UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al., Plaintiffs, v. U.S. DEPARTMENT OF AGRICULTURE, et al., Defendants.	Civil Action No. 1:20-cv-00119-BAH
BREAD FOR THE CITY, et al., Plaintiffs, v. U.S. DEPARTMENT OF AGRICULTURE, et al., Defendants.	Civil Action No. 1:20-cv-00127-BAH

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS BRIEF OF NATIVE AMERICAN BUDGET AND POLICY INSTITUTE AND NEW MEXICO CENTER ON LAW AND POVERTY AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Pursuant to LCvR 7(o) of the Local Civil Rules of the United States District Court for the District of Columbia, Amici Curiae Native American Budget and Policy Institute and New Mexico Center on Law and Poverty ("Amici") respectfully move this court for leave to file an amicus curiae brief on behalf of the Plaintiffs in this case, which is attached to this Motion. In support of their motion Amici state as follows:

1) Pursuant to LCvR7(m) and (o), Amici requested the consent of all parties to this case, and all parties have consented to the filing of this brief.

2) No party's counsel authored this brief in whole or in part, and no party, party counsel, or person other than Amici or their counsel contributed money that was intended to fund this brief's preparation or submission.

3) This court has "broad discretion" to permit contributions by amici and routinely permits leave to file amicus briefs when the court "may benefit from their input." *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D. D.C. 2011); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,* 519 F. Sup. 2d 89, 93 *(D. D.C.) 2007; Ellsworth Assocs. V. United States*, 917 F. Supp. 841 846 (D. D.C. 1996). In particular, the Court will permit participation by amici curiae with "a special interest in th[e] litigation as well as familiarity and knowledge of the issues raised therein that could aid in the resolution of th[e] case." *Ellsworth Assocs.*, 917 F. Supp.841, 846; *see Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (granting leave to file amicus brief where amicus has "relevant expertise and a stated concern for the issues at stake in th[e] case.") This Court should permit filing of an amicus brief "if it will assist the judge 'by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" *Northern Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1 (D. D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)).

4) Amici have an interest in the final Rule implemented by the United States Department of Agriculture in December 2019, titled "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents." 84 Fed. Reg. 66,782 (Dec. 5, 2019) (to be codified at 7 C.F.R. pt. 273) (Rule), because it was promulgated without consultation or addressing the documented harm to Native American communities. Amici agree with Plaintiffs that the entire rule is unlawful, but write separately to address the specific harm to Native American SNAP participants, including 82,599 Native Americans in New Mexico, and to demonstrate that USDA acted arbitrarily and capriciously in violation of the Administrative Procedures Act.

5) Amici agree with Plaintiffs that the rule is unlawful and submit their amicus brief to specifically address the Defendants' failure to address how legal violations in the rulemaking process and issuance of the final rule impacts Native communities.

6) Amicus Native American Budget and Policy Institute conducts research, budget, and policy analysis, social justice advocacy, litigation, and community lawyering to encourage Native American communities to create self-determined and systematic change. The Native American Budget and Policy Institute also focuses on issues of Native government sovereignty and has a concern with the Federal Government's failure to consult with Native governments on issues that will cause them significant impacts.

7) Amicus New Mexico Center on Law and Poverty works to advance economic and social justice through education, advocacy, and litigation to improve living conditions, increase opportunities and protect the rights of people living in poverty. The New Mexico Center on Law and Poverty advocates for law and policy regarding the fair and accurate provision of food stamp benefits to address food insecurity. The New Mexico Center on Law and Poverty also serves as counsel for the plaintiff class in litigation to reform the administration of the SNAP and Medicaid programs in New Mexico. That litigation seeks to ensure that people in need can access the SNAP program, including New Mexico's 23 Native Nations, Tribes, and Pueblos.

8) Amici's interests in Tribal sovereignty and the administration of SNAP benefits on Native lands are not adequately represented by the parties, and the matters asserted by Amici are uniquely relevant to the disposition of this case. Amici are concerned by Defendants' failure to consult with Native governments on a government-to-government basis, and the harmful impact of USDA's final rule which will cause many people, including Native Americans, in need of food assistance to lose access to SNAP benefits. Additionally, Amici's brief raises USDA's failure to respond to significant comments regarding the harmful impact of the final

rule on Native communities, including those from Native governments. Amici submit this Unopposed Motion for Leave to File Amicus Brief to put these issues before this Court.

9) For the above-stated reasons, Amici respectfully request that this Court grant their motion to file their proposed amicus brief, attached as an exhibit to this motion.

DATED: July 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 13, 2020, I electronically files this motion using the District Court CM/ECF system, which I understand to have caused service of the papers to be made on counsel for all parties.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Civil Action No. 20-119-BAH
Civil Action No. 20-127-BAH
Chief Judge Beryl A. Howell

DISTRICT OF COLUMBIA, *et al.*,
Plaintiffs,
v.
U.S. DEPARTMENT OF AGRICULTURE, *et al.*,
Defendants

BREAD FOR THE CITY, *et al.*,
Plaintiffs,
v.
U.S. DEPARTMENT OF AGRICULTURE, *et al.*
Defendants.

BRIEF OF AMICUS CURIAE NATIVE AMERICAN BUDGET AND POLICY INSTITUTE AND NEW MEXICO CENTER ON LAW AND POVERTY, IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Amici's counsel certifies that no party to this filing has a parent corporation. No publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

RULE 29 STATEMENT

As required by LCvR 7(o)(5) and Fed. R. App. P. 29(a)(4)(E), Amici certify that (a) no party's counsel authored this brief by Amici in whole or in part; (b) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (c) no person other than Amici, its members or its counsel contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF CONSENT TO PARTICIPATE AS AMICI CURIAE

Amici received consent from all parties to participate as Amici Curiae prior to this filing.

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INTERESTS OF AMICI CURIAE

Amici Native American Budget and Policy Institute ("NABPI") and New Mexico Center on Law and Poverty ("NMCLP") have a strong and unique interest in this case involving the Supplemental Assistance Nutrition Program ("SNAP"). Both NABPI and NMCLP are non-profit, non-partisan law and policy organizations based in Albuquerque, New Mexico. Amici have an interest in the final rule implemented by the United States Department of Agriculture in December 2019, titled "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents." 84 Fed. Reg. 66,782 (Dec. 5, 2019) (to be codified at 7 C.F.R. § 273) ("Final Rule"), because it was promulgated without consultation or addressing the documented harm to Native American communities. Amici agree with Plaintiffs that the entire Final Rule is unlawful but write separately to address the specific harm to Native American SNAP participants, including 82,599 Native Americans in New Mexico.[1]

NABPI conducts research, budget, and policy analysis, social justice advocacy, litigation, and community lawyering to encourage Native American communities to create self-determined and systematic change. NABPI also focuses on issues of Native government sovereignty and has a concern with the Federal Government's failure to consult with Native governments on issues that will cause them significant impact.

NMCLP works to advance economic and social justice through education, advocacy, and litigation to improve living conditions, increase opportunities, and protect the rights of people living in poverty. NMCLP advocates for law and policy regarding the fair and accurate provision of SNAP benefits to address food insecurity. NMCLP also serves as counsel for the plaintiff class

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[1] New Mexico Human Services Department, *Monthly Statistical Report*, May 2020, at 5. Available at: https://www.hsd.state.nm.us/uploads/FileLinks/587930e6bdd0402c9d4990a78c041734/MSR_May_2020.pdf

in litigation to reform the administration of the SNAP and Medicaid programs in New Mexico. That litigation seeks to ensure that people in need can access the SNAP program, including New Mexico's 23 Native Nations, Tribes, and Pueblos.

For the reasons set out below, Amicus Curiae, NABPI and NMCLP, respectfully ask this Court to grant Plaintiffs' Motions for Summary Judgement.

INTRODUCTION

The purpose of the Supplemental Nutrition Assistance Program (SNAP) is to increase the level of nutrition among low-income Americans. 7 U.S.C. § 2011. SNAP participants will face significant barriers to adequate nutrition if the USDA's Final Rule limiting SNAP for unemployed Americans is implemented. In improperly promulgating its Final Rule amending 7 C.F.R. § 273 limiting food assistance for individuals known as Able-Bodied Adults Without Dependents ("ABAWDs"), the United States Department of Agriculture ("USDA") ignored the significant harm the rule change would cause Native Americans, failed to consult with sovereign tribal governments as required by law on policy changes that would have substantial direct effects on their members, and in doing so violated the trust responsibility to Native American governments.[2] This trust responsibility was created when Native American nations ceded large portions of their aboriginal lands to the United States in return for promises to protect tribal rights as self-governing nations within the reserved lands. The colonial land seizures that restricted access to food, income and agriculture caused widespread food insecurity that persists. As a result, the Final Rule

[2] The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) (Recognizing an "undisputed existence of a general trust relationship between the United States and the Indian people.").

restricting access to SNAP for adults who are unemployed for more than three months will disproportionately impact Native American communities, where the unemployment rate significantly exceeds the overall unemployment rate.[3]

Amici write to support Plaintiffs' argument that the Final Rule is arbitrary and capricious, and to highlight USDA's failure to comply with legal obligations to Native America and Native governments.

ARGUMENT

I. USDA Failed to Respond to Comments Detailing the Specific Harm to Native American Communities Caused by the Final Rule

USDA's failure to consider comments detailing specific harm to Native American communities renders the Final Rule arbitrary and capricious, since the agency "entirely failed to consider [this] important aspect of the problem." *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983). In proposing and promulgating regulations, "agenc[ies] must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Int'l. Ladies' Garment Workers' Union v. Donovan*, 722 F. 2d 795, 814 (D.C. Cir. 1983) (quotation marks and citation omitted). Under the Administrative Procedures Act 5 U.S.C. §551 *et seq.* ("APA") agencies do not have to respond to every comment received, but they "must respond in a reasoned manner to those that raise significant problems." *City of Waukesha v. EPA*, 320 F. 3d 228, 257-

[3] U.S. Bureau of Labor Statistics, *American Indians and Alaska Natives in the U.S. Labor Force*, November 2019 Available at: https://www.bls.gov/opub/mlr/2019/article/american-indians-and-alaska-natives-in-the-u-s-labor-force.htm (During the 2016-18 period, "[T]he unemployment rate for [American Indians and Alaska Natives] was 6.6 percent, considerably higher than the rate of 3.9 percent for the country as a whole.")

258 (D.C. Cir. 2003) (quoting *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F. 3d 715, 722 (D.C. Cir. 1997)).

Many commenters pointed out the significant problems and harms that the Final Rule will cause in Native communities. For example, the Western Center on Law and Poverty ("WCLP") wrote that "more than "one in three American Indian and Alaska Native children live in poverty . . . [and] 18,491 American Indians and Alaska Native households in California receive SNAP benefits." *See Comments from WCLP*, Doc. No. FNS-0004-18391.[4] Native American governments also explained that the proposed rule did not include an "exemption or exception [] for Tribal statistical areas" even though these areas experience high rates of unemployment and poverty. *See Comments of Walker River Paiute Tribe*, Doc. No. FNS-2018-0004-18226.[5] Commenters also indicated that according to the U.S. Census Bureau, 28.3 percent of American Indians and Alaska Natives were in poverty in in 2014, almost twice the poverty rate for the nation as a whole.[6] Nationally, one in four Native Americans is food insecure, which is double the national average.[7] *See e.g. Comments from NMCLP*, Doc No. 2018-0004-18394.[8] The Center for Native American Youth ("CNAY") added "Limited job opportunities available to Native Americans results in consistently high unemployment rates. The high unemployment rate on reservations causes youth to work at low-paying jobs in order to maintain valuable ties to their community." *Comments from*

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[4] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18391

[5] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18226

[6] U.S. Census Bureau, *Facts for Figures: American Indian and Alaska Native Heritage Month*: November 2015, Release Number CB15-FF.22, November 2, 2015 https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html

[7] Valarie Blue Bird Jernigan, Kimberly R. Huyser, Jimmy Valdes and Vanessa Watts Simonds (207), *Food insecurity Among American Indians and Alaska Natives: A National Profile Using the Current Population Survey-Food Security Supplement*, Journal of Hunger and Environmental Nutrition, 12:1,1-10, DOI: https://doi.org/10.1080/19320248.2016.1227750

[8] Available at https://www.regulations.gov/document?D=FNS-2018-0004-18394 Stating that over 76,000 Native Americans participate in SNAP in New Mexico and citing statistics that show high rates of poverty and food insecurity among Native populations.

CNAY, Doc. No. FNS-018-0004-14578.[9] As pointed out by the Shakopee Mdewakanton Sioux Community, the proposed rule would negatively impact "American Indian and Alaska Native people, 25 percent of whom rely on federal food assistance through SNAP[.]" *Comments from Shakopee Mdewakanton Sioux Community*, Doc. No. FNS-2018-0004-17792.[10] The Port Gamble S'klallam Tribe echoed these concerns stating, "Roughly 10[percent] of our Tribe, as well as the clients we serve within the seven zip code areas within our catchment area, will be unable to put food on the table if the proposed rule is implemented." *Comments from Port Gamble S'klallam Tribe*, Doc. No. FNS-2018-0004-17618.[11] *See also Comments from the Association of Arizona Food Banks*, Doc. No. FNS-2018-0004-11395[12] (Stating that based on data responsive to a public records request to the Arizona Department of Economic Security in April 2018, "About 20 percent of the Hopi Reservation population live in Coconino County, which would no longer be eligible to waive SNAP time limits under the proposed rule.").

In comments, Native governments raised issues regarding the remoteness of Native lands causing difficulty in traveling to areas where work may be available, and that reliable unemployment data is not always available for Native lands. *See Comments from the Pueblo of Laguna*, Doc. No. FNS-2018-0004-18093[13], ("The geographical area in which the Pueblo of Laguna members reside can be a conflict if the member lacks transportation or finances to commute. [] [Low income and travel difficulty] in combination with the Department's acknowledgement in the Proposed Rule that reliable data are not always available for the labor force on all reservations, necessitates a wholesale exemption from the newly proposed waiver

[9] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-14578
[10] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17792
[11] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17618
[12] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-11395
[13] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18093

process for Tribal statistical areas.") *See Comments from Pascua Yaqui Tribe*, Doc. No. FNS-2018-0004-17849[14] (Forty nine percent of Pascua Yaqui members participate in SNAP, and [t]he Pascua Yaqui's higher participation rates in the nutrition programs hinge on limited meaningful employment opportunities," and "poor transportation options.")

Commenters also pointed out the relationship between SNAP and the Food Distribution Program on Indian Reservations ("FDIPR") and how the proposed rule would harm Native governments' ability to administer that program. This is because when people lose SNAP benefits, they turn to FDIPR for food assistance. For example, the Native Farm Bill Coalition ("NFBC"), National Conference of American Indians ("NCAI"), Shakopee Mdewakanton Sioux Community, Pueblo of Laguna, Port Gamble S'klallam Tribe, Walker River Paiute Tribe, Seneca Nation, and The National Association of Food Distribution Programs on Indian Reservations ("NAFDPIR"), among others, asked USDA to consider the burden that the proposed rule would place on FDIPR:

> The FDPIR serves approximately 90,000 people each month. The program serves many of our Tribal elders, and 42 percent of FDIPR households have a member over the age of 60. [] FDIPR is an alternative to SNAP; no one can participate in both programs in the same month. Because of this interrelationship between the programs, we know from the 103 Indian Tribal Organizations (ITOs) who administer FDIPR for the 276 Tribes across Indian Country that when policy changes are made to SNAP that impact the ability of SNAP recipients to access that program, they turn the next month to their Tribal governments for assistance and seek certification for FDIPR. This places an undue burden on FDIPR sites, which must seek to serve more people without any overall increase in funding. *Comments from NFBC*, Doc. No. FNS-2018-0004-17783.[15]

ITOs rely on SNAP participation to determining what resources need to be allocated to FDPIR. NFBC made this point in their comments and stressed that this rule change will create an increased burden on FDPIR without additional funding for the program. *See also Comments from NMCLP*,

[14] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17849
[15] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17783

Doc. No. 2018-0004-18394,[16] ("This [proposed rule] will cause a strain on FDPIR's limited available funding. Native American governments in New Mexico have consistently opposed the elimination of waivers and imposition of time limits in their communities. Principles of self-determination require that Native American governments establish the policies that support their members based on unique community needs.")[17]

In failing to respond to these comments that raised significant problems, USDA acted arbitrarily and capriciously and failed to "enable us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." *Auto Parts and Accessories Ass'n v. Boyd*, 407 F. 2d 330, 335 (D.C. Cir. 1968). USDA failed to address even a single point raised by these commenters, which displays a lack of reasoned decision making. (*See American Wild Horse Preservation Campaign v. Perdue* 873 F.3d 914, 932 (D.C. Cir. 2017) ("Facts are stubborn things. But record facts are the grist of reasoned agency decisionmaking.") (Finding agency decision arbitrary and capricious for "brush[ing] aside critical facts"). USDA's failure to explain its decision to ignore these significant problems was arbitrary and capricious. *See Lilliputian Systems, Inc. v. Pipeline and Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("An agency's failure to respond to relevant and significant public comments generally 'demonstrates that the agency's decision was not based on a consideration of the relevant factors.'") (citing *Thompson v. Clark* 741 F.2d 401, 409 (D.C. Cir. 1984)) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

[16] Available at https://www.regulations.gov/document?D=FNS-2018-0004-18394
[17] Referencing a Resolution 2014-13 of the All Pueblo Council of Governors (August 20, 2014) and transmitted to the USDA.

II. USDA failed to meaningfully consult with sovereign Native American governments

USDA's own rules mandate that it must "engage with Tribes in timely and meaningful consultation on policies that have substantial direct effects on one or more Tribes," to ensure "American Indians and Alaska Natives (AI/AN) have full access to the programs and services of the Department." S*ee* USDA Departmental Regulation 1350-002 *Tribal Consultation, Coordination, and Collaboration* (Jan. 13, 2018). Additionally, Executive Order No. 13175 ("E.O. 13175") requires that the federal government must consult with Native American governments to ensure that they have input on this proposed policy change. *See* Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).[18]

USDA is bound to follow Departmental Regulation 1350-002 and E.O. 13175. While E.O. 13175 by itself does not create a right to judicial review, USDA is bound by its requirements because the agency referenced E.O. 13175 throughout the rulemaking process and claimed that it complied with its requirements. Both E.O. 13175, as well as the USDA's own Departmental Regulation 1350-002, constitute internal rules for USDA, and the *Accardi* doctrine mandates that "government agencies are bound to follow their own rules, even if self-imposed procedural rules that limit otherwise discretionary decisions." *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-268 (1954)). *See also Padula v. Webster*, 822 F. 2d 97, 100 (D.C. Cir. 1987) (An agency "must adhere to voluntarily adopted, binding policies that limit its discretion.")

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[18] Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).
https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments and USDA Departmental Regulation 1350-002, *available at*
https://www.ocio.usda.gov/sites/default/files/docs/2012/20130118_DR_OTR_final_1_18_13.pdf

The D.C. Circuit has recognized that the *Accardi* doctrine "has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005). *Accardi* claims provide "a means [t]o hold agencies accountable for their own policies." *Damus v. Nielsen* 313 F. Supp. 3d 317, 337 (D. D.C. 2018) (*citing Burdue v. FAA*, 774 F. 3d 1076, 1082 n.2 (6th Cir. 2014)). Additionally, "it is clear" that *Accardi* claims may be brought under the APA.[19] *Accardi* violations are arbitrary and capricious agency action in violation of the APA.[20] Arbitrary and capricious agency actions must be held unlawful and set aside under the APA. 5 U.S.C. §706 (2)(A). Here, USDA failed to follow its own Departmental Regulation 1350-002, as well as E.O. 13175, which the agency cited throughout the rulemaking process. This failure resulted in USDA acting arbitrarily and capriciously by prejudicing Native governments that did not have a meaningful opportunity to consult with the agency regarding a rule that would cause harm to Native communities. Therefore, USDA's rulemaking should be set aside.

Instead of engaging in meaningful consultation, USDA stated in the Advance Notice of Proposed Rulemaking ("ANPR") that the proposed rule "does not, to our knowledge, have tribal implications that require consultation under E.O. 13175." 83 FR 8016. USDA added that if requested, the agency would provide meaningful consultation "where changes, additions and modifications identified herein are not expressly mandated by Congress."[21] In making this statement USDA failed in its duty to consult by attempting to shift its obligation to consult to Native governments, by putting the burden on them to reach out to the agency. USDA also

[19] *Id.* (*citing Schaefer v. Geren*, 607 F. Supp. 2d 61, 68-70 (D. D.C. 2009), aff'd sub nom. *Schaeffer v. McHugh*, 608 F.3d 851, (D.C. Cir. 2010)).
[20] *Id.*(citing *McHugh*, 608 F.3d 851 (D.C. Cir. 2010)(Court addressed "*Accardi* claim pursuant to allegation that Army Board for Correction of Military Records acted arbitrarily, capriciously, and contrary to law in violation of APA §706(2)(A)") (internal quotations omitted).
[21] *Id.*

qualified its obligation to consult on whether the changes in the proposed rule were "expressly mandated by Congress." USDA did not state who decides whether the changes were expressly mandated by Congress, but the suggestion is that if USDA decides one of the changes in the Final Rule is not expressly mandated by Congress, it will then be open to consultation with Native governments.

Many commenters discussed USDA's failure to consult and asked for USDA to delay implementation until meaningful consultation could be conducted. USDA must engage in meaningful consultation when "policy actions . . . may have tribal implications" which are defined as "substantial direct effects on one or more Indian Tribes." USDA Departmental Regulation 1350-002. The NCAI highlighted this fact in comments on the proposed rule stating "The proposed rule will limit SNAP eligibility and affect how states determine which areas use carryover exceptions. These changes will have a substantial direct impact on many citizens of tribal nations who are eligible for SNAP benefits under current rules and will place additional strain on the already under-resourced FDIPR program." *Comments from National Congress of American Indians ("NCAI")*, Doc. No. FNS-2018-0004-17849.[22] NCAI added "government-to-government consultation should occur with representatives of federal agencies that are both informed about the tribal government's requests or critiques of a proposed federal action and empowered to make decisions about the scope of the proposed action and agencies engaged in tribal consultation should review written and oral comments, and provide meaningful responses in writing, in a timely manner."[23] *See also*

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[22] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17849

[23] *Id.* (internal quotes omitted) (Citing The National Conference of American Indians Resolution #MOH-17-001, *A Call on Congress to Enact Legislation That Will Ensure Uniform, Effective, and Meaningful Consultation with Indian Nations and Tribes Whenever Federal Activities Have Tribal Impacts*, (June 15, 2017)) Available at: http://www.ncai.org/attachments/Resolution_tNWJMIbVBsWNXwnaUYCgwjpsJImEmxzkuQZYPcJxjDIxJpMrqJR_MOH-17-001.pdf

Comments from NMCLP Doc No. 2018-0004-18394.[24] ("[T]he federal government must consult with Native American governments to ensure that they have input on this proposed policy change.") (citing E.O. 13175 and USDA Departmental Regulation 1350-002).

Other commenters pointed out, "This Proposed Rule represents a significant shift away from a regulation that has been in existence since 1996 and will absolutely have tribal implications." *See Comments of NFBC* Doc. No. FNS-2018-0004-17783.[25] The United South and Eastern Tribes, Inc. Sovereignty Protection Fund ("USET SPF") likewise recognized USDA's failure to consult stating "Before this rule is allowed to move forward, USDA [] must consult with Tribal Nations by providing substantial opportunities for meaningful dialogue between the agency and Tribal Nations." *Comments from USET SPF*, Doc. No. FNS-2018-0004-17827.[26] USET SPF further recommended delaying implementation of the proposed rule to "provide for meaningful consultation with Tribal Nations and ample response time."[27]

The National Indian Health Board ("NIHB") submitted comments underlining USDA's failure to meaningfully consult, stating that consultation must take place prior to finalizing and implementing the proposed rule, something that USDA failed to do. *See Comments of NIHB* Doc. No. FNS-2018-0004-18133.[28] NIHB also reminded USDA of its obligation to "review" and "streamline" processes for Native government requesting waivers from regulatory requirements "with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal

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[24] Available at https://www.regulations.gov/document?D=FNS-2018-0004-18394 Stating that over 76,000 Native Americans participate in SNAP in New Mexico and citing statistics that show high rates of poverty and food insecurity among Native populations.
[25] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17783
[26] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17827
[27] *Id.*
[28] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18133

policy objectives[.]"[29] Despite this requirement, USDA failed to consult, and ignored requests by NIHB and numerous other commenters to delay implementation of the proposed rule to allow for time to conduct meaningful consultation. *See Comments of NIHB* Doc. No. FNS-2018-0004-18133.[30] *See also Comments from NAFDPIR*, Doc. No. FNS-2018-0004-18121[31] (Discussing the value of meaningful consultation with USDA and relaying that through past experience in consulting with USDA on the FDPIR program, Tribes and USDA have worked toward better service for families that participate in FDIPR. Unfortunately, "the same kind of dialogue did not occur here, and we urge the Department to delay implementation, reconsider the changes made by the proposed rule and their impact on Indian Country, and schedule meaningful consultation without delay.")

NIHB and USET SPF also made important points highlighting USDA's failure to fulfill its trust responsibility in considering the government-to-government relationship between the U.S. and Native governments. For example, USET SPF reminded USDA that "Tribal governments are sovereign nations . . . [therefore] USDA should allow Tribes to report data to the agency as they see fit." *Comments from USET SPF*, Doc. No. FNS-2018-0004-17827.[32] USET SFP continued that the U.S. Government's trust responsibility "is a legal and moral imperative shared by all branches and agencies of the federal government stemming from the exchange of millions of acres of land and natural resources ceded to the U.S., oftentimes by force."[33] This responsibility is "rooted in the Constitution, ratified by numerous treaties, reaffirmed by the Supreme Court, and codified by federal law."[34] Therefore, "it is wholly inappropriate for states to impose eligibility

[29] *Id*. (citing E.O. 13175 §6(a)-(b)).
[30] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18133
[31] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18121
[32] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17827
[33] *Id.*
[34] *Id.*

requirements upon [American Indian and Alaska Natives] within SNAP, including through the waiver process" because "USDA and FNS must honor the government-to-government relationship between the federal government and Tribal Nations, and ensure this responsibility [is] not to be delegated to the states."[35] *Id.* NIHB echoed these comments and took issue with the requirement that state governors must endorse a state's application for a waiver. *See* 84 FR 66801. This is because "the trust responsibility is a federal government responsibility" and [f]inal governor approval is inconsistent with the government-to-government relationship between the U.S. and Tribal governments." *See Comments of NIHB* Doc. No. FNS-2018-0004-18133.[36]

In an attempt to provide rationale for failing to comply with its obligations under its own departmental regulations and Executive Order 13175 by consulting on a government-to-government basis, USDA states "FNS briefed Tribes on this rule at the February 14, 2019 listening session . . . but FNS received no feedback." 84 FR 66808. However, this statement does little to comply with the requirements of USDA Departmental Regulation 1350-002 and E.O. 13175, and USDA provided this statement after it claimed in the ANPRM that consultation was not necessary. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943) (agency actions cannot be upheld on after-the-fact reasoning.) *See also Tabor v. Joint Bd. For Enrollment of Actuaries* 566 F. 2d 705, 709-710 (D.C. Cir. 1977) ("agency action cannot be sustained on post hoc rationalizations supplied during judicial review.")

Again, commenters pointed out to USDA that it tried to justify its failure to consult in the rulemaking process, and USDA knew that it failed to meaningfully consult with sovereign Native nations on a government-to-government basis during the rulemaking process. *See Comments of*

[35] *Id.*
[36] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18133

NFBC Doc. No. FNS-2018-0004-17783.[37] ("Despite the ANPRM's denial of the need for consultation, the Proposed Rule claims that consultation was accomplished on March 4, 2018, only one month after the Department claimed in the published ANPRM that no consultation was necessary.")[38] However, USDA's claim of March 4, 2018 "occurred as part of a series of teleconference calls that USDA-FNS holds quarterly [that] concern the entirety of USDA's food assistance programs in Indian Country, not just SNAP [and the USDA official on the call] was a regional staffer [] not someone with the delegated authority of the Secretary of Agriculture."[39] This is hardly consultation on a government-to-government basis, and as commenters pointed out is an attempt to "backdoor a consultation" after USDA stated its original position that the proposed rule did not require consultation even though it was a significant change in a regulation that has been in existence since 1996.[40]

This failure to consult meant that instead of discussing significant issues like the undue burden the change in regulation would have on FDPIR discussed above, Native governments were forced to point out this problem in comments on the proposed rule. Even then, when commenters raised this issue, USDA did not address the problem or even mention it when publishing the Final Rule. Native leaders asked the USDA to delay implementation of the proposed rule to allow for meaningful consultation. *See Comments of Seneca Nation*, Doc. No. FNS-2018-0004-17990.[41]

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[37] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17783

[38] Numerous Native governments raised the same points in their comments on the proposed rule See e.g. *Walker River Paiute Tribe*, Doc. No. FNS-2018-0004-18226 Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18226; Comments from the Pueblo of Laguna, Doc. No. FNS-2018-0004-18093 Available at: https://www.regulations.gov/document?D=FNS-2018-0004-18093; *Comments from Shakopee Mdewakanton Sioux Community*, Doc. No. FNS-2018-0004-17792 Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17792; *Comments from Port Gamble S'Klallam Tribe*, Doc. No. FNS-2018-0004-17618 Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17618; Comments of Seneca Nation, Doc. No. FNS-2018-0004-17990 Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17990

[39] *Id.*

[40] *See id.*

[41] Available at: https://www.regulations.gov/document?D=FNS-2018-0004-17990

However, the USDA's response was to ignore these problems raised by commenters and issue the Final Rule.

By failing to consult, USDA also missed the opportunity to consider the expertise of Native governments on the unique issues faced by their communities. This failure meant that USDA did not adhere to the principles underlying E.O. 13175, such as "recogniz[ing] the right of Indian tribes to self-government and support[ing] tribal sovereignty and self-determination." E.O. 13175 §2(c). Doing so, USDA failed in its trust responsibility to Native governments and "brushed aside" critical facts, resulting in arbitrary and capricious agency action. *See American Wild Horse Preservation Campaign* 873 F.3d 914, 932. USDA's *Accardi* violations were arbitrary and capricious agency actions, which were unlawful under the APA, and must be set aside. *See Damus* 313 F. Supp. 3d 317, 336-337 (D. D.C. 2018) (*citing McHugh*, 608 F.3d 851 (D.C. Cir. 2010)) (Stating that *Accardi* claims derive from the APA, and violations of the *Accardi* doctrine are arbitrary and capricious agency action.)

CONCLUSION

For the above-stated reasons, Amici respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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