates do not account for," "such as criminal records, housing instability, a lack of transportation, necessary skills or education, or of reliable, quality jobs." ABAWD00008234-35; 84 Fed. Reg. at 66785-86. Commenters identified other metrics of labor market conditions that could better demonstrate insufficient jobs for ABAWDs. ABAWD00008235; 84 Fed. Reg. at 66788-89. The record also includes extensive evidence that the unemployment rate on which the Rule relies underestimates the number of ABAWDs who are unable to find work because this rate fails to account for the potentially numerous ABAWDs who have stopped looking for employment because of their longstanding inability to find work, ABAWD00008235, -8238, -8246, and that the 2-year average unemployment rate is "insufficiently responsive to economic downturns," ABAWD00008246. *See also* 84 Fed. Reg. at 66798.[13] As one commenter shrewdly summarized, USDA "avoided the statutory requirement of measuring the availability of jobs to ABAWDs by using this metric." ABAWD00008255.

This Court found that USDA's perfunctory rationale for the Rule's new waiver standard was merely a "few sentences of defective argument" that falls short of the reasoned explanation the law requires. P.I. Op. at 30-32. The Rule acknowledges "that ABAWDs may face barriers to employment and have more limited employment prospects than the general public due to low educational attainment or other factors," 84 Fed. Reg. at 66787, but maintains that the 2-year

[13]The economic disruption wrought by the COVID-19 pandemic provides a vivid illustration of this point: in less than three months, general unemployment in many areas skyrocketed from the low single digits to nearly 20 percent. The 24-month average unemployment rate thus wildly understates current economic suffering and the difficulty of finding work. *See* Rivera Supp. Decl. ¶ 5 (noting that unemployment rates in Michigan rose from 3.8% in January 2020 to 22.7% in April 2020).

unemployment rate and a 6 percent floor is the best standard by which to judge the availability of jobs for ABAWDs. *Id.* at 66787. USDA's circular statement is devoid of analysis beyond noting that, absent the Rule, "a state could request and qualify for a waiver in areas with an unemployment rate as low as of 4.7 percent." *Id.* at 66787. USDA presents no evidence that an area with 4.7 percent general unemployment necessarily provides sufficient job opportunities for ABAWDs.

USDA failed to "analyze or explain" why it rejected other previously accepted measures of job availability for ABAWDs. *Encino*, 136 S. Ct. at 2127; *see* 84 Fed. Reg. at 66790-91. For example, "[m]any commenters" "expressed opposition to the proposal to no longer allow employment to population ratios that demonstrate economic weakness to qualify areas for waivers." ABAWD00008237. Commenters provided evidence that this metric can be reliably calculated and shows a more accurate picture of the economic climate. ABAWD00008246. Broadly, commenters showed that eliminating this criterion "would unduly limit the economic factors considered in assessing an area's eligibility for a waiver." ABAWD00008237.

Other commenters contended that "information about declining industries or occupations should be retained as a criterion" to provide "appropriate flexibility for local labor conditions." ABAWD00008238. Commenters also "stated that academic studies and publications can often provide a more accurate description of a region's unemployment or can more accurately describe job availability among the ABAWD population than unemployment rates." 84 Fed. Reg. at 66791. Commenters argued that excluding these criteria, along with the imposition of an unemployment rate floor, results in an overreliance on unemployment rates that do not accurately capture ABAWDs' job prospects. *Id*. at 66790.

USDA agrees that these criteria "can be used to help understand employment changes in an area," but summarily discounts these previously credited metrics as "less reliable and consistent

than standard unemployment data" based on USDA's "operational experience." *Id*. at 66791. USDA never provides its basis for determining that these metrics are "less reliable and consistent" evidence of local labor markets or why this information cannot be used in combination with other metrics to demonstrate a lack of sufficient jobs. USDA fails to justify this departure from past practice. *See* P.I. Op. at 31-32.

USDA cannot arbitrarily prioritize its purported desire to rely on standardized or "consistent" data over answering the Statute's mandated inquiry. *State Farm*, 463 U.S. at 43 (reliance on nonstatutory factors "which Congress has not intended it to consider" constitutes arbitrary and capricious action); *Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020) (agency arbitrarily "prioritize[d] non-statutory objectives to the exclusion of the statutory purpose"); *see also Good Fortune Shipping SA v. Comm'r of IRS.*, 897 F.3d 256, 262 (D.C. Cir. 2018) (finding that IRS could not "categorically deny consideration of a recognized form of ownership based on only a single, undeveloped statement that it is 'difficult[ ]' to reliably track the location of a given owner"). USDA never supports its conclusion that the unemployment figures are a *more* reliable—or even *a* reliable—indicator of sufficient jobs for ABAWDs in the area where they reside. Nor does the record provide any basis for this unexplained assumption. Absent a substantive reason why the unemployment rate alone best captures ABAWDS' job prospects, the Rule is arbitrary and capricious.

B. The Rule's Elimination of the Extended Unemployment Benefits Qualification Standard Is Arbitrary and Capricious.

In addition to being procedurally unlawful, USDA's decision to eliminate receipt of extended unemployment benefits as a basis for waiver is unreasoned. USDA's only justification for its summary about-face on this criterion is that "qualification for extended unemployment benefits is designated only at the state level, not at the LMA level." 84 Fed. Reg. at 66790. USDA

invoked "concern[s]" that "the extended unemployment benefits criterion would allow States to receive statewide waivers even when there is not a lack of sufficient jobs within certain areas of the State." *Id.* USDA provides no evidence or other analysis for its newfound concerns that this criterion—which USDA described in the Proposed Rule as a "clear indicator" of labor market distress—was likely to result in waivers in areas with sufficient jobs for ABAWDs. 84 Fed. Reg. at 985.[14]

The importance of this criterion has been brought into stark relief by the COVID-19 pandemic: currently, 48 states and the District of Columbia qualify for a waiver under this criterion. Bolen Supp. Decl. ¶ 14. But some of these states would not qualify for a waiver under the Rule because an area's unemployment rate must be *both* over 6 percent AND 20 percent above the national average. *Id*. ¶ 17. Accordingly, an area with 9 percent unemployment would not qualify if the national average unemployment rate was 8 percent. *Id*.

Moreover, USDA's supposed reservations about a statewide waiver under this criterion failing to narrowly target areas that lack sufficient jobs is incongruous with USDA's decision to grant waivers only for entire LMAs, areas that often encompass much larger areas across multiple state boundaries. Such incongruity is a hallmark of arbitrary decision-making. *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (stating that an agency's "reasoning cannot be internally inconsistent") (citing *Sierra Club v. EPA*, 884 F.3d 1185, 1194-96 (D.C. Cir. 2018)); *see* P.I. Op. at 31 n. 12.

C. The Rule's Restrictions on Waiver Area Are Arbitrary and Capricious.

The Rule's redefinition of "area," 84 Fed. Reg. 66793-97, is arbitrary and capricious.

[14] Notably, some commenters submitted evidence that this standard is already set too high to provide appropriate relief to states facing high unemployment. *See, e.g.,* ABAWD00079168.

USDA fails to offer a reasoned explanation for abandoning factual findings and longstanding regulation supporting states' superior knowledge of local labor conditions and permitting states flexibility to define "areas" that lack sufficient jobs for ABAWDs. *Fox Television Stations, Inc.*, 556 U.S. at 515 (requiring "good reasons" for changing course and discounting prior findings). USDA failed to satisfactorily respond to comments showing that LMAs do not accurately capture the ABAWD experience. P.I. Op. at 36-45.

USDA previously found that less flexible definitions of "area" diminish the ability of states to evaluate and respond to local economic realities. In 1996 guidance, USDA acknowledged that states should have "broad discretion in defining areas that best reflect the labor market prospects of program participants and State administrative needs" and that "to some extent, the decision to approve waivers based on an insufficient number of jobs must be made on an area-by-area basis." ABAWD00000166, -168. USDA's 1999 proposed rule expressed that states should request waivers for substate areas because statewide unemployment averages may "mask slack job markets in some counties, cities, or towns." ABAWD00000089. USDA reiterated this need for state discretion in the 2001 rule, which made clear that "State agencies have complete discretion to define the geographic areas covered by waivers so long as they provide data for the corresponding area." ABAWD00000124. In 2006, USDA reaffirmed that states have discretion to define the areas for waiver requests. ABAWD00000212. In 2016, USDA observed that "the state can request that a waiver apply statewide or at the sub-state level, as statewide averages may mask slack job markets in some counties, cities, or towns," and recognized that the "economic regions" could include non-contiguous areas defined by shared industries or other factors. ABAWD00000316-17 -324.

Commenters expressed opposition to the proposed restrictions on grouping areas for waiver

applications, ABAWD00008239, and "[m]ost" argued that states should retain the flexibility in administering SNAP that was provided for under USDA's past policies. ABAWD00008225; 84 Fed. Reg. at 66793.[15] Commenters observed that states have more detailed knowledge of local job markets and challenges faced by ABAWDs and are better suited to identify the most appropriate grouping areas for a waiver application. ABAWD00008239-43. They pointed out that states have properly exercised discretion to identify areas for waiver requests for decades under USDA's longstanding policies, and that USDA "fails to identify the data and evidence that justify the . . . use of one narrow, inflexible, federally prescribed method for grouping areas." ABAWD00008240. Commenters also observed that USDA had provided insufficient evidence of states abusing waivers to justify the strict area definition which admittedly failed to capture ABAWD job prospects. ABAWD00008240, -8255.

The Rule arbitrarily rejects longstanding policy, prior findings, and commenters' evidence. USDA's only justification for its strict "area" definition is supposed "operational experience" that "States are grouping areas in such a way to maximize waived areas" and that the "problem" of strategic grouping "outweighs" arguments for state flexibility. 84 Fed. Reg. at 66794. USDA rationalizes its reversal by accusing states of "manipulat[ing]" the waiver process to "maximize" the number of ABAWDs subject to a waiver. *Id.* This Court has already found that the agency "has provided no evidence" that such state manipulation is "a real problem." P.I. Op. at 37; *see Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) ("Professing that an" agency action "ameliorates a real . . . problem but then citing no evidence demonstrating that there is in fact a[] . . . problem is not reasoned decisionmaking."). There is no basis to conclude otherwise

[15] *See, e.g.,* ABAWD00110192-202; ABAWD00168809-10; ABAWD00078132-33; ABAWD00079169-70; ABAWD000168348-49; ABAWD00167079.

now. Indeed, USDA does not show that any prior waiver requests actually resulted in waivers for ABAWDs that had sufficient job opportunities, or that the agency denied any prior waiver request because it failed to adequately substantiate a lack of sufficient jobs for ABAWDs.

As the Court previously found, USDA's assertion that "about half" of ABAWDs live in waived areas is no indicator of manipulation because ABAWDs outside of waived areas who cannot meet the work requirements lose their benefits after three months, and USDA's analysis failed to account for these individuals. P.I. Op. at 38. USDA asserted that states had "grouped nearly all contiguous counties in the State together while omitting a few counties with relatively low unemployment," and "grouped certain towns together that share the same economic region while omitting others with relatively low unemployment from the group." 84 Fed. Reg. at 66794. The Court correctly found that these observations were entirely consistent with a good faith effort to seek a waiver only for areas where jobs for ABAWDs are scarce. P.I. Op. at 39-43.

Commenters explained that issues like cost of living, commuter patterns, availability of employment and training services, and whether areas share similar employment opportunities could explain why states seek waivers for some areas and not others. ABAWD00008242. The Rule fails to engage with any of these alternative explanations for the purported "problem" and does not acknowledge past USDA guidance that encouraged states to explore methods for grouping areas. P.I. Op. at 40-41. Even if some states sought to "maximize" waivers, USDA never explains how these examples reflect "gerrymandering" or establish that sufficient jobs for ABAWDs were available in these areas. Nor is there any evidence that USDA *ever* took steps to address any such issue where it purportedly arose—such as by notifying the state in question, seeking a modified waiver application, or denying an application in whole or in part. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *14 (U.S. June 18, 2020)

(failure to consider alternative "'within the ambit of the existing' [policy]" rendered agency rule arbitrary and capricious) (citing *State Farm*, 463 U.S. at 51); P.I. Op. at 3 (agency rule is unlawful unless the agency has "weighed the consequences of its actions"). As the Court noted, "That history is another sign that USDA's new policy eliminating state discretion in designing waiver areas is a solution in search of a problem." P.I. Op. at 43.

USDA compounded its arbitrary area restriction by rejecting several waiver criteria because they do not align with LMA boundaries. USDA rejected evidence that the "U–6 unemployment rate may better reflect the unemployment situation for ABAWDs" on the grounds that "this measure … is not available at the substate level." 84 Fed. Reg. at 66789. The agency similarly eliminated the long-established LSA designation criteria because it applies statewide, rather than LMA-wide. In both instances, USDA's reasoning is arbitrary because the agency failed to engage with the statutory question (whether areas lack sufficient jobs for ABAWDs) and instead relied on its self-imposed LMA limit—a limit not calibrated to capture factors influencing ABAWDs' job prospects.

USDA neglected to "respond meaningfully" to the evidence that LMAs do not appropriately reflect job availability for ABAWDs, *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000), noting only that "LMAs remain the best available and most appropriate delineation to address the issue of grouping, as there are no Federally-designated areas that specifically assess commuting patterns and other related economic factors for ABAWDs." 84 Fed. Reg. at 66793.[16]

The Rule replaces an informed, tailored approach to defining waivable "areas" with a one-

[16] *See, e.g.,* ABAWD00110203-10; ABAWD00168810-11; ABAWD00078132-33; ABAWD00079169-70; ABAWD00070511; ABAWD00182272-73.

size-fits-all definition that has little to do with ABAWDs' job prospects. Numerous commenters provided evidence that "LMAs are based on commuting patterns of the general workforce" and thus cannot capture available employment for "low-income, low-skilled ABAWDs who lack affordable transportation options." 84 Fed. Reg. at 66793. Commenters also provided evidence that "local nuances" in work opportunities—such as the types of jobs available, the kinds of skills needed, whether affordable transportation options are available, and even job losses in neighboring areas—counseled against reliance on rigid and "overly narrow" LMAs. ABAWD00008242.

In light of this mismatch, commenters argued that LMAs would hamper states' ability to target waivers to specific areas, like a single city, town, or county—or, in some cases, an entire state—based on the area's particular conditions. ABAWD00008239-40, 42. Commenters noted that LMAs are problematic when applied to assess waivers for both "rural States" and "urban areas," and suggested other metrics for evaluating labor market conditions within a local area and grouping substate areas for waivers, ABAWD00008239, -8241, -8243; *see, e.g.,* ABAWD00110318-28.

"Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking." *Gresham*, 950 F.3d at 103 (citations omitted). As this Court observed, two examples highlighted at oral argument underscore the shortcomings of LMAs to appropriately target waivers: New York City and Washington, D.C. Both cities are part of large LMAs that include counties in adjacent states that are considerable distances from the city. P.I. Op. at 43-45. There is no reasonable way for residents of these cities to travel to far-flung jobs in neighboring states that are inaccessible by public transportation. It is irrational to conclude that when Congress asked whether there are sufficient jobs to provide employment for an ABAWD who resides in New York City or Washington, D.C., Congress intended USDA to look to a

statistical area covering parts of Pennsylvania or West Virginia, respectively. *Bostock*, 2020 WL 3146686, at *6.

D. USDA's Decision to Limit Carryover of Unused Exemptions Is Arbitrary and Capricious.

USDA's plan to remove exemption balances from states in October 2020, and yearly thereafter, relies on deeply flawed reasoning. Most of the 50 states will lose accumulated exemptions. P.I. Op. at 19. Yet USDA does not offer a "good reason" for undermining states' significant reliance interests, and it summarily discounts numerous comments stressing the irrational consequences of limiting accumulation of these exemptions.

Congress provided for exemptions to give states a tool to mitigate the impact of the time limit on ABAWDs and more nimbly provide for their residents in times of swift economic downturn. USDA's longstanding policy permitting indefinite carryover of these exemptions best effectuated this purpose by enabling states to save their exemptions in times of economic well-being and use them in times of economic instability. This policy created a reliance interest whereby states relied on their "banks" of these exemptions to weather rapid changes in economic circumstances, like loss of a major employer or a national pandemic, by quickly and temporarily addressing increased needs of SNAP recipients while working on longer-term solutions. *See* Buhrig Decl. ¶ 17, ECF No. 3-4; Fernandez Decl. ¶¶ 21-22, ECF No. 3-5; Neira Decl. ¶ 12, ECF No. 3-16.

The impact of the Rule on these reliance interests is amply set forth in hundreds of comments. ABAWD00008249-50.[17] Many commenters argued that the carryover of exemptions

[17] *See, e.g.,* ABAWD00110252-258; ABAWD00078133; ABAWD00079170; ABAWD00070512; ABAWD000168350; ABAWD00167080.

provides states flexibility to respond to unexpected economic crises, such as the current pandemic. *Id*. Other commenters argued that a one-year limitation on accumulation of exemptions creates the perverse incentive to use exemptions in relatively good economic times instead of tailoring exemptions to where they are needed. *Id*. Finally, commenters provided that states who have accumulated exemptions should not be punished for conservative use of their exemptions. ABAWD00008250.

The current public health and economic crises caused by the COVID-19 pandemic underscore the importance of these exemptions and the agility they give states to address needs for vital food assistance in the face of rapid economic downturn. The crisis triggered an unprecedented rise in unemployment and economic instability as the nation effectively shut down. Parts of the country today are only "reopening" in fits and starts, *see* Buhrig Supp. Decl. ⁋ 8, and certain places where reopening has proceeded are seeing spikes in new cases of infection. Despite the speed with which the impacts were felt, the economic crisis threatens to continue for an extended period of time. *See* Rivera Supp. Decl. ⁋ 5. States need all reasonable flexibility under the Statute to best address this crisis and ensure that the maximum number of their struggling residents can eat. *See* Bolen Supp. Decl. ⁋ 13 (estimating only 9-10 percent of counties would qualify for waiver under final Rule during current pandemic, but 97 percent of counties would qualify under current regulations); Fernández Supp. Decl. ⁋ 12 (explaining that current areas of high unemployment would not qualify for waiver under final Rule); Buhrig Supp. Decl. ⁋⁋ 7, 11, 13-14; Rivera Supp. Decl. ⁋ 8; Zeilinger Supp. Decl. ⁋⁋ 6-7.

Several commenters elaborated on the impacts of the Rule on specific states. For example, commenters explained that some states accumulate exemptions to provide flexibility as they begin implementing the ABAWD time limit. ABAWD00008250. Commenters also argued that

discretionary exemptions should not be restricted "because they can be a lifeline for some of the most vulnerable recipients," including former foster children, domestic violence survivors, formerly incarcerated individuals, people who are looking for work or are in low-paid jobs with unpredictable hours, people who cannot work, and people who work the number of hours required but have difficulty reporting it. *Id*. Some of these commenters recommended that, at the very least, all exemptions earned prior to the finalization of this Rule should be permanently available for states to use moving forward. ABAWD00008251-52.

USDA's response to these comments was limited to a conclusory and flawed claim that the Rule was more consistent than prior practice with the statute. USDA asserts that removing states' accumulated balances hews to Congress's decision to limit the number of exemptions available to states in a given fiscal year by sections 6(o)(6)(C), (D), and (E) of the statute. 84 Fed. Reg. at 66802. But nothing in these sections is incompatible with the decision to permit carryover. To the contrary, the statute's plain language supports the states' position, and, beyond merely referring to the statute's subparagraphs as "limit[s]," the agency does not provide any good reason for its newfound construction of the statute. *See supra* Section II(C). The notion that Congress intended some "limit" does not negate or alter that Congress also intended carryover. It is unreasonable for USDA to conclude that because the statute contains *some* limits that the carryover provision should now be substantially curtailed—particularly when Congress has recently concluded just the opposite. Conference Report at 616 (noting, in conjunction with reduction of percentage, that "States will … continue to accrue exemptions and retain any carryover exemptions from previous years, consistent with current law").

E. The Rule Fails to Consider the Cost and Disparate Impact of the Rule.

The Rule also is arbitrary and capricious because it ignores evidence of the Rule's significant impacts on state governments and protected groups. *See State Farm*, 463 U.S. at 43;

Nat. Res. Def. Council, Inc. v. Rauch, 244 F. Supp. 3d 66, 97 (D.D.C. 2017). "[A]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The Supreme Court has recognized that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 2707. And "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). The Rule upends a regulatory scheme without justification for the high costs it will impose on states and minorities, who are disparately impacted by the changes.

USDA's cost analysis overlooks many demonstrable costs, rendering the rule unreasonable. *See City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"). In its Regulatory Impact Analysis, USDA claimed that the "proposed regulation is not expected to result in any additional administrative costs" for states. ABAWD00000452. USDA walked back this statement in the final Rule, claiming that the Rule will result in a "small increase" of $1.4 million in "State costs related to the administrative burden for verifying work hours and exemptions and sending notices." 84 Fed. Reg. at 66807. The agency does not explain the basis for either projection, which both stand in stark contrast to state estimates. *See, e.g.,* Zeilinger Decl. ¶ 13, ECF No. 3-19 (estimating an increase in annual costs of hundreds of thousands of dollars for the District alone).

USDA was on notice that its cost analysis was defective and failed to adequately address the concerns. ABAWD00008257-60. The agency's cost analysis considers only the immediate costs to the states of increased monitoring and notice requirements, but commenters identified (and

in some instances quantified) many other foreseeable costs of the Rule.[18] These include, for example:

- **The cost to amplify current state programs to accommodate the increased number of ABAWDs subject to the time limit**. Commenters explained that the Rule will impose significant costs on states in the form of heavier burdens on Employment and Training programs and the need for additional resources to develop policy, retain and train staff, and implement IT measures. Commenters also noted the need for additional personnel to respond to an increase in fair hearing requests. ABAWD00008257-58.[19]

- **Increased poverty and hunger**. Commenters explained that, because ABAWDs who lack access to jobs will be ineligible for SNAP benefits under the Rule, the Rule will result in increased hunger and poverty, and a greater burden on states to mitigate food insecurity and its impacts. ABAWD00008258-59.

- **Health care costs.** Commenters highlighted significant increases in health care costs as a direct result of the increased food insecurity caused by the Rule. The negative impact on public health largely will be borne by states in the form of increased Medicaid and uncompensated care costs. ABAWD00008259-60.

- **The impact on economic activity of cutting SNAP benefits**. "Many commenters … highlighted the economic impact the proposed rule would have, stating that every $1 in federal SNAP benefits generates $1.79 in economic activity," and provided evidence that the proposed rule would significantly reduce economic activity in a number of states, including negative impacts on local small businesses in particular. ABAWD00008257-58. Commenters also assessed the indirect impact of reduced SNAP benefits on employment. ABAWD00008258.

USDA gave no weight to the exorbitant costs resulting from these "second order impacts" in its analysis of the Rule. ABAWD00008260. USDA cannot selectively ignore costs that foreseeably flow from its rulemaking to justify its preferred results. *See Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 53 (D.D.C. 2019) (finding delay regulation was arbitrary and capricious where Department of Education failed to consider costs to

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[18] *See, e.g.,* ABAWD00110316-317; ABAWD00168812-14; ABAWD00078135-36; ABAWD00079151-52; ABAWD000168358-59; ABAWD00173986-89.

[19] *See* Buhrig Decl. ¶ 16, ECF No. 3-4; Zeilinger Decl. ¶ 15, ECF No. 3-19; Storen Decl. ¶ 12, ECF No. 3-17; Banks Decl. ¶ 34, ECF No. 3-1; Gifford Decl. ¶¶ 20, 24, ECF No. 3-9; Fernandez Decl. ¶ 72, ECF No. 3-5.

states and interested stakeholders), *appeal dismissed*, No. 19-5137, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019); *Sec. Indus. & Fin. Markets Ass'n v. CFTC.*, 67 F. Supp. 3d 373, 430-33 (D.D.C. 2014) (CFTC's failure to consider or evaluate costs of extraterritorial application of Rule rendered rule arbitrary and capricious). USDA's failure to assess reasonable costs renders the Rule arbitrary and capricious. *See Bus. Roundtable v. SEC.,* 647 F.3d 1144, 1152 (D.C. Cir. 2011).

Finally, while USDA concedes that the Rule has "the potential for impacting protected groups due to factors affecting rates of employment of members of these groups," 84 Fed. Reg. at 66808, it fails to adequately consider the impact of the Rule on minorities, or to meaningfully respond to numerous comments urging USDA to analyze such effects.[20]

USDA's Civil Rights Impact Analysis ("CRIA") states that "[s]pecific race, ethnicity, and gender data regarding the ABAWDs that will be impacted are not available" but that "implementation of the final rule may impact African Americans and Hispanic groups at a higher rate due to factors more strongly associated with potential program users in these minority groups." ABAWD00000358; 84 Fed. Reg. 66808. USDA's claim that it lacked data is dubious because it received numerous comments from various organizations regarding the Rule's impact on communities of color, the LGBTQ community, the disabled community, immigrants, women, the elderly, those afflicted with HIV/AIDS, those with criminal records, victims of domestic abuse, veterans, and Native Americans. ABAWD00008263-66. As just one example, an elected official provided evidence that more than half of ABAWDs come from communities of color, and other commenters provided empirical data that the Rule will not accurately evaluate the availability of

[20] *See* ABAWD00008263-66; *see, e.g.,* ABAWD00110318-328; ABAWD00168814-16; ABAWD00078130-31; ABAWD00078136; ABAWD00079153-163; ABAWD00079170; ABAWD000168350-58; ABAWD00168373-74.

jobs for ABAWDs who are minorities because the general unemployment rate does not account for barriers to consistent, gainful employment faced by minority communities. ABAWD00008235, -8264. USDA fails to offer a reasoned response to evidence that its new standards are poorly calibrated to evaluate the availability of jobs for these communities (and others) who make up a substantial portion of ABAWDs.

Even if it were true that USDA lacked adequate data to evaluate this issue, an agency cannot simply ignore impacts it deems too difficult to calculate. *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 840 (5th Cir. 2010) ("Given the admitted information shortage, the EPA must make use of the information it has …; EPA cannot refuse to carry out its mandate, waiting for the day when it might possess perfect information."). USDA's conclusory statements cannot meet the agency's burden to consider the Rule's impact on protected groups. *Ass'n of Private Sector Colleges & Univs.*, 681 F.3d at 448-49 (agency decision arbitrary under the APA where agency failed to meaningfully address comments regarding impact on minorities); *AT&T Wireless Servs. Inc. v. FCC,* 270 F. 3d 959, 968 (D.C. Cir. 2001) ("Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.").

IV. PLAINTIFFS HAVE STANDING TO CHALLENGE THE RULE.

To show standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Court has already found that the Rule is likely to impose significant harm on Plaintiffs and that enjoining the Rule is likely to ameliorate that harm. P.I. Op. at 46-56. No more is required to establish standing.

In particular, unless the Rule is vacated, Plaintiffs will suffer three independent injuries traceable to the rule and redressable by the requested relief: (1) the Rule will increase the

administrative burden on state-operated programs;[21] (2) Plaintiffs' health care costs will rise because the Rule puts the states' residents at greater risk of adverse health impacts, and the states pay health care costs for some of those residents;[22] and (3) the states will lose tax revenue and suffer other direct economic injuries as a result of the Rule.[23]

As this Court previously recognized, USDA's own analysis confirms these injuries. P.I. Op. at 53-54 (citation omitted). These harms—particularly when confirmed by the agency's own analysis—establish injury-in-fact for standing purposes. *See, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059 (D.C. Cir. 2018). Plaintiffs' injuries are traceable to the challenged provisions of the Rule, and a favorable decision would redress those injuries. *New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 127 (D.D.C. 2019).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment.

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[21] *See, e.g.*, Brown Decl. ¶ 10, ECF No. 3-3; Buhrig Decl. ¶¶ 13, 16, ECF No. 3-4; Fernandez Decl. ¶¶ 46, 49-52, 69, ECF No. 3-5; Fisher Decl. ¶¶ 9, 10 ECF No. 3-6; Gifford Decl. ¶¶ 20-24, ECF No. 3-9; Haun Decl. ¶¶ 18-19, ECF No. 3-11; Mangini Decl. ¶ 10. ECF No. 3-14; Neira Decl. ¶ 10, ECF No. 3-16; Storen Decl. ¶ 23, ECF No. 3-17; Sweeney Decl. ¶¶ 5, 15, ECF No. 3-18; Zeilinger Decl. ¶ 13, ECF No. 3-19.

[22] *See, e.g.*, Brown Decl. ¶ 11, ECF No. 3-3; Hartline-Grafton Decl. ¶¶ 6-12, ECF No. 3-10.

[23] *See, e.g.*, Banks Decl. ¶¶ 28-30, ECF No. 3-1; Buhrig Decl. ¶ 21, ECF No. 3-4; Fernandez Decl. ¶ 73, ECF No. 3-5; Freishtat Decl. ¶¶ 14-16, ECF No. 3-7; Gifford Decl. ¶ 16, ECF No. 3-9; Haun Decl. ¶¶ 24-25, ECF No. 3-11; Lazere Decl. ¶¶ 17-19, ECF No. 3-13; Zeilinger Decl. ¶ 21, ECF No. 3-19.

Dated: June 24, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK, Plaintiffs, v. U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA, Defendants.	Civ. Action No. 1:20-cv-00119-BAH

DECLARATION OF EDWARD BOLEN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Edward Bolen, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained herein, and testify based on my personal knowledge and information.

2. I am a Senior Policy Analyst with the Center on Budget and Policy Priorities (CBPP). In this position, I focus on state and federal issues in the Supplemental Nutrition Assistance Program (SNAP), including SNAP Employment & Training (E&T) and waivers for able-bodied adults without dependents (ABAWDs). I have provided trainings to multiple states regarding their loss of waivers and have worked with advocates and state officials concerning issues in implementing ABAWD time limits. CBPP is a nonpartisan research and policy institute. We work to protect and strengthen programs that reduce poverty and inequality and increase opportunity for people trying to gain a foothold on the economic ladder. Federal nutrition programs, including SNAP, are a core component of our organization's work. We have deep expertise on SNAP time limit policy, including waivers and individual exemptions. I base the analysis and estimates in this declaration on my work and the work of my colleagues at the Center.

3. I am aware that the federal government recently issued a final rule, "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents," 84 Fed. Reg. 66,782 ("the rule"). I have reviewed the rule and am aware of its direct implications for the administration of SNAP, formerly known as the Food Stamp Program, within the states. I understand that this lawsuit challenges the rule. I previously submitted a declaration in support of the State Plaintiffs' motion for preliminary injunction.

4. Current economic circumstances show how the final Rule would fail to respond to deteriorating labor market conditions. In contrast, the long-standing rules currently in place give states important options to help low-income unemployed workers who have been adversely affected by the events of the last few months.

5. The country is in the midst of both an unprecedented public health emergency caused by the coronavirus pandemic and an economic crash that has resulted in record unemployment. As a result, food insecurity – the limited or uncertain availability of a nutritionally adequate diet arising from a lack of resources – rose at unprecedented rates during the pandemic and remains at historic highs as the economic crisis continues. Beginning with survey responses from late March, nearly a third of non-elderly adults reported that their families spent less on food in the last month.[1] That number rises to 46.5 percent among adults in families that experienced job or income loss. Nearly 23 percent of households said the food they bought "just didn't last" and they didn't have the money to buy more, according to another national survey.[2] In contrast, at the worst point of the 2008 recession, 16 percent of households had the same response. The levels of food insecurity appear to have levelled off but remain historically high.

6. SNAP has historically responded to worsening economic conditions by quickly providing modest food assistance to households that have seen a drop in income. Some states

[1] Elaine Waxman, "More than One in Five US Adults Experienced Food Insecurity in the Early Weeks of the Pandemic," April 28, 2020, Urban Institute, https://www.urban.org/urban-wire/more-one-five-us-adults-experienced-food-insecurity-early-weeks-pandemic.

[2] Laruen Baur, https://www.hamiltonproject.org/blog/the_covid_19_crisis_has_already_left_too_many_children_hungry_in_america.

are reporting significant increases in applications for assistance, indicating that SNAP may be responding quickly now as well.

7. The time-limit, however, reduces SNAP's ability to respond to economic downturns, because ABAWDs are at risk of losing benefits when jobs are hard to find and often work in industries that are especially hard hit during recessions, such as food service, home health aides, office support and retail sales. Workers in these jobs are at greatest risk of losing employment due to the pandemic.[3] The Families First Act, passed in response to the coronavirus pandemic, temporarily suspends the time limit until the month after the public health emergency ends.

8. The ability of states to waive the time limit in areas with a lack of sufficient jobs is an important response when childless adults suddenly lose their earnings and are unable to find work. But areas must meet prescribed unemployment-based criteria to document the lack of jobs, and the final rule, had it been in effect as of April 1, would have prevented almost every area throughout the country from qualifying. As a result, despite record unemployment, the final rule would offer almost no relief to unemployed workers and overwhelmed state benefit systems and local food banks.

9. The coronavirus pandemic and state stay-at-home orders have resulted in record unemployment:

- The number of unemployed persons rose from an average of under 6.4 million in January and February to 21.0 million in May. The Bureau of Labor Statistics (BLS) notes, however, that as many as 4.9 million workers who were absent from work may have been misclassified as employed rather than unemployed.[4]

- The unemployment rate in May (not accounting for misclassification) was 13.3 percent.

- People already facing barriers to opportunity, including Black and Latino workers, those working in industries with low wages, and those without a bachelor's degree, were hit hardest by the massive recent job losses.[5] The white unemployment rate in May was 12.4 percent, the Black rate was 16.8 percent, and the Hispanic rate was 17.6 percent.[6]

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[3] Berube, Alan and Nicole Bateman, "Who are the workers already impacted by the covid-19 recession?", Brookings Institute, April 3, 2020, https://www.brookings.edu/research/who-are-the-workers-already-impacted-by-the-covid-19-recession/.

[4] U.S. Department of Labor, Bureau of Labor Statistics, "The Employment Situation, May 2020," June 5, 2020, https://www.bls.gov/news.release/pdf/empsit.pdf

[5] Chad Stone, "People Already Facing Opportunity Barriers Hit Hardest By Massive April Job Losses," CBPP, May 12, 2020, https://www.cbpp.org/blog/people-already-facing-opportunity-barriers-hit-hardest-by-massive-april-job-losses

[6] U.S. Department of Labor, Bureau of Labor Statistics, "The Employment Situation, May 2020," June 5, 2020, https://www.bls.gov/news.release/pdf/empsit.pdf

- The number of people claiming unemployment benefits rose to 30 million in the week ending May 16, from an average of 2 million in a typical week between the beginning of the year and mid-March.

10. The Administration's final rule, if it were in effect now, would have failed to allow states to respond to the pandemic and record unemployment. Under the final rule, an area, limited by the rule to be a Labor Market Area (LMA), cannot receive a waiver unless:

- its average unemployment rate over a recent two-year period is at least 6 percent *and* at least 20 percent higher than the national average; or

- its average unemployment rate over a recent one-year period is over 10 percent.[7]

11. The final rule eliminates the two criteria that would most quickly respond to worsening economic conditions affecting low-income unemployed workers. The long-standing criteria allowing states to identify 3-month unemployment rate of 10 percent as evidence of 10 percent unemployment was eliminated in the proposed and final rule. The final rule also eliminated the ability for a state to qualify for a waiver when the state qualifies for Extended Unemployment Benefits (EB). The primary means of qualifying for a waiver under the final rule require at least 12 or 24 months of high unemployment.

12. By requiring such long periods of high unemployment, the final rule was flawed even prior to the pandemic because it lacked a quick response to economic downturns. Under the final rule, far fewer areas would qualify for waivers during any future national recession, when the national average unemployment rate is high — and, the worse the recession, the higher the hurdle to receive a waiver. If national unemployment for the two-year period averaged an already high 7 percent, for example, an area would need an even higher 8.4 unemployment rate to qualify.

13. But more troubling, the final rule largely fails to allow states to respond to the extraordinary circumstances our nation has faced since the final rule was issued in December 2019. As of April 1, when the final rule was scheduled to go into effect, even with the extraordinary increases in unemployment, the share of U.S. counties that are eligible for a waiver would have dropped from about 36 percent to about 9 percent. As of June, during the midst of the pandemic and after record numbers of people filing for unemployment, only 10 percent of counties are eligible for a waiver based on the most recently available data that could be used under the final rule criteria for submitting a waiver.[8] As a result of the restrictions in the final rule, only a negligible number of new areas have become eligible, despite the most staggering loss of employment since at least the Great Depression. Under current rules, 97 percent of U.S. counties could be waived, as a result of most of the U.S. states qualifying of extended unemployment benefits.

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[7] The final rule does allow waivers for undefined "exceptional circumstances" but the limits of this provision are discussed later.

[8] Based on CBPP internal analysis of unemployment data from the U.S. Bureau of Labor Statistics and the U.S. Census Bureau.

14. In contrast, the current, long-standing waiver rules allow states to quickly respond to worsening economic conditions. Under the long-standing waiver criteria currently in effect, states have begun to qualify for waivers of the three-month time limit, allowing hard-hit states to adapt quickly to worsening economic conditions. For example, under current rules, a state that qualifies for federal Extended Unemployment Benefits as determined by the U.S Bureau of Labor Statistics can qualify for a statewide waiver. In the final rule, USDA notes that no state qualified for EB at the time due to the strength of the economy. As of June 18, 48 states and the District of Columbia have qualified for Extended Unemployment benefits (and the remaining states – South Dakota and Utah – may qualify in the coming weeks).[9] Almost the entire country is suffering from widespread unemployment and qualifies for a waiver of the time limit under current rules.

15. In addition, the flexibility given states to define the areas to waive – eliminated in the final rule – has allowed states to request waivers for all affected areas within the state, including the state as a whole. Given the geographic impact of the spread of the coronavirus and the economic downturn, this broad flexibility is proving critical to states as they work to respond to the hardships of their residents. The final rule does not allow states to request waivers for the entire state, unless each LMA qualifies under the rule's more stringent criteria.

16. Because the long-standing rules are still in place, approximately 97 percent of the counties in the United States could waive the three-month limit on SNAP benefits for unemployment adults during this time of economic hardship and widespread unemployment if the temporary suspension of the time limit were not in effect.

17. Eliminating extended unemployment benefits as a qualifying criterion for a waiver will be harmful in any recession. The final rule illustrates that USDA does not understand the impact of eliminating the EB trigger during any future recession. EB was eliminated in the final rule, but not in the proposed rule, giving commenters no opportunity to discuss the drastic impact this change would have when the economy worsens. In describing the elimination of the EB trigger in the Regulatory Impact Analysis (RIA) of the final rule, USDA admits that because the EB trigger is eliminated, some areas may not qualify for waivers as quickly during an economic downturn as they otherwise would have under the long-standing criteria.[10] But USDA doesn't seem to understand that many areas with high unemployment would not qualify *at all* during and after recessions when national unemployment is high, because an area's unemployment rate must be *both* over 6 percent AND 20 percent above the national average. So an area with 9 percent unemployment would not qualify if the national average unemployment rate was 8 percent. This will result in far fewer areas qualifying for waivers during and after recessions.

18. The RIA fails to provide useful information to assess the impact of the final rule because it was based on the assumption that the economic circumstances and employment rates at the time would continue unabated. It states "[c]urrently no States qualify for EB so no State

[9] https://oui.doleta.gov/unemploy/trigger/2020/trig_062120.html

[10] Regulatory Impact Analysis, 7 CFR Part 273, Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, at 29 and 55, https://www.regulations.gov/document?D=FNS-2018-0004-19016.

may apply for waivers under the EB criterion. Therefore this provision is not expected to have measurable impacts on SNAP participants, State agencies, or Federal spending during FYs 2020-2024."[11] Because as of June 2020, 48 states now qualify for EB, that analysis is fatally flawed. Notwithstanding the current economic situation, recessions historically have occurred at least once a decade so it is unreasonable to assume there would never be another one.

19. Research continues to show the shortcomings of the final rule. Using recent data for six LMAs, the Urban Institute found that using LMA unemployment rates could "mask significant variation in the availability of jobs across counties and cities within the same LMA without considering the barriers to transportation faced by low-wage workers." The study also found that the final rule would also adversely affect waiver eligibility for urban areas with high shares of Black and Hispanic residents, areas with significant immigrant populations, and rural areas across the U.S.[12]

20. The flaws with the final rule are not resolved simply because the rule includes an option to submit waivers under "exceptional circumstances." First, USDA would need to decide what constitutes an exceptional circumstance, and states may well be concerned that USDA would not exercise this authority broadly, given the historical experience of the agency (touted repeatedly in preamble of the final rule as the reason to discount comments that suggested changes to, or problems with, the final rule). The current rules have a similar provision that has rarely if ever been approved by FNS. Second, the RIA claimed the "exceptional circumstances" criteria would be rarely used and not impact the number of individuals or cost savings of the final rule, noting "by design these criteria are expected to be used infrequently. Therefore, the Department believes that this provision will have minimal impact on SNAP participants, State agencies, or Federal spending."[13]

21. The final rule significantly diminishes SNAP's value as an important response to economic downturns. In local economies with high unemployment, SNAP payments support recipients to maintain their spending and, as a result help sustain overall economic activity in the area. And in a national recession, SNAP provides high "bang-for-the-buck" stimulus — generating $1.50 or more in spending for each dollar of benefits — that slows job losses when business and consumer confidence is low and economic activity is weak. The expansion in SNAP caseloads due to lower incomes provides this stimulus automatically when the economy weakens. Under the current long-standing rules, waivers allow low-income unemployed workers to receive SNAP, providing added stimulus while simultaneously addressing the greater hardship from a recession. By drastically restricting the number of areas with high unemployment that can qualify, the waiver criteria in the final rule would not help these workers and would thereby suppress economic activity. USDA failed to address the impact this would have on increasing hardship and prolonging the recession.

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[11] *Id.* at 29.

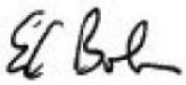
[12] Kwon, Danielle, Nathan Joo and Elaine Waxman, "Using Labor Market Areas to Determine ABAWD Waiver Eligibility Limits SNAP's Local Flexibility," Urban Institute, April 2020, https://www.urban.org/sites/default/files/publication/101940/using-labor-market-areas-to-determine-abawd-eligibility-limits-snaps-local-flexibility_3.pdf.

[13] Regulatory Impact Analysis 7 CFR Part 273, Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, at 32.

22. The USDA's stated goal for issuing the final rule is no longer valid. In the preamble to the final rule, USDA repeatedly notes it intends to limit waiver eligibility, claiming that at a *time of low national unemployment*, too many ABAWDs are living in areas that are covered by waivers. While that rationale is faulty on its own merits, it is now no longer even true. We are not in a time of low national unemployment. Nor are economic forecasts predicting a quick return to a strong economy. The final rule fails to account for circumstances like those we now are facing. As a result, the final rule does not permit states to respond to spiking food insecurity by requesting a waiver of the time limit.

I declare under penalty of perjury that the forgoing is true and correct and of my own personal knowledge.

Executed on June 23, 2020 in Washington, DC.



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 1:20-cv-00119-BAH

DECLARATION OF CATHERINE BUHRIG IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Catherine Buhrig, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained herein, and testify based on my personal knowledge and information.

2. I am the Director of the Bureau of Policy in the Office of Income Maintenance (OIM) at the Pennsylvania Department of Human Services (PA DHS). I have held this position since December 2014. I have worked for PA DHS for 17 years and have held numerous positions within human services. I hold a B.S. in Psychology from the University of Pittsburgh, a Master's in Organization Development and Leadership with a concentration in public organizations and a Master's in Public Administration from Shippensburg University. As policy director, I am responsible for monitoring, maintaining and analyzing program changes, legislative bill analysis at both the state and federal level. I am also responsible for the administration, implementation, oversight, compliance, and reporting of eligibility policy for Medicaid, state-funded Medical Assistance, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, and the Low-Income Energy Assistance Program (LIHEAP) for the Commonwealth of Pennsylvania.

3. I am aware that the federal government in December 2019 issued a final rule "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents" 84 Fed. Reg. 66,782 (Dec. 5, 2019) (Final Rule). I have reviewed the Final Rule and am aware of its direct implications on administering SNAP, formerly known as food stamps, within Pennsylvania. I understand that this lawsuit challenges the Final Rule. I previously submitted a declaration in support of the State Plaintiffs' motion for preliminary injunction.

4. After State Plaintiffs filed their motion for preliminary injunction, the novel coronavirus which causes the disease known as COVID-19 began spreading throughout Pennsylvania. On March 6, 2020, Pennsylvania Governor Tom Wolf declared a public health emergency. To mitigate the spread of COVID- 19, businesses were forced to close their doors. As a result of the economic fallout, many Pennsylvania residents lost their jobs.

5. The current public health crisis demonstrates the untenability of the restrictions on ABAWD waiver requests that would be imposed under the Final Rule. The new ABAWD waiver criteria in the Final Rule cripples States' ability to respond to sudden economic downturns and emergencies such as the one caused by COVID-19. The current health crisis has underscored the urgent need for states to be nimble and flexible in their ability to respond to this and other crises. Current ABAWD waiver requirements do exactly that. States will be hamstrung without this flexibility, and SNAP recipients and state economies will suffer.

6. The Final Rule eliminates a state's ability to justify ABAWD waiver requests with a U.S. Department of Labor determination that the state qualifies for extended unemployment benefits. Under the Final rule, Pennsylvania must wait for the release of three full months of local area unemployment data reflecting the effects of the crisis before qualifying for a waiver, thereby delaying the ability of some ABAWDs to receive benefits during the emergency. The COVID-19 crisis illustrates that this change would unduly delay states' ability to receive an ABAWD waiver during a widespread regional or national emergency like the COVID-19 pandemic. Under the Final rule, Pennsylvania must wait for the release of three full months of local-area unemployment data reflecting the effects of the crisis before qualifying for a waiver, thereby delaying the ability of some ABAWDs to receive benefits during the emergency.

7. The Final Rule eliminates unlimited carryover of discretionary exemptions, hampering the state's ability to respond to statewide and local emergencies. The COVID-19 crisis is a cogent example of why states need to maintain their ability to carryover all discretionary ABAWD exemptions. Limiting carryover leaves states unable to adequately protect ABAWDs subject to the time limit before enough time passes to qualify for a waiver. The virus remains, and with a threatened second wave later this year, the Final Rule would undermine Pennsylvania's ability to grant discretionary exemptions from the ABAWD time limit and continue food assistance pending a waiver. Together these rules would limit access to food at the height of an emergency when they are most needed.

8. Using Labor Market Areas ("LMAs") as the geographic basis of a waiver request, as the Final Rule requires, is likewise unreasonable. Each state with localities within the LMA makes independent decisions on when to reopen restaurants, businesses, schools, and parks. These decisions directly affect the local unemployment rate. Counties in Ohio, Maryland, Delaware and New Jersey, which are part of the same LMA as Pennsylvania, have designed their own narrowly tailored tracks for reopening. States are determining how and when to reopen portions of the economy in consideration of public health conditions in local areas and not based on the LMA as a whole. The nature and extent of each state's health and economic crisis is unique – and the trajectory varies, even by county. Pennsylvania's ability to receive an ABAWD waiver should not depend on the health and economic situation in surrounding states within the LMA.

9. Job availability in counties within the LMA that are 50 to 70 miles from the state may improve. But Pennsylvania residents subject to ABAWD time limits may not have meaningful access to these jobs. Before the COVID-19 crisis, many ABAWDs had limited access to the far reaches of the LMA because of limited transportation. Many ABAWDs do not own a car and many LMAs do not have ready access via public transportation. To reduce the risk of exposure to COVID-19, public transportation has been further limited.

10. Pennsylvania must focus on the well-being of its own residents in determining when to reopen the economy and how to address unemployment in the state. Relying on the LMA as the geographic basis for the waiver inappropriately requires the state to take into account decisions to reopen businesses in surrounding states – in places many miles away where the COVID-19 infection rates may be lower. An ABAWD waiver under the Final Rule's new criteria would be constrained to reflect the overall unemployment rate of all counties. This broad-brush approach ignores the fact that some portions of the LMA may have had permission to returned to "normal" economic activity before others, triggering lower unemployment rates. Meanwhile states like Pennsylvania are still seeing high unemployment rates as state officials prioritize preventing the spread of COVID-19. Decisions made in other jurisdictions, without consideration of the status of COVID cases within Pennsylvania, could nevertheless prevent the state from providing its residents with much-needed food assistance during a public health crisis.

11. In the face of the Final Rule's draconian restrictions that would, even in these dire times, deny or delay a waiver for Pennsylvania, the food banks are drained, local feeding centers are the norm, and supermarket shelves are just beginning to return to normal stock. No one can reasonably dispute that the nation is in the midst of an unprecedented crisis. Without the ability to qualify for a waiver, Pennsylvania would have limited means of providing much needed food

assistance to ABAWDs. Many ABAWDS cannot find work in a flailing economy, are unable to look for work while maintaining appropriate social distancing or are unable to participate in online training services because of the digital divide.

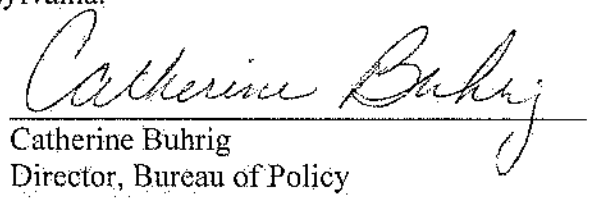
12. On May 10, 2020, Pennsylvania qualified for a statewide waiver under the current rule's extended unemployment benefits criterion. However, the Final Rule eliminates this criterion as a basis for a waiver.

13. If the Final Rule becomes effective, Pennsylvania would be left with limited options, if any, to seek a waiver of the ABAWD time limits. While some businesses are open, capacity is limited and not all employees have yet been called back to work. Many may never called back. The remaining waiver options will take significantly more time for federal approval at a time when low-income Pennsylvanians are most vulnerable.

14. The Final Rule will retroactively strip Pennsylvania of almost 135,000 previously earned discretionary exemptions that could otherwise be used to maintain food assistance to ABAWDs while awaiting waiver approval. Low-income families have been hit especially hard by the pandemic, and many are at high risk as they are disabled, elderly, or have underlying health conditions that make them more vulnerable to being infected or death from COVID-19. SNAP benefits are crucial for their ability to put food on the table to keep their families healthy and better positioned to combat the spread of the coronavirus.

I declare under penalty of perjury that the forgoing is true and correct and of my own personal knowledge.

Executed on June 19, 2020 in Harrisburg, Pennsylvania.



Catherine Buhrig
Director, Bureau of Policy
Office of Income Maintenance
Pennsylvania Department of Human Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 1:20-cv-00119-BAH

DECLARATION OF ALEXIS CARMEN FERNÁNDEZ IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Alexis Carmen Fernández, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained herein, and testify based on my personal knowledge and information.

2. I am Chief of the CalFresh & Nutrition Branch within the California Department of Social Services (CDSS). I have held this position since July 2019, first as Acting Chief and now in my appointed position. Prior to the position I hold now, I served as Chief of the CalFresh Policy Bureau, previously known as the CalFresh Policy Section, within the CalFresh and Nutrition Branch at CDSS, from June 2016 to July 2019. Before joining state service, I was the Policy Director at the First 5 Association of California and Director of Legislation at California Food Policy Advocates. I have a Master of Social Welfare, with a specialization in Management and Planning, from the University of California, Berkeley.

3. I am aware that the federal government in December 2019 issued a final rule "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents" 84 Fed. Reg. 66,782 (Dec. 5, 2019) (the "Final Rule"). I have reviewed the Final Rule and am aware of its direct implications on the administration of the Supplemental Nutrition Assistance Program (SNAP), known in California as CalFresh. I understand that this lawsuit challenges the Final Rule. I previously submitted a declaration in support of the State Plaintiffs' motion for preliminary injunction.

4. In the months since the State Plaintiffs filed their motion for preliminary injunction, the novel coronavirus that causes the disease known as COVID-19 has impacted and continues to impact California's economy. On March 4, 2020, the Governor of the State of California, Gavin Newsom, proclaimed a state of emergency. On March 19, 2020, the State Public Health Officer issued a statewide stay-at-home order to disrupt the spread of the coronavirus. Many California businesses have limited their hours or methods of operation or closed their doors altogether. From March to June 2020, the California Employment Development Department reported processing nearly 5.5 million Unemployment Insurance claims. While California has begun moving through a four-stage reopening framework, it is unclear when the stay-at-home order will be lifted in full. It is also unclear whether California will experience a resurgence of the virus, which might require further restrictions.

5. Many of those experiencing increased financial hardship began applying for CalFresh benefits. In February 2020, before the economic impacts of COVID-19 had been felt in earnest, 4,063,062 California households received CalFresh and 160,968 new applications for CalFresh were submitted. In March and April 2020, 608,306 new SNAP applications were submitted and by the end of April 2020, CalFresh participation had grown to 4,487,411 recipient households. While household participation numbers for May 2020 are not yet available, another 258,146 applications were submitted. This trend represents a complete reversal of prior trends: ahead of the COVID-19 pandemic, CalFresh participation, like SNAP participation nationwide, was trending downward due to a strong economic outlook.

6. As explained in my previous declaration, CalFresh Employment & Training (CalFresh E&T) is California's version of the SNAP Employment & Training program and provides important job resources to those eligible for CalFresh. At the time of that declaration, CalFresh E&T did not have the capacity to provide services to all Able-Bodied Adults Without Dependents (ABAWDs) that would need to engage in qualifying work activities as a result of the Final Rule and the Final Rule did nothing to supplement these resources. The economic impact of the COVID-19 pandemic has further decreased this capacity as most CalFresh E&T counties

have limited their operations to essential services only and many providers have also limited their operations and are unable to provide CalFresh E&T services in-person. While virtual and home-based CalFresh E&T services may be provided in the future, many counties and providers have not yet been able to reconfigure their service model. This change will require time, resources, and technological capacity, and would have significantly strained CDSS's resources even before the COVID-19 pandemic.

7. There has been a limited increase in demand for some service industry jobs, such as grocery and restaurant delivery jobs, during the COVID-19 pandemic. Gig economy jobs do not reliably provide sufficient hours to meet the ABAWD time limit work requirements; they may also require other resources that may not be available to the ABAWD, like a reliable vehicle. Many ABAWDs who struggled to find work before the COVID-19 pandemic continue to struggle; many now find it even more difficult to find work. There are now more limited options for employment and far greater competition for the jobs that do exist. Lastly, in light of the COVID-19 pandemic, some people are unable to return to the workforce without jeopardizing their own health and safety or that of their families.

8. In response to the economic hardships created by the COVID-19 pandemic, the Families First Coronavirus Response Act (Public Law 116-127) was passed by Congress and signed by the President in March 2020. Under this Act, the ABAWD time limit rule is suspended for the length of the federal public health emergency. It is unclear when this suspension will end; thus, while a waiver is not currently necessary, one may be necessary in the near future.

9. On June 2, 2020, California submitted a new request to the U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) to waive the ABAWD time limit statewide beginning July 1, 2020 and continuing until June 30, 2021. The waiver request is based on California qualifying for Extended Benefits under the U.S. Department of Labor's Unemployment Insurance program. Under the current ABAWD regulations, this is an approved form of evidence to support a state's claim of insufficient jobs. Under the Final Rule, California would not be able to request a statewide waiver and statewide approval of extended unemployment benefits would likely be deemed insufficient to demonstrate the need for a waiver for any of the Labor Market Areas (LMAs) within the state.

10. The current public health crisis has demonstrated the untenability of the restrictions on ABAWD waiver requests that would be imposed under the Final Rule. The new ABAWD criteria contained in the Final Rule will not allow States to respond to sudden economic downturns such as the one caused by COVID-19. The current COVID-19 pandemic has underscored the need for states to have flexibility when it comes to the administration of SNAP.

11. The economic impacts of the COVID-19 pandemic on local jurisdictions have demonstrated that using LMAs as the only permissible geographic basis for waiver requests does not sufficiently address local needs. LMAs can include more than one county and/or multiple cities. However, under California's four-stage reopening framework, different counties may move through the reopening process on different timelines. Additionally, local health officers may impose restrictions that go beyond restrictions imposed by the State. Thus, there may be significant differences in reopening across jurisdictions that are combined into a single LMA.

For this and other reasons, a portion of an LMA may experience a slower economic recovery than other portions of that same LMA. Yet, under the Final Rule, the part of the LMA suffering more economically would be masked by unemployment data from the rest of the LMA.

12. The Final Rule requires an LMA have a 12-month average unemployment rate of at least 10% or a 24-month average unemployment rate of at least 6% and 20% higher than the national average for that LMA to qualify for a waiver of the ABAWD rule. These thresholds are so high, and the LMAs are so rigid, that the Final Rule, were it in effect today, would not allow for waivers in some California LMAs with very high rates of unemployment for the month of April 2020, due to the fact that those LMAs had low unemployment rates for the preceding two years. The anticipated high unemployment rates of 2020 may not even be enough to raise the average 12- or 24-month unemployment rate to the necessary threshold under the Final Rule. Further, the Final Rule's provision for obtaining a waiver without meeting these thresholds in "exceptional circumstances" is vague and would unnecessarily delay response to an emergency (7 CFR 273.24(f)(3)). The only example of how such an exception would function describes "data from the BLS or a BLS-cooperating agency that shows an area has a most recent three-month average unemployment rate over 10 percent." As of the date of this declaration, the Bureau of Labor Statistics (BLS) only reflects unemployment data as recent as April 2020, the first month in which areas had unemployment rates over 10%. This seems to indicate that even under this "exceptional circumstances" standard, a waiver would not be approved until not one, but two more months of BLS data are published.

13. In addition to vastly restricting California's ability to seek a waiver during the current crisis or a future crisis, the Final Rule will eliminate California's carryover of discretionary exemptions, which could be used to mitigate some of the harm of the ABAWD time limit during such crises. In October 2020, 853,947 of California's discretionary exemptions will be eliminated as a result of the non-enjoined portion of the Final Rule. These exemptions are not being used currently due to the congressional suspension of the ABAWD time limit under Public Law 116-127. If California's waiver request is granted, then the exemptions will not be used again for at least a year. When California's economy begins to recover and the ABAWD time limit is implemented in certain counties, there will be no discretionary exemptions to help those households that are slower to recover.

14. The administrative challenges in implementing this Final Rule have only increased as a result of the COVID-19 pandemic. Many CDSS and county employees have had to take a leave of absence or time off to care for themselves or other family members. Staff capacity will likely continue to be limited as a result of budget cuts, discussed further below. This limited capacity must be dedicated to general recovery efforts, including taking up projects that were delayed by the response to the COVID-19 pandemic, and to ensuring that CalFresh is accessible to all. Dedicating staff time to implementation of a work rule at this point in time would divert resources away from those other critical responsibilities, at a time when such resources cannot be spared.

15. As discussed in my previous declaration, implementation of the Final Rule would require automation changes in California's three eligibility information technology (IT) systems. The COVID-19 pandemic has led to a number of urgent, high-priority automation projects. As a result, non-COVID-19 automation projects have been delayed. This means that automation for

this Final Rule will either be significantly delayed or will further delay other high priority non-COVID-19 projects. It could be well over a year before any automation for the Final Rule could begin. It is worth noting that California will be migrating to a single eligibility IT system in the next few years, so any automation work done in the retiring systems will only be of use for a short time.

16. At the time my prior declaration was filed with the court, California was projecting a $5.6 billion budget surplus. On May 14, 2020, as a result of the COVID-19 pandemic, the State projected a budget deficit of $54.3 billion. The Final Rule would further harm the economy and be costly to the State. As I explained in my prior declaration, it is estimated by USDA that one dollar in SNAP benefits spent is $1.54 added to the Gross Domestic Product (GDP). Therefore, any reduction in CalFresh eligibility has a negative impact on an already hard-hit economy. Similarly, the Final Rule would increase state and local administrative costs during a time when public entities are experiencing significant budget cuts. Jointly, the State and counties pay 50% of the administrative costs of CalFresh, with the FNS matching the other 50%. Therefore, the implementation of the Final Rule will only add to the State's and counties' economic and fiscal hardship.

17. As Chief of the CalFresh and Nutrition Branch, I also oversee the administration of several major federal and state food distribution and food bank programs. As a result of the COVID-19 pandemic, California food banks are reporting unprecedented levels of need. In my previous declaration I explained that California's food banks do not have the capacity to serve as the sole-food provider for an individual who loses their eligibility for CalFresh. The COVID-19 pandemic has underscored that food banks cannot be relied upon to be the sole source of food for individuals who should be receiving SNAP. Instead, they must be able to support those individuals and households who are experiencing a crisis and are urgently in need of the food safety net.

18. Were this Final Rule to go into effect, California could be left with extremely limited options, if any, to seek a waiver of the ABAWD work requirements during an unprecedented crisis where it is even more difficult to find available jobs and individuals are being asked to stay home to protect their own health and the health of the community. Families with low-income have been hit especially hard by the pandemic, and CalFresh benefits are crucial for their ability to put food on the table to keep their families healthy and better positioned to combat the spread of the coronavirus.

I declare under penalty of perjury that the forgoing is true and correct and of my own personal knowledge.

Executed on June 22, 2020 in Sacramento, California.

ALEXIS CARMEN FERNÁNDEZ
Chief, CalFresh & Nutrition Branch
California Department of Social Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 1:20-cv-00119-BAH

DECLARATION OF JOSHUA RIVERA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Joshua Rivera, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained herein, and testify based on my personal knowledge and information.

2. I am the Economic Stability Administration (ESA) Policy Director for the Michigan Department of Health and Human Services (MDHHS). I have worked on behalf of low-income households throughout my career. Prior to my position as ESA Policy Director, I served as the Senior Data and Policy Advisor at Poverty Solutions at the University of Michigan. I also serve as a resource to the MDHHS director and his administration regarding improving public assistance programs for MDHHS clients and Michigan residents in need.

3. I am aware that the federal government in December 2019 issued a final rule "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents" 84 Fed. Reg. 66,782 (Dec. 5, 2019) (the "Final Rule"). I have reviewed the Final Rule and am aware of its direct implications on the administration of the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, within Michigan. I understand that this lawsuit challenges the Final Rule.

4. After State Plaintiffs filed their motion for preliminary injunction, the novel coronavirus that causes the disease known as COVID-19 began spreading throughout Michigan. The Governor of Michigan, Gretchen Whitmer, responded to the economic and public health crisis by declaring a state of emergency throughout the entire state on March 10, 2020 (Executive Order 2020-04). That order has been extended to remain in effect through July 16. Michigan has had more than 66,798 cases and 6,061 deaths due to the virus.

5. The coronavirus (COVID-19) pandemic is causing significant economic harm in Michigan. To mitigate the spread of the coronavirus, many businesses were forced to close their doors. As a result of the economic fallout, many Michigan residents lost their jobs. According to the U.S. Bureau of Labor Statistics, unemployment increased this year from 3.8 percent in January to 22.7 percent in April, an increase of 497 percent. As a result, applications for unemployment are at record highs, with nearly 1.05 million claims being filed in April alone. In Detroit, Michigan's most populous city, about half of Detroiters report that they are more likely than not to run out of money in three months due to the COVID-19 crisis. The economic harm caused by COVID-19 is likely to be protracted as employers resort to permanent layoffs. In fact, the Upjohn Institute reports that 30 percent of Michigan's workforce does not expect to be recalled to their job.

6. Many of those experiencing increased financial hardship began relying on SNAP benefits in order to keep food on the table. For Michigan's residents receiving food assistance through the Supplemental Nutrition Assistance Program (SNAP), current conditions make it extremely difficult to find work and earn an income. The situation in Michigan is uniquely dire, given that the state's unemployment rate of 22.7 percent is higher than every state in the nation, except Nevada.

7. In recent months, applications for SNAP increased substantially. From February through June 2020, MDHHS received 335,612 SNAP applications. The current SNAP caseload has increased from 628,909 cases (1,175,901 individuals) in February 2020 to 811,099 cases (1,528,379 individuals) as of this report. By comparison, during the same period in 2019, the number of SNAP cases decreased by 19,097. Moreover, households applying to SNAP are coming in facing extreme economic insecurity, with MDHHS seeing an over 50 percent increase in the number of applicants reporting no income.

8. The current unemployment rate qualifies Michigan for extended benefits under the Unemployment Insurance program. This change allows Michigan to receive a statewide waiver from time limits facing able-bodied adults without dependents (ABAWDs) on SNAP. States are eligible for a waiver using this criterion when unemployment rises rapidly. The United States Department of Agriculture, Food and Nutrition Services (USDA FNS) routinely approved these types of waivers during the Great Recession. Were the Rule to go into effect, however, Michigan could not apply for waivers of the ABAWD work requirements based on this criterion. Given the current economic recession, requiring SNAP recipients that are ABAWDs to meet work requirements sets those recipients up for failure. If Michigan does not have the flexibility to apply for waivers of the ABAWD work requirements, SNAP recipients within the state will be in a precarious economic position as it is immensely more difficult now to find and maintain work than it has been in recent memory due to historic levels of unemployment.

I declare under penalty of perjury that the forgoing is true and correct and of my own personal knowledge.

Executed on June 19, 2020 in Lansing, Michigan.

Joshua Rivera

Joshua Rivera
Economic Stability Administration Policy Director
Michigan Department of Health & Human Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 1:20-cv-00119-BAH

DECLARATION OF LAURA ZEILINGER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Laura Green Zeilinger, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained herein, and testify based on my personal knowledge and information.

2. I am the Director of the District of Columbia (the District) Department of Human Services (DHS). I have been committed to underserved populations throughout my career. Prior to my position as DHS Director, I served as the Deputy Director and then Executive Director of the United States Interagency Council on Homelessness, where I was responsible for the implementation of Opening Doors: Federal Strategic Plan to Prevent and End Homelessness, an effort that includes the coordination of Federal homelessness policies among nineteen federal departments and agencies, as well as partnerships with state and local communities, non-profits, and the private sector. I also previously served as DHS Deputy Director for Program Operations and led efforts to create permanent supportive housing for persons experiencing homelessness and housing stability for District residents.

3. I am aware that the federal government in December 2019 issued a final rule "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents" 84 Fed. Reg. 66,782 (Dec. 5, 2019) (the "Final Rule"). I have reviewed the Final Rule and am aware of its direct implications on the administration of the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, within the District. I understand that this lawsuit challenges the Final Rule. I previously submitted a declaration in support of the State Plaintiffs' motion for preliminary injunction.

4. After State Plaintiffs filed their motion for preliminary injunction, the novel coronavirus that causes the disease known as COVID-19 began spreading throughout the District of Columbia. On March 11, 2020, the Mayor of the District of Columbia declared a public health emergency. To mitigate the spread of the coronavirus, many businesses were forced to close their doors. As a result of the economic fallout, many District residents lost their jobs. The District's unemployment rate increased from 5.1% in February 2020 to an estimated 11.1% in April 2020. However, even this figure is likely an underestimation of the District's actual unemployment rate. Between March 15, 2020 and June 17, 2020, the Department of Employment Services has received 115,000 new unemployment claims, which is more than 25% of the District's labor force.

5. Many District residents experiencing increased financial hardship began relying on SNAP benefits in order to keep food on the table. The average number of new SNAP applications per month during the COVID-19 crisis has nearly doubled, going from an average of 3,000 per month pre-COVID to an average of 5,500 per month during COVID-19.

6. The current public health crisis has demonstrated the untenability of the restrictions on ABAWD waiver requests that would be imposed under the Rule. The new ABAWD criteria contained in the Rule will not allow States to respond to sudden economic downturns and emergencies such as the one caused by COVID-19. Rather, the current COVID-19 crisis has underscored the need for jurisdictions to be nimble and flexible in their ability to respond to a crisis, which is allowed under the criteria as currently established.

7. Specifically, the COVID-19 crisis has emphasized that using Labor Market Areas ("LMAs") as the geographic basis of a waiver request is illogical. Each respective state with localities within the LMA will make independent decisions on when to open restaurants, businesses, school, and parks. That will all have a direct bearing on the unemployment rate in each respective jurisdiction. Counties in Virginia, Maryland, and West Virginia that are part of

the same LMA as the District have not always been on the same track for reopening. Determinations for how and when to reopen portions of the economy are made in consideration of the public health conditions in those particular jurisdictions, not based on the LMA as a whole. However, the District's ability to request a waiver would be impacted by the decisions in the surrounding states to reopen because it could decrease the overall unemployment rate for the LMA; meanwhile, the District and surrounding counties in the LMA will continue to experience localized high unemployment rates because they are still under stricter guidelines for operating businesses.

8. Job availability in other counties in the LMA that are 50 to 70 miles from the District may improve, but that does not mean that District residents subject to ABAWD time limits will have meaningful access to these jobs. Prior to the COVID-19 crisis, jobs in the farther reaches of the LMA were not easily accessible or were completely inaccessible to District residents, depending on whether the District resident owned a car or had to rely on public transportation. However, accessibility has become even further restricted as public transportation has been limited to reduce public exposure to COVID-19.

9. The District must focus on the well-being of its own residents in determining when to reopen the economy and how to address unemployment in the District. Relying on the LMA as the geographic basis for the waiver inappropriately requires the District to take into account decisions to reopen businesses in surrounding states – in places many miles away where there may not be as many cases of COVID-19. An ABAWD waiver under the new criteria would have to reflect the composite unemployment rate of all counties, disregarding that some portions of the LMA were allowed to return to "normal" economic activity earlier than other jurisdictions and may have seen a dip in unemployment rates. Meanwhile jurisdictions like the District are still seeing high localized unemployment rates as local officials prioritize preventing the spread of COVID-19. Decisions made in these other jurisdictions, without consideration of the status of COVID cases within the District, could nevertheless prevent the District from providing its residents with much-needed food assistance during a public health crisis.

10. As the District reopens – which is being done through a phased approach – it must continue to prioritize the health and well-being of its residents, recognizing that human lives and the economic conditions of households are more influenced by their immediate neighborhood than by the broader LMA.

11. As a result of the economic impact of the COVID-19 crisis, many providers of nutrition assistance, including food banks and other non-profit organizations, have been over-extended in trying to meet the heightened need for nutrition assistance. The economic impact of the public health crisis is likely to last long after emergency declarations are lifted, leaving many without jobs in the coming months who will still need to rely on these providers of nutrition assistance. These providers cannot realistically absorb the demand that would be created if individuals subject to ABAWD requirements in the District cannot receive SNAP benefits. Were this Rule to go into effect, however, the District would be left with extremely limited options, if any, to seek a waiver of the ABAWD work requirements during an unprecedented crisis and while dealing with its aftereffects.

12. Low-income households – the population that would be subject to the ABAWD work requirements without a waiver – have been hit disproportionately hard by the pandemic, experiencing substantially higher rates of infection and poor health outcomes from COVID-19 compared to higher-income households.[1] To comply with work requirements, these individuals will have to place themselves at risk of exposing themselves and their community to COVID-19 while searching for jobs. These jobs are simply not available in the current economic climate and may not be available for several months to come, even as the economy recovers. These individuals should not have to needlessly risk exposing themselves to infection and instead should be able to use SNAP benefits to obtain nutritious food to keep themselves healthy.

I declare under penalty of perjury that the forgoing is true and correct and of my own personal knowledge.

Executed on June 23, 2020 in Washington, DC.

Laura Green Zeilinger
Director
D.C. Department of Human Services

[1] Updated data is provided daily on the impact of COVID-19 by ward at https://coronavirus.dc.gov/page/coronavirus-data.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., *Defendants.*	C.A. No. 1:20-cv 00119-BAH
BREAD FOR THE CITY, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE et al., *Defendants.*	C.A. No. 1:20-cv-00127-BAH

[PROPOSED] ORDER

Upon consideration of State Plaintiffs' Motion for Summary Judgment, the Memorandum and Declarations in support thereof, any opposition, any reply thereto, and any oral argument, the Final Rule, *see Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, 84 Fed. Reg. 66782 (Dec. 5, 2019); and the full record herein, it is hereby:

ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED; and it is further

ORDERED that judgment is hereby entered to Plaintiffs as to all claims asserted in the above-captioned action; and it is further

ORDERED that pursuant to the Order, the Rule: *Supplemental Nutrition Assistance*

Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66782 (Dec. 5, 2019) is hereby vacated.

DATED: _____, 2020

_____
BERYL A. HOWELL
Chief Judge