Attorneys General of the District of Columbia, California, Connecticut, Guam, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington

April 2, 2019

Via Federal eRulemaking Portal
Certification Policy Branch
Program Development Division
Food & Nutrition Service
3101 Park Center Drive
Alexandria, Virginia 22302

Re: *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents,* Notice of Proposed Rulemaking, 84 Fed. Reg. 980, FNS–2018–0004

We, the Attorneys General of the District of Columbia, California, Connecticut, Guam, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington (the "States") submit these comments to oppose the Department of Agriculture's Food & Nutrition Service ("FNS") Proposed Rule: *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents,* Notice of Proposed Rulemaking, 84 Fed. Reg. 980, FNS–2018–0004 (published Feb. 1, 2019) (to be codified at 7 C.F.R. pt. 273) ("Proposed Rule").

The Proposed Rule is an impermissible attempt to use the rulemaking process to flout the legislative process and implement draconian changes to the Supplemental Nutrition Assistance Program ("SNAP") for able-bodied adults without dependents ("ABAWDs") that were rejected by Congress in the 2018 Farm Bill. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat 4490 (2018). Furthermore, it is inconsistent with—and indeed undermines—the fundamental purpose of the Food & Nutrition Act ("FNA" or "Act"), which is to "alleviate hunger and malnutrition" and "permit [recipient] low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power." 7 U.S.C. § 2011. Instead, the Proposed Rule restricts the ability of States to address local job availability and labor market nuances in administering the program, as the FNA provides, without offering any evidence to support such dramatic changes to long-standing policy.

The Proposed Rule would severely restrict the ability of States to extend SNAP benefits to unemployed ABAWDs for more than three months in a thirty-six-month period despite insufficient local job availability. As States responsible for ensuring the welfare of our residents, we have a deeper, more nuanced understanding of our labor markets, including conditions that

lead to increased unemployment at the local level. The Proposed Rule spurns this knowledge in favor of concentrating nearly the entirety of the waiver application process within the federal executive branch. It constrains the flexibility that States have long possessed in crafting waiver requests, including determining which geographic areas should be included in such requests and the relevant data offered in support thereof. In doing so, the Department of Agriculture ("the Department" or "USDA") has completely disregarded the costs associated with restricting this flexibility.

The Proposed Rule cannot become final. First, it is wholly inconsistent with the text and intent of the FNA and narrows the application of the Act without any authority for doing so. Second, the Proposed Rule is unlawful and runs afoul of the Administrative Procedure Act ("APA"), as it is arbitrary, capricious, unsupported by any evidence or legitimate rationale, and fails to consider the costs associated with its implementation, including downstream harm to the States' economies. Finally, the Proposed Rule would disproportionately impact protected groups, as the Department itself has acknowledged while failing to explain how it will mitigate this impact.

I. Background

SNAP, formerly known as the Food Stamp Program ("FSP"),[1] is the country's most significant anti-hunger program. SNAP provides crucial non-cash nutritional support for millions of low-income individuals and families who meet financial eligibility tests for limited monthly income and liquid assets. SNAP gives people with limited incomes the opportunity to access nutritious food that they otherwise would not have. The authorizing legislation states that the program is intended to "alleviate . . . hunger and malnutrition" by "permit[ing] low-income households to obtain a more nutritious diet through normal channels of trade." 7 U.S.C. § 2011. To do this, SNAP provides benefits redeemable for SNAP-eligible foods at SNAP-eligible retailers.

SNAP is a federal-state partnership.[2] While the federal government pays the full cost of SNAP benefits, it shares the costs of administering the program on a 50-50 basis with the States[3] and local governments, which operate the program. Each State designs its own process—based on federal guidelines—for how low-income people can apply for benefits, and States must track whether participants meet the requirements for the program on a monthly basis and adjust their benefits accordingly.

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[1] The FSP was authorized by the Food Stamp Act of 1977. The name of the program was changed to SNAP by the Food Conservation, and Energy Act of 2008, Pub. L. No. 110-246, which also changed the name of the Food Stamp Act to the Food and Nutrition Act. All references to the program prior to 2008 will use the FSP title, while references to the program after the 2008 change will use the SNAP title.

[2] References to a "State" herein include all jurisdictions that operate SNAP programs under federal law, including the 50 states, the District of Columbia, Guam, and the Virgin Islands. 7 U.S.C. § 2012(r).

[3] 7 U.S.C. §§ 2013(a), 2019, 2025(a); 7 C.F.R. §§ 277.1(b), 277.4.

A. Introduction of a Time Limit for ABAWDs and the Ability of States to Request that the Time Limit be Waived

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") introduced new restrictions on who was eligible for benefits under the FSP. Among these restrictions was a provision that generally barred unemployed adults age 18 to 49 who are not disabled or raising minor children from receiving SNAP benefits for more than three months in any thirty-six-month period (hereinafter referred to as the "ABAWD time limit" or "time limit"). 7 U.S.C. § 2015(o);[4] *see also* 7 C.F.R. § 273.24(b) ("Individuals are not eligible to participate in the Food Stamp Program . . . if the individual received food stamps for more than three countable months during any three-year period."). These participants are eligible to receive benefits beyond the time limit if they engage in work activities for at least 20 hours a week.[5]

Built into PRWORA was the option for States to request a waiver from the time limit if the State or an area within the State has an unemployment rate above 10 percent[6] or does not have a sufficient number of jobs to provide employment for the individuals. 7 U.S.C. § 2015(o). When the time limit was being debated in Congress, then-congressman and co-author of the provision John Kasich said, "It 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."[7] According to guidance from the FNS, the law provided for waivers based on an insufficient number of jobs because the Congress recognized that "the unemployment rate alone is an imperfect measure of the employment prospects of individuals with little work history and diminished opportunities."[8]

B. USDA Guidance and Regulations Regarding Waivers of the ABAWD Time Limit

After PRWORA was enacted, the USDA issued guidance to the States regarding requests for waivers.[9] From the beginning, USDA's guidance on how a State can qualify for a waiver due

[4] Also exempt from the time limit are individuals who are pregnant and those who are otherwise exempt from the general SNAP work requirements under section 6(d)(2) of the Act. 7 U.S.C. § 2015(o).

[5] To meet the work requirement, these individuals must (1) work a minimum of 20 hours a week or 80 hours a month, (2) participate in a qualifying state employment and training ("E&T") program for 20 hours a week, or (3) do public service through a state workfare program—a program that provides work in a public service capacity in exchange for public benefits. 7 U.S.C. § 2015(o)(2). Individuals who lose eligibility under the ABAWD time limit could regain eligibility by working or participating in work programs for 80 hours in a 30-day period, or complying with a workfare program for 30 days. 7 C.F.R. § 273.24(d)(1)(i)-(iii).

[6] Waivers based on an unemployment rate above 10 percent can be based on a 12-month period, a 3-month period, or a seasonal unemployment rate. 7 C.F.R. § 273.24(f)(2)(ii).

[7] Cong. Record, 104th Congress, Welfare and Medicaid Reform Act of 1996 (House of Representatives – July 18, 1996), page H7905, https://www.congress.gov/crec/1996/07/18/CREC-1996-07-18.pdf.

[8] *See* U.S. Gen. Accounting Off., "Food Stamp Program: How States are Using Federal Waivers of the Work Requirement," Report to the Chairman, Committee on the Budget, House of Representatives (Oct. 1999), at 4 (hereinafter "GAO Report").

[9] *See* Michael Leachman & Charles Sheketoff, "Helping Rural Oregonians Avoid Hunger: Eliminating the Three Month Food Stamp Time Limit in 30 Oregon Counties," Oregon Center for Public Policy (Feb. 23, 2000) at 2, https://www.ocpp.org/2000/rpt20000223.pdf (describing the December 3, 1996 USDA guidance to the States regarding waiver requests).

to a lack of "a sufficient number of jobs" has been the same:[10] States or area(s) within a State may qualify for a waiver of the ABAWD time limit if the State can demonstrate that:

- the area has been designated a Labor Surplus Area ("LSA") for the current fiscal year by the Department of Labor ("DOL");
- the DOL's Department of Unemployment Insurance Service has qualified the State for extended unemployment benefits;
- the area has a low and declining employment-to-population ratio;
- the area has declining occupations or industries;
- the area is described in an academic study or other publication as an area where there are a lack of jobs; or
- the area has a 24-month average unemployment rate that is 20 percent above the national average for the same period (the 24-month period must begin no earlier than the date DOL uses to designate LSAs for the fiscal year) ("20 percent standard").

States have always had some degree of flexibility in the data they can submit to support a waiver request.[11] Waivers are readily approvable when the waiver request is supported by unemployment data from the DOL Bureau of Labor Statistics ("BLS") or evidence that the area has been designated as an LSA by DOL's Employment and Training Administration ("ETA").[12] But States can also submit other data to support their waiver requests. Recognizing that the lack of "sufficient jobs" can only be defined by reference to local labor market conditions, the Department has always allowed the States to define the areas to be covered by waivers based on data and analyses that correspond to the defined area.[13]

Because waiver requests based on data from the BLS or a BLS-cooperating agency or an ETA designation of an area as an LSA are readily approvable, States can begin implementing the waiver at the time that the waiver request is submitted.[14] The Department typically grants ABAWD time limit waivers for a 1-year period, but a State or area may qualify for a longer waiver if there are compelling reasons.[15]

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[10] *See, e.g.*, *Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Notice of Proposed Rulemaking, 64 Fed. Reg. 70,920, 70,944-46 (Dec. 17, 1999) (noting that the proposed rule did not substantially change the policies expressed in the Department's December 3, 1996 guidance regarding waivers); *Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Final Rule, 66 Fed. Reg. 4,438, 4,462 (Jan. 17, 2001) (incorporating the "most pertinent aspects of the [December 3, 1996] guidance into the regulation.").
[11] 7 C.F.R. § 273.24(f)(2) (States "may submit whatever data it deems appropriate to support its request.").
[12] 7 C.F.R. § 273.24(f)(3). For territories that the BLS does not study, FNS accepts unemployment data generated by a State cooperating agency that relies on BLS methods. But States have also been permitted to submit data from the Census Bureau and other sources to support their waiver requests.
[13] 7 C.F.R. § 273.24(f)(6).
[14] 7 C.F.R. § 273.24(f)(4).
[15] 7 C.F.R. § 273.24(f)(5).

States are not required to request a waiver of the ABAWD time limit, nor are they required to implement a waiver that has been granted by the Department. In the first year, 43 States applied for and received approval from FNS to waive some or all of the State from the ABAWD time limit.[16] Since PRWORA was enacted, several States that would have qualified for waivers did not request them,[17] and some States that requested waivers did not implement them.[18]

Under these rules, 6 States currently have statewide waivers, while 30 States have partial waivers for specific areas.[19] 17 States do not have any ABAWD time limit waivers. All States, with the exception of Delaware, have had waivers at some point since PRWORA was enacted.[20]

C. Introduction of Exemptions from the Time Limit for ABAWDs

In addition to the abovementioned flexibility through waivers, in the Balanced Budget Act of 1997 ("BBA"), Pub. L. No. 105-33, Congress gave additional flexibility to the States to exempt up to "15-percent" of the State's "covered individuals" from the ABAWD time limit.[21] The "15-percent" exemption rule is an imprecise name for a statutory allowance that States have to extend benefits for ABAWDs who do not reside in a waived area and would otherwise be ineligible for SNAP benefits because of the ABAWD time limit. The USDA allocates exemptions to the States based on 15 percent of the estimated ABAWD population who would otherwise be ineligible for benefits.[22] Under the statute, States can use one exemption to provide one additional month of SNAP benefits to an individual ABAWD who would otherwise be ineligible for SNAP benefits because of the time limit.[23]

In addition, the statute provides that the Secretary shall increase or decrease the number of individuals who may be granted an exemption by a State agency to the extent that the average monthly number of exemptions used in the State for the preceding fiscal year is different than the average monthly number of exemptions estimated for the preceding fiscal year.[24] Therefore, if a State does not use its allocated exemptions by the end of the fiscal year, the State may carry over the balance. If more exemptions are used than authorized in a fiscal year, the State's allocation for the next year will be reduced.

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[16] Vivian Gabor & Christopher Botsko, "State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey," (May 1998) at 12.

[17] GAO Report, supra n. 8 at 6, 8-9.

[18] Gabor & Botsko, supra n.16 at 12 (noting that 7 of the 43 States that had approved waivers did not apply the waiver in some or all of their approved local jurisdictions); GAO Report, supra n. 8 at 9.

[19] U.S. Dep't of Agric., *Supplemental Nutrition Assistance Program (SNAP):Status of Able Bodied Adult Without Dependents (ABAWD) Time Limit Waivers – Fiscal Year 2019 – 2nd Quarter* (Mar. 13, 2019), https://fns-prod.azureedge.net/sites/default/files/snap/FY19-Quarter2-ABAWD-Waiver-Status.pdf.

[20] Ed Bolen & Stacy Dean, "Waivers Add Key State Flexibility to SNAP's Three-Month Time Limit," Center on Budget & Policy Priorities (2017), https://www.cbpp.org/research/food-assistance/waivers-add-key-state-flexibility-to-snaps-three-month-time-limit.

[21] "Covered individuals" are those ABAWDs who are not excepted, covered by a waiver, complying with the work requirement, or in their first or second three months of eligibility. 7 U.S.C. § 2015(o)(6)(A)(ii).

[22] *See* 7 U.S.C. § 2015(o)(6).

[23] *Id.*

[24] 7 U.S.C. § 2015(o)(6)(G)

While the USDA determines the total number of exemptions a State can provide in a given year based on the Department's own formula, States have "maximum flexibility to apply the exemptions as they deem appropriate."[25]

D. The 2014 Farm Bill and the Examination of the Effectiveness of Work Requirements

The work requirements for SNAP benefits have been the subject of long-running debates,[26] but there is no research evidence that simply setting work requirements, and specifically the requirements for ABAWDs, are effective at helping individuals gain employment, increase their incomes, reduce their dependence on SNAP benefits, and move people out of poverty.[27] Indeed, there is very little research available about how to help ABAWDs subject to the time limit attain self-sufficiency.[28] The lack of research evidence on the effectiveness of work requirements for SNAP benefits spurred Congress to authorize funding to study the matter. In the Agricultural Act of 2014 ("2014 Farm Bill"), Pub. L. No. 113-79, Congress authorized $200 million in funding to the USDA for three-year employment & training ("E&T") pilot projects in ten States to rigorously evaluate new approaches to move SNAP participants into work or higher paying jobs. In March 2015, the USDA awarded grants to California, Delaware, Georgia, Illinois, Kansas, Kentucky, Mississippi, Vermont, Virginia, and Washington. These pilots were fully operational beginning in Fiscal Year ("FY") 2017. The pilot projects will be evaluated, but research findings are not yet available. A final report is due to Congress in 2021.[29]

E. Executive Order Directing USDA to Examine Waivers

On April 10, 2018, President Trump signed an Executive Order ("EO") on Reducing Poverty in America by Promoting Opportunity and Economic Mobility. Exec. Order No. 13,828, 83 Fed. Reg. 15,941 (Apr. 10, 2018). The EO outlines guiding principles for public assistance programs that primarily focus on enforcing work requirements. The EO directed the USDA and other federal agencies to review their public assistance programs and determine whether (i) implementing or enforcing work requirements and (ii) existing waivers are consistent with federal laws and the principles outlined in the executive order. *Id.* § 3.

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[25] U.S. Dep't of Agric., Food & Nutrition Serv., "Guide to Serving ABAWDs Subject to Time-limited Participation," at 8 (2015).
[26] *See, e.g.*, Cong. Research Serv., "SNAP and Related Nutrition Provisions of the 2014 Farm Bill (P.L. 13-79)," R43332 (Apr. 24, 2014) at 9 (noting that "policy makers debated whether to require more SNAP participants to be working in addition to or instead of receiving food assistance."), 12-13 (noting that the House proposed to repeal the USDA's authority to grant area waivers from the ABAWD time limit based on local labor market conditions, but the change was not enacted in the 2014 Farm Bill).
[27] *See* Cong. Research Serv., "Research Evidence on the Impact of Work Requirements in Need-Tested Programs," R45317 at 1 (Sept. 20, 2018) ("As Congress debates work requirements in SNAP, . . . there is no large accumulated research base to draw from.").
[28] *See* Steven Carlson et al., "Who Are the Low-Income Childless Adults Facing the Loss of SNAP in 2016?" Center on Budget and Policy Priorities (Feb. 8, 2016), at 1, https://www.cbpp.org/research/food-assistance/who-are-the-low-income-childless-adults-facing-the-loss-of-snap-in-2016 ("the research is surprisingly limited").
[29] *See* U.S. Dep't of Agric., *Evaluation of SNAP Employment and Training Pilots: Fiscal Year 2017 Annual Report to Congress* at 34.

The EO also emphasized the need "to empower State, local, and tribal governments and private-sector entities to effectively administer and manage public assistance programs." *Id.* § 2(d). The EO noted that "Federal policies should allow local entities to develop and implement programs and strategies that are best for their respective communities." *Id.*

F. Congress Rejects Stricter Requirements for Waivers and Exemptions in the Agriculture Improvement Act of 2018

The 115th Congress considered limiting the ability of States to request waivers and use exemptions in the 2018 Farm Bill. The version of the bill that passed the House would have eliminated the statutory language regarding a lack of "sufficient number of jobs," and replaced it with a much stricter version of the USDA's rule regarding waivers. H.R. 2 retained the ability of States to request waivers if an area is designated as an LSA by DOL's ETA, but would not permit waivers based the 20 percent standard unless the area's unemployment rate was at least 7 percent.[30] The House version of the bill also would have limited the data on which States can rely in their waiver requests, and would have permitted State agencies to request waivers only with the approval of the chief executive officer of the State. It also would have limited the ability of States to combine individual jurisdictions in a waiver request unless the jurisdictions were designated as a Labor Market Area ("LMA") by DOL. Finally, it made changes to the "15-percent" exemption criteria, did not permit carryover exemptions, and decreased the number of exemptions starting in FY 2026.

The Senate version of the bill did not make any changes to the work requirements but consolidated the ABAWD work requirement into the general work requirements of the law.[31] The Senate version did not make any changes to the waiver or exemption provisions. It did provide additional funding for additional pilot projects to study how to assist individuals with significant barriers to employment.

Faced with these conflicting bills, the Conference Committee retained the general work requirements and ABAWD work requirements from the prior law, struck the House's modifications to the criteria that States may use to request a geographic waiver of the ABAWD time limit, and struck the changes to the "15-percent" exemption criteria. The Conference adopted language that specified that a State's waiver request have the support of the State's chief executive officer and decreased the "15-percent" exemption to 12 percent starting in FY 2020. The Conference also increased funding for E&T, including by allowing funds to be reallocated to fund pilot projects "that have the most demonstrable impact on the ability of participants to find and retain employment," with a particular focus on individuals who have significant barriers to employment. *Id.*

President Trump signed the Agriculture Improvement Act of 2018 on December 20, 2018, as Pub. L. No. 115-334.

[30] The version of the bill that was introduced in the House set the unemployment floor at 6 percent, but the version that passed the House in mid-2018 raised the unemployment floor rate to 7 percent.
[31] S. 3042, 115th Cong. § 4103 (as reported by S. Comm. on Agric., Nutrition, & Forestry, June 18, 2018).

G. The Proposed Rule

On the same day that President Trump signed the 2018 Farm Bill, and at the direction of President Trump, the Secretary of Agriculture announced a proposed rule "intended to move more able-bodied recipients of [SNAP] benefits to self-sufficiency through the dignity of work."[32] Rather than creating a program that would actually help ABAWDs overcome barriers and gain stable employment, the Proposed Rule would simply impose many of the features of the House version of the 2018 Farm Bill that were rejected by the Conference and that did not pass Congress. The Proposed Rule in fact goes even further than the House version of the bill did.

The proposed rule substantially limits the ability of States to request waivers of the ABAWD time limit by:

- Setting an unemployment rate floor for States that seek waivers because an area's unemployment rate is 20 percent or more above the national average. Under the Proposed Rule, a State or portion thereof would not be eligible for a waiver under the 20 percent standard unless the unemployment rate is 7 percent or more, 84 Fed. Reg. 983-84;[33]
- Eliminating the ability of a State to qualify for a waiver if it is designated as a Labor Surplus Area by DOL's ETA, 84 Fed. Reg. 987;
- Limiting the availability of statewide waivers if there is data available from the Bureau of Labor Statistics at the substate level, 84 Fed. Reg. 985;
- Restricting States from combining data to group substate areas unless the areas are considered a Labor Market Area by DOL, 84 Fed. Reg. 985-86;
- Limiting the data on which States can rely for their waiver requests, requiring States to rely on data from BLS or BLS-cooperating agencies, 84 Fed. Reg. 986-87;
- Eliminating "a historical seasonal unemployment rate over 10 percent," as a basis for a waiver, 84 Fed. Reg. 987;
- Limiting the duration of waiver approval to *up to* one year, but no longer than one year, 84 Fed. Reg. 986;
- Eliminating the ability of States to carry exemptions over from year to year, 84 Fed. Reg. 987-99;
- Requiring the "endorsement" of the Governor, 84 Fed. Reg. 983; and
- Prohibiting States from implementing waivers prior to receiving approval from FNS, 84 Fed. Reg. 987.

[32] Press Release, "USDA to Restore Original Intent of SNAP: A Second Chance, Not A Way of Life," U.S. Dep't of Agriculture (Dec. 20, 2018), https://www.fns.usda.gov/pressrelease/2018/027718.
[33] The USDA actually requests public comment on whether 7 percent or another rate floor – 6 percent or 10 percent – would be appropriate, which is discussed *infra*.

II. The Proposed Rule Conflicts with the Purpose of the FNA and the Clear Intent of Congress.

The Proposed Rule is contrary to the purpose of SNAP. In the FNA, Congress declared that its policy is "to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 U.S.C. § 2011. Yet, by the Department's own calculations, under the Proposed Rule more than three-quarters of a million people will lose their ability to obtain an adequate level of nutrition in FY 2020 alone. 84 Fed. Reg. 989.

Moreover, the Proposed Rule is contrary to the clear intent of Congress when it passed the 2018 Farm Bill. In the drafting and negotiations process of the 2018 Farm Bill, the House of Representatives included language regarding waivers and exemptions almost identical to the language that the Department now proposes. Congress removed the provisions from the final legislation and passed the 2018 Farm Bill on December 20, 2018, without the new restrictions on waivers and exemptions. The Department announced the Proposed Rule the same day with language virtually identical to that stricken from the 2018 Farm Bill. While Congress explicitly chose not to strengthen work requirements for SNAP by ensuring that more ABAWDs are subject to the time limit, the Department states that this is the express goal of the Proposed Rule. 84 Fed. Reg. 985, 987. Indeed, the Department says that its "proposal aligns with the proposal in . . . H.R. 2, as passed by the House June 21, 2018," while failing to acknowledge that the proposal in the House failed to pass Congress. 84 Fed. Reg. 984. By proposing this rule, the Department now seeks to make an end-run around the legislative process and implement requirements that Congress refused to adopt through legislation.

It is abundantly clear—from both its actions and its explicit statements—that Congress believed that congressional action would be required to accomplish the changes to SNAP waivers and exemptions that FNS seeks to make in the Proposed Rule. Congress refused to make these statutory changes and intended for SNAP waivers and exemptions to continue to operate as they have since they were introduced in the law more than 20 years ago. By attempting to amend the statute through rulemaking, the Department has clearly overstepped its authority.

A. Waivers

In its draft of the 2018 Farm Bill, the House sought to remove a lack of "sufficient jobs" as a standard for waivers, including eliminating States' ability to seek a waiver based on a showing of declining employment to population ratio or a lack of jobs in a declining industry. Instead, the House would have adopted the 20 percent standard with a 7 percent unemployment baseline.[34] The House also sought to virtually eliminate States' ability to combine areas for purposes of waiver.[35] Congress intentionally excluded all of this language in its final 2018 Farm Bill.[36] Finally, the House also attempted to require the "approval" of the State's chief executive officer before a State administering agency could request a waiver.[37]

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[34] H.R. 2 (115th) § 4015.
[35] H.R. 2 (115th) § 4015.
[36] Pub. L. No. 115-334 (2018).
[37] H.R. 2 (115th) § 4015.

By contrast, Congress in its final bill explicitly maintained the States' discretion on ABAWD time limit waivers. It rejected using *any* unemployment floor for waiver requests based on an unemployment rate of 20 percent or more above the national unemployment rate. Moreover, in explaining their decision to make no changes to the waiver requirements by statute, the Conference Report stated that the conference managers from the House and Senate "intend to maintain the practice that bestows authority on the State agency responsible for administering SNAP to determine when and how waiver requests for ABAWDs are submitted."[38] Congress thus intended to allow States to continue to use their discretion in what data to use and how to group regions together for the purposes of obtaining a waiver. Congress also rejected the requirement that a State agency's waiver request have the "approval" of the State's chief executive officer because Congress understood that the State agencies need to have the authority to respond to sudden changes in their local economies by seeking waivers. The Conference Committee added language to the statute to encourage communication between State agencies and their chief executive officers, but made clear that it was not Congress's "intent that USDA undertake any new rulemaking in order to facilitate support for requests from State agencies, nor should the language result in additional paperwork or administrative steps under the waiver process.[39]

But the Department adopts a 7 percent floor for waiver requests based on the 20 percent standard in the Proposed Rule—the same *exact* floor that was passed by the House but rejected by the Conference. And the Proposed Rule severely restricts when areas can be combined in a State's waiver request—grouping of contiguous areas is not permitted under the Proposed Rule unless the areas are considered an LMA by DOL, ignoring the fact that LMAs are not limited to regions within a State, and can cross State lines.[40] The Department also expressly adopts new regulatory language requiring "the Governor's endorsement," 84 Fed. Reg. 983, 992, despite congressional direction that no such rulemaking was necessary to implement the new language in the law. Finally, the Proposed Rule goes further than even the House version of the 2018 Farm Bill in proposing to eliminate an area's designation as an LSA by DOL's ETA as a basis for a waiver request. The Department now attempts to do what Congress explicitly refused to do by statute, usurping Congress's lawmaking authority to make these policy decisions.

B. Exemptions

In 1997[41] Congress provided States with the flexibility to provide one-month exemptions to up to 15 percent of the estimated ABAWD population who would otherwise be ineligible for food stamps and allowed for the States to carry over their allotted exemptions ("caseload exemptions").[42] In 2018, Congress made substantial changes to the law by reducing the exemption rates from 15 percent to 12 percent beginning in FY 2020. However, Congress did not change the statutory language that permits States to carry over exemptions from year to year, and

[38] H. Conf. Rpt. on H.R. 2 (115-1072) at 616.
[39] *Id.* at 617.
[40] *See* Bur. of Labor Statistics, "Local Area Unemployment Statistics," (Mar. 15, 2019), https://www.bls.gov/lau/laugeo.htm#geolma (noting that because "these areas are based on the degree of economic integration as measured by commuting flows without regard to state boundaries, interstate LMAs exist").
[41] Pub. L. No. 105-33 (1997).
[42] *See* 7 U.S.C. § 2015(o)(6).

maintained State authority in determining the use of exemptions. The 2018 Farm Bill Conference report makes clear that under the statute, States will "continue to accrue exemptions and retain any carryover exemptions from previous years, consistent with current law."[43] By proposing to eliminate the ability of States to carry exemptions over, the Proposed Rule is inconsistent with and contrary to the law.

III. The Proposed Rule is Arbitrary and Capricious and Therefore Violates the APA.

Not only does the Proposed Rule flout the text and intent of the FNA, but it also violates the Administrative Procedure Act ("APA"). Under the APA, agencies are required to act reasonably, providing a reasoned explanation for their actions and observing the procedure required by law. *Schurz Commc'ns v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992); *see also Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (agency must show that it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."); *American Ass'n of Cosmetology Schools v. Devos*, 258 F. Supp. 3d 50, 71 (D.D.C. 2017) (the "touchstone of arbitrary-and-capricious review is reasoned decisionmaking."). When an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, it will be held invalid and vacated. 5 U.S.C. § 706(2)(A).

The Proposed Rule is arbitrary and capricious, and therefore cannot withstand scrutiny under the APA, on several grounds: first, it conflicts with numerous longstanding policies of the USDA governing time limit waiver requests; second, the USDA provides no reasoned explanation for the proposed changes; third, the changes are not supported by available evidence; and fourth, the Proposed Rule does not consider the costs associated with its implementation.

A. The Proposed Rule Conflicts with the Longstanding Policy of the USDA.

The changes to time limit waiver requests in the Proposed Rule are inconsistent with more than two decades of USDA guidance on waivers. Because the Proposed Rule contradicts the USDA's own longstanding position without reasoned support, this change would be arbitrary and capricious under the APA. *See Perez v.Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

The Proposed Rule reverses a variety of longstanding policies. First, relying on agency guidance to States regarding requests for waivers of the ABAWD time limit from December 1996, the USDA implemented a Final Rule in 2001 that set the standards for the current regulations. Among these standards was the ability of States to use a Labor Surplus Area ("LSA") designation as a criterion for receiving a waiver. In fact, according to the 2001 Rule and guidance from as recently as 2016, "[i]f the area is designated as an LSA for the current fiscal

[43] H. Conf. Rpt. on H.R. 2 (115-1072) at 616.

year, FNS will approve the waiver readily and the State may begin to operate the waiver at the time the request is submitted."[44]

Second, the Proposed Rule would eliminate States' discretion in defining geographic scope of the area to be covered by a waiver. Not only have States long been permitted to submit requests for statewide waivers, but they were given "complete discretion to define the geographic areas covered by waivers so long as they provide data for the corresponding area." 66 Fed. Reg. 4463. The Department's 2016 guidance permitted the States "discretion to define the group of areas to be combined, provided that the areas are contiguous or can be considered to be part of an economic region."[45] The Proposed Rule, however, essentially eliminates statewide waivers and severely restricts States' discretion in defining the geographic scope of the area for the waiver.

Third, agency guidance for the last twenty years has also permitted States to buttress their requests for waivers using a variety of data sources in addition to BLS data. These data sources included a low and declining employment-to-population ratio, a lack of jobs in declining occupations or industries, and academic studies or other credible publications that document a lack of jobs in an area.[46] Nevertheless, the Proposed Rule seeks to undercut States' more nuanced understandings of local job markets, and whether those conditions are accurately reflected in the data sources submitted with their waiver requests, by strictly limiting the data for evaluation to BLS data.

Other policies that have been in place for the last two decades that would be eliminated under the Proposed Rule include the ability of States to immediately implement waivers in extreme circumstances and the ability for some waivers to extend beyond a year.

As discussed in further detail in the subsequent sections, the USDA has provided no reasoning behind drastically changing course after following essentially the same guidance for more than two decades. Because the USDA has provided no support for these contradictory policies, the Proposed Rule is arbitrary and capricious.

B. The Proposed Rule is Not Supported by a Legitimate Rationale.

The Proposed Rule fails to provide a reasoned explanation for its radical departure from the Department's longstanding policy. Indeed, the Proposed Rule abandons decades-old policy without any support whatsoever. This alone makes the Proposed Rule arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (federal agency has a

[44] U.S. Dep't of Agric., Food & Nutrition Serv., "Supplemental Nutrition Assistance Program – Guide to Supporting Requests to Waive the Time Limit for Able-Bodied Adults without Dependents (ABAWD)," at 3 (Dec. 2, 2016) (hereinafter "USDA SNAP Guide").
[45] *Id.* at 10.; *see also* 66 Fed Reg. 4462 ("States may submit evidence of a lack of sufficient jobs by submitting data that the area: (1) Was designated as a Labor Surplus Area by the Department of Labor's employment and Training Administration (ETA); (2) was determined by the Department of Labor'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.").
[46] USDA SNAP Guide, supra n. 44 at 16-17.

"duty to explain why it deemed it necessary to overrule its previous position" and when "the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."); *Massachusetts v. EPA*, 549 U.S. 497 534 (2007).

1. The Department Provides No Grounds for Establishing a Floor Unemployment Rate for the 20 Percent Standard.

In attempting to establish an unemployment rate floor for the 20 percent standard,[47] the Proposed Rule is arbitrary and capricious because it is not based on any legitimate rationale. The USDA primarily refers to unsupported assertions that there has been "excessive use of ABAWD time limit waivers to date," without considering whether the use of waivers has been appropriate or necessary, and relies on "operational experience" without providing data or concrete examples to support its assertions that States have exploited time limit waivers. 84 Fed. Reg. 984. Rather, the USDA points to decreases in the percentage of the ABAWD population that will live in waiver eligible areas, noting that the current 44 percent of ABAWDs living in a waived area would decrease to 11 percent under the Proposed Rule. *Id.* However, the Department does not explain why the size of the waived areas or the number of ABAWDs who reside in waived areas somehow demonstrate that waivers have been exploited or abused.

The Department does not need to impose an unemployment rate floor if the sole purpose is to reduce the number of ABAWDs living in waived areas. This reduction has already occurred naturally after the economy stabilized following the economic downturn: the number of States and areas in which the time limit is waived has been steadily declining for the past four years, and the number of ABAWDs who reside in waived areas has been declining as well. 84 Fed. Reg. 982. Just reducing the number of ABAWDs residing in waived areas on its own is not a reasonable explanation for making it more difficult for States to qualify for waivers when their unemployment rates are 20 percent or more above the national unemployment rate. Moreover, simply reducing the size and proportion of waived areas, and thus decreasing the number of ABAWDs who live in waived areas, does not somehow mean that those individuals newly subjected to the time limit will more easily find employment.

The only other reason for the unemployment rate floor offered by the USDA is "so that areas do not qualify for waivers when their unemployment rates are generally considered to be normal or low." 84 Fed. Reg. 984.The USDA raises concerns that local unemployment rates that are lower than the "natural" rate could lead to "inflationary pressure on prices." *Id.* First, the USDA cites to no study that explains the "natural rate of unemployment" or its effect on inflation, nor does it cite to data demonstrating that the current "natural rate of unemployment" is approximately 5 or 6 percent, as the USDA claims it is. In fact, the current natural rate of unemployment may be as low as 4.0-4.6 percent.[48] Second, concerns about inflation do not

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[47] The 20 percent standard is a criterion used for evaluating qualification for a time limit waiver. The standard is that an area has a 24-month average unemployment rate that is 20 percent above the national average for the same period. The 24-month period must begin no earlier than the date DOL uses to designate LSAs for the fiscal year. There has never been an unemployment rate floor for the 20 percent standard.

[48] Fed. Res., *What is the lowest level of unemployment that the U.S. economy can sustain?*, last updated March 20, 2019, https://www.federalreserve.gov/faqs/economy_14424.htm.

necessarily correlate with the Proposed Rule's stated goal to increase self-sufficiency and employment. As such, the "natural rate of unemployment" is not a legitimate rationale for implementing an unemployment rate floor. [49]

The USDA's request for "evidence-based and data-driven feedback on the appropriate threshold for the floor" further underscores its failure to ground its rationale in research. *See* 84 Fed. Reg. 984. The proposed unemployment rate floor is a slipshod attempt to make a blanket reduction in the number of ABAWDs living in waived areas. That strategy ignores unique conditions in these areas indicating significant barriers to employment for ABAWDs and, more broadly, the congressionally expressed purpose to make appropriate exceptions where such barriers exist.

2. *The Proposed Rule Unreasonably Restricts the Geographic Scope of Waiver Areas.*

The Proposed Rule's attempt to restrict States' ability to define the geographic scope of requested waivers is also arbitrary and capricious. The Proposed Rule limits States' flexibility to define the geographic scope of waivers in two primary ways: 1) eliminating statewide waivers when substate data is available through BLS,[50] and 2) prohibiting the grouping of substate areas unless the federal government itself has grouped those areas. As with many of the other changes included in the Proposed Rule, the USDA provides no legitimate reasoning for either of these changes.

The only reasoning provided for eliminating statewide waivers is "so that waivers of the ABAWD time limit are more appropriately targeted to those particular areas in which unemployment rates are high." 84 Fed. Reg. 985. However, State agencies typically have a better understanding of economic conditions within a State that may cross substate areas in such a way that a statewide waiver would be warranted. The BLS substate data may not accurately convey such conditions. Additionally, States may not have the resources to track ABAWDs within the BLS-defined substate groups, and determining which substate areas should be included in waiver requests may impose a significant burden on already over-taxed State agencies.

Moreover, the BLS substate data may not accurately depict a substate economic market area, which may encompass several jurisdictions. Furthermore, the BLS data does not portray more nuanced aspects of employment statistics, such as the types of jobs available, the qualifications needed for such jobs, and whether affordable transportation options are available for those who need it.

The USDA attempts to justify the elimination of most statewide waivers by suggesting that it aligns with the Department's goal to subject more individuals "to the ABAWD time limit and work requirement, which can be met through working or participating in a work program or

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[49] Further undermining the Department's reliance on the "natural" rate of unemployment is the growing criticism about this unproven economic theory. *See* Mike Konczal*, How low can employment go? Economists keep getting the answer wrong,* VOX, May 5, 2018, https://www.vox.com/the-big-idea/2018/5/4/17320188/jobs-report-natural-rate-unemployment-inflation-economics-april.

[50] The exception to this change in the Proposed Rule would be statewide waivers "based upon a State's qualification for extended unemployment benefits as determined by DOL's Unemployment Insurance Service." 84 Fed. Reg. 985.

workfare program, consistent with the intent of the Act." 84 Fed. Reg. 985. The intent of the waiver provisions of the FNA, however, was to ensure that nutrition assistance would be provided to those individuals who had insufficient opportunities to obtain employment. Eliminating most statewide waivers undercuts State agencies' ability to determine which areas most appropriately qualify for time limit waivers. Barriers to employment may exist statewide, rather than just in one substate area. States should have the flexibility to determine whether it is more appropriate to seek a statewide waiver rather than waivers for substate areas.

The USDA's only rationale for prohibiting States' grouping of substate areas for waiver requests is that "in practice, the Department has learned that its standards for combining areas provide too much flexibility for State agencies and are often ineffective at ensuring that States are only grouping areas that are economically tied." 84 Fed. Reg. 986. This rationale contradicts the facts. Current regulations in fact provide some restriction on how States can group substate areas for waiver requests. The USDA itself acknowledges that under current regulations, "States can only group areas and support approval based on qualifying unemployment data" and that grouped areas must be "contiguous and/or share the same Federal- or State-recognized economic region." *Id.* at 985. Moreover, even according to the Proposed Rule itself, the amount of waivers sought by States and the population covered by waivers has fallen precipitously since its peak in 2013. *Id.* at 982. FNS states that ABAWD waivers covered 45 States and territories in full in 2013. By comparison, only 8 waivers currently apply to entire States or territories today. *Id.* This demonstrates that States are in fact using their discretion judiciously and in accordance with appropriate standards under the law and the current rule.

Nevertheless, the USDA accuses States of using their ability to group substate areas in order to omit areas of low unemployment and skew data to support waiver requests. However, such a practice is actually in accord with the USDA's stated intent because rather than "maximize" the waived area, as the USDA contends, it narrows the areas covered by waivers to those with higher unemployment rates. Further, as previously mentioned, States have a better understanding of which regions are economically tied and what employment conditions are actually like in those regions.

The USDA proposes to use Labor Market Areas ("LMAs") as a mechanism to group substate areas. However, grouping by LMAs is not only ineffective, but it infringes on State sovereignty. Metropolitan areas near State borders tend to fall within LMAs that extend into multiple States.[51] State agencies, however, can only provide benefits to those individuals residing within their borders. In determining whether to apply for a waiver, then, these State agencies would have to take into account job conditions in another State or multiple other States, which is beyond the reach of their authority. Furthermore, these multistate LMAs may not reflect the job conditions in a particular substate area that falls within its confines.

Not allowing States to define the geographic scope of the requested waivers, whether by prohibiting grouping outright or by limiting grouping to LMAs as defined by the federal

[51] Examples of these LMAs include Philadelphia (PA, NJ, DE, and MD), Washington, DC (DC, VA, MD, and WV), New York City (NY, NJ, and PA), and Memphis (TN, MS, and AR). *See* https://www.bls.gov/lau/lmadir2015.xlsx.

government, undermines States' abilities to effectively administer benefits to those individuals who need them and for whom the application of waivers is appropriate.

C. The Proposed Rule is Not Supported by the Available Evidence.

There is no evidence cited to support the effective elimination of waivers for most of the country. Nor is there evidence that the Proposed Rule will "restore the dignity of work," as the Department claims it will. Rather, all the available evidence shows that the group of people who will be subject to the ABAWD time limit under the Proposed Rule will likely simply lose the limited nutrition assistance that SNAP provides and become more food insecure, and will continue to be unemployed because they will continue to face barriers to employment in the local labor market.

The evidence available to the Department demonstrates that the population that will be most directly affected by the time limit face many barriers to employment and self-sufficiency that cannot be solved simply by stripping them of limited but essential nutrition assistance. In 1997, the USDA published a report demonstrating that 95 percent of the men and women in this group had incomes below 75 percent of the poverty line with average incomes of 24 percent of the poverty line.[52] More than 40 percent did not have a high school diploma, and many lived in rural areas and with limited access to transportation. 42 percent were women and one-third were aged 41 or older. The limited research done in the intervening years shows that the ABAWD population remains very poor and has a number of barriers to employment.

In 1998, the Department issued a report on "The Effect of Welfare Reform on Able-Bodied Food Stamp Recipients." Michael Stavrianos & Lucia Nixon, U.S. Dep't of Agric. (July 23, 1998). That report noted that only 3.6 percent of all FSP participants were subject to the ABAWD time limit. *Id.* at xi. The report noted that the employment prospects for this group were "not promising," because "job opportunities for less-educated job seekers are severely limited, especially for nonwhites and in urban areas," *id.* at xiii.[53] The report also noted that the job prospects for ABAWDs depends significantly on the prevailing conditions in their local area, including the demand for low-skill workers. *Id.* at xiv.

Among the most in-depth studies on the men and women affected by the time limit comes from the Work Experience Program in Franklin County, Ohio, a partnership between the Ohio Association of Foodbanks and the Franklin County Department of Job and Family Services.[54] Data from the assessments of affected recipients in the 2015 Ohio study showed a group of men and women who face a combination of barriers to work, with low levels of education and training and high incidences of health problems. Many in this group have no high

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[52] U.S. Dep't of Agric., "Characteristics of Childless Unemployed Adult and Legal Immigrant Food Stamp Participants: Fiscal Year 1995" (Feb. 13, 1997).
[53] *See also* John L. Czajka, et al., "Imposing a Time Limit on Food Stamp Receipt: Implementation of the Provisions and Effects on Food Stamp Participation," Vol. I (Sept. 2, 2001) at xix (finding that ABAWDs were a mere 2.5 percent of FSP participants, and many of them faced "significant barriers to both work and participation in qualifying work activities.").
[54] *See* Franklin County Dep't of Job & Family Servs. & Ohio Ass'n of Foodbanks, *A Comprehensive Assessment of Able-Bodied Adults Without Dependents and Their Participation in the Work Experience Program in Franklin County, Ohio: Report 2015*, http://ohiofoodbanks.org/wep/WEP-2013-2015-report.pdf

school diploma or GED, and very few have college degrees. Many of these affected individuals have mental or physical limitations that make gaining and maintaining work difficult but did not meet the high threshold for disability benefits. More than a third of affected individuals have felony convictions or gaps in employment records, which deter employers and make it difficult to pass background checks. Individuals in this group also have undiagnosed intellectual disabilities, have only short-term housing or are experiencing homelessness, lack access to reliable public or private transportation, and are responsible for caring for another person, like a parent or other relative. All of these factors weigh in favor of maintaining the status quo, as States are in the best position to assess whether jobs are available for their ABAWD populations.

As the Department noted in 1998, the ability of this population to secure stable employment depends on the local labor market and the availability of jobs for workers with limited education and work histories. The Department cites no evidence showing that this has changed. Instead of relying on the evidence, the Department repeatedly reiterates its reliance on the low *nationwide* unemployment rate in issuing the proposed rule. 84 Fed. Reg. 981. The nationwide unemployment rate is an unreliable indicator of local availability of jobs for the ABAWD population. The FNA and the Department's guidance have long recognized that States are in the best position to assess the local labor market conditions, and the need for flexibility to waive the time limit for ABAWDs within their borders, either by way of a waiver request or the use of exemptions. But the Proposed Rule expressly seeks to remove this flexibility that Congress provided without any supporting evidence of a need for change. Rather than "restoring the dignity of work" for this population, the Proposed Rule will simply lead to more hungry poor people who still cannot secure stable employment in the local labor market where they reside.

Moreover, recognizing that there is limited evidence about the effectiveness of work requirements for SNAP, Congress authorized substantial funding for pilot projects to study the best ways to secure employment for SNAP participants, and increase their incomes and self-sufficiency.[55] It would undermine the intent of Congress, and simply waste hundreds of millions of taxpayer dollars for the Department to implement a rule that tightens work requirements for more than three-quarters of a million people before the results of the pilot projects are reported to Congress in 2021.

D. The Department Failed to Consider the Costs of Drastically Slashing SNAP Benefits for the ABAWD Population.

Because the Department failed to adequately consider the costs of its Proposed Rule, the agency's action is arbitrary and capricious. To the extent that the USDA conducted any assessment of the burden of the Proposed Rule, the agency found that there would not be "any new costs," but rather, the Proposed Rule would result in "a reduction of burden hours since State agencies are no longer able to group areas together for waiver approval." 84 Fed. Reg. 990. The USDA has estimated that the Proposed Rule would result in a collective savings of $12,092 for State agencies. *Id.* However, the Department fails to account for the harms to the States' economies or the burden on State agencies that must implement the time limit. As demonstrated

[55] Agricultural Act of 2014, Pub. L. No. 113-79, § 4022, 128 Stat. 805 (2014) (allocating up to $200 million for pilot studies of effectiveness of work requirements).

below, the Proposed Rule would have significant costs that were not considered by the Department.

The Proposed Rule fails to account for the harm to the local and national economies that will occur when unemployed ABAWDs are subject to the time limit and are no longer eligible for SNAP benefits. SNAP is a highly efficient program that produces benefits to businesses and to individuals who do not participate in the program. Because SNAP benefits are provided to low-income individuals with immediate spending needs, SNAP boosts local economies by increasing consumer demand, injecting money directly into the economy, creating jobs, and supporting national and local retailers and the food industry generally.[56] During strong economic times, $1 in redeemed SNAP benefits means more than $1.20 in the local economy.[57] During a recession, $1 in redeemed SNAP benefits generates more than $1.70 in economic activity.[58]

SNAP generates revenue for grocery stores both large and small. SNAP expenditures make up about 10 percent of all grocery expenditures nationwide,[59] and an even higher percentage in low-income areas where SNAP benefits are used for a greater portion of sales.[60] SNAP helps many food retailers operating on thin margins to remain in business, which improves food access for all residents. SNAP also creates jobs in rural areas and small towns, where it created and bolstered about 567,000 jobs in 2017, including almost 50,000 in agriculture.[61] Non-grocery businesses also receive a boost from SNAP expenditures because individuals who use SNAP to purchase food then have greater purchasing power to buy other types of goods as well.[62] This greater purchasing power also benefits State governments, which

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[56] *See generally* Mark M. Zandi, Assessing the Macro Economic Impact of Fiscal Stimulus 2008, (Jan. 2008) https://www.economy.com/markzandi/documents/Stimulus-Impact-2008.pdf; Kenneth Hanson, "The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP," U.S. Dep't of Agric. (Oct. 2010), https://www.ers.usda.gov/webdocs/publications/44748/7996_err103_1_.pdf?v=41056; "The Benefits of Increasing the Supplemental Nutrition Assistance Program Participation in Your State," U.S. Dep't of Agric. (Dec. 2011), https://www.fns.usda.gov/sites/default/files/bc_facts.pdf; "Chart Book: SNAP Helps Struggling Families Put Food on the Table," Center on Budget and Policy Priorities, (Mar. 2017), https://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table#part8.

[57] Alan S. Blinder & Mark Zandi, "The Financial Crisis: Lessons for the Next One," Center for Budget and Policy Priorities (Oct. 15, 2015), https://www.cbpp.org/research/economy/the-financial-crisis-lessons-for-the-next-one.

[58] *Id.* (showing that at the height of the last recession, in 2009, $50 billion in SNAP benefits translated into $85 billion in local economies); Kenneth Hanson, "The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP: Executive Summary," U.S. Dep't of Agric., Economic Research Serv. (Oct. 2010), https://www.ers.usda.gov/webdocs/publications/44748/8003_err103_reportsummary_1_.pdf?v=0 (finding that an additional $1 billion in SNAP expenditures was estimated to increase economic activity (GDP) by $1.79 billion. "In other words, every $5 in new SNAP benefits generates as much as $9 of economic activity.").

[59] Elizabeth Wolkomir, "SNAP Boosts Retailers and Local Economies," Center on Budget and Policy Priorities (Apr. 6, 2018), https://www.cbpp.org/research/food-assistance/snap-boosts-retailers-and-local-economies.

[60] Sarah Reinhardt, "SNAP is a Boon to Urban and Rural Economies—and Small-Town Stores May Not Survive Cuts." Union of Concerned Scientists (May 14, 2018), https://blog.ucsusa.org/sarah-reinhardt/snap-is-a-boon-to-urban-and-rural-economies-and-small-town-stores-may-not-survive-cuts.

[61] *Id.*

[62] Wolkmoir, supra n.59.

see increased revenue from additional sales tax when more people are eligible for SNAP benefits.[63]

The Proposed Rule threatens to harm the economy by terminating SNAP benefits for people who currently live in waived areas or who receive one of the "15-percent" exemptions. By the Administration's own calculations, the Proposed Rule would take food away from at least 755,000 low-income Americans, resulting in a loss of at least $15 billion in SNAP benefits over 10 years. As the Department itself notes, though, the number of individuals who stand to lose benefits under the Proposed Rule could be more than 850,000.[64] These cuts will have negative ripple effects throughout the nation's economy, and will be particularly harmful should the economy enter a recession, as many economists predict will occur in the next two years.[65] Historically, SNAP has helped to shorten recessions and dampen the effects of an economic downturn. Carryover exemptions, in particular, permit States to accumulate exemptions when the economy is strong, and provide them with flexibility to extend SNAP benefits when there is a sudden economic downturn. Without the mitigating effects of SNAP benefits for ABAWDs who reside in waived areas or are eligible for an exemption, the impact of the next recession will escalate. In addition to inhibiting States' ability to rapidly respond to changing economic conditions with waivers and exemptions from the ABAWD time limit, the Proposed Rule's impact on the economy will affect all job seekers.

The substantial diminution in States' ability to seek waivers would also impose a heavy burden on States to find alternatives for nutrition. Without the flexibility permitted through the exemptions, States would find themselves in a difficult position when dealing with sudden economic downturns in a particular area or the loss of a certain industry. States' medical, disability, and other systems will be further burdened when individuals who lose SNAP benefits due to the Proposed Rule are malnourished.[66] The Proposed Rule completely fails to account for these harms, and is thus arbitrary and capricious, in violation of the APA.

IV. The Proposed Rule Would Disproportionately Burden People of Color with No Justification.

The Proposed Rule is also arbitrary and capricious because the Department acknowledges that the changes would bear most heavily on protected classes – including racial minorities – with no justification. The USDA notes that while the proposed changes "have the potential for

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[63] Scott Graves, "State Policymakers Could Be On the Verge of Boosting Basic Supports for Low-Income Seniors and People with Disabilities," California Budget and Policy Center (May 23, 2018), https://calbudgetcenter.org/blog/state-policymakers-could-be-on-the-verge-of-boosting-basic-support-for-low-income-seniors-and-people-with-disabilities/ (finding that a proposal to expand SNAP eligibility in California could boost the state's revenue with $3.5 million in additional sales tax).

[64] *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, *Regulatory Impact Analysis* at 26, https://www.regulations.gov/contentStreamer?documentId=FNS-2018-0004-6000&contentType=pdf.

[65] *See* Taylor Telford, "Majority of economists think the U.S. will enter a recession by 2021, survey finds," WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/business/2019/02/25/most-economists-predict-us-recession-by-survey-finds/.

[66] *See, e.g.*, Berkowitz S., Seligman H, Rigdon J., et al., "Supplemental Nutrition Assistance Program (SNAP) Participation and Health Care Expenditures Among Low-Income Adults," JAMA INTERNAL MEDICINE (2017; 177(11):1642-49)

disparately impacting certain protected groups due to factors affecting rates of employment of these groups, [it] find[s] that implementation of mitigation strategies and monitoring by the Civil Rights Division of FNS will lessen these impacts." 84 Fed. Reg. 990. However, the USDA sheds no light on the mitigation strategies and monitoring that it will use. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (agencies must "adequately analyze . . . the consequences" of their actions). Furthermore, given the deep-rooted employment issues already faced by protected groups, no mitigation strategy can adequately alleviate the greater likelihood of food insecurity and poverty that stricter time limit waiver requirements will have on protected classes.

Current employment statistics already underscore the disproportionate employment opportunities available to protected groups, especially racial minority groups. For example, the national unemployment rate in the first quarter of 2018 was 7.2 percent for Black or African American workers and 5.1 percent for Hispanic workers, compared to 3.4 percent for white workers.[67] In fourteen States and the District of Columbia, the unemployment rate for African Americans was more than double the unemployment rate for white workers.[68]

Discriminatory hiring practices impede these individuals from being able to find adequate employment to fulfill the work requirement.[69] For those individuals who can find work, they are disproportionately forced into part-time work. A report from the Economic Policy Institute found that Hispanic and Black workers "are relatively much more likely to be involuntarily part-time (6.8 percent and 6.3 percent, respectively) than white workers, of whom just 3.7 percent work part time involuntarily."[70] Hispanic and Black workers also represent a disproportionate amount of involuntary part-time workers, constituting 41.1 percent of all involuntary part-time workers.[71] The greater amount of involuntary part-time employment among Black and Hispanic workers is due to their both having a greater inability to find full-time work and facing more work conditions where hours are variable and can be reduced without notice.[72]

In addition, the unemployment rate as calculated by BLS in the monthly employment situation report fails to account for other measures of under-employment by Black and Hispanic workers as compared to white workers, such as workers who have searched for work in the past year but not in the past four weeks (known as "marginally attached" to the labor force) According to BLS data, Black workers "made up 13 percent of the civilian labor force, but 22 percent of people marginally attached to the labor force,"[73] whereas white workers represented

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[67] Janelle Jones, "In 14 states and DC, the African American unemployment rate is at least twice the white unemployment rate," ECONOMIC POLICY INST., (May 17, 2018) https://www.epi.org/publication/state-race-unemployment-2018q1/.

[68] *Id.*

[69] *See* Lincoln Quillian, et al. "Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years." HARVARD BUS. REV. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-blackamericans-hasnt-declined-in-25-years (discussing a study that found that "[s]ince 1990 white applicants received, on average, 36% more callbacks than black applicants and 24% more callbacks than Latino applicants with identical résumés").

[70] Lonnie Golden, "Still Falling Short on Hours and Pay," ECONOMIC POLICY INST. (Dec. 2016), http://www.epi.org/publication/still-falling-short-on-hours-and-pay-part-time-work-becoming-new-normal/.

[71] *Id.*

[72] *Id.*

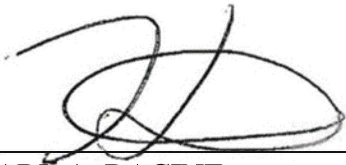
[73] Bureau of Labor Statistics, "Labor force characteristics by race and ethnicity, 2017," (Aug. 2018)

"78 percent of the labor force versus 67 percent of the marginally attached."[74] The exclusion of marginally attached workers, involuntary part-time workers, and other data points from the unemployment rate suggests that the proposed core standard for determining lack of sufficient jobs—unemployment data—disproportionately impacts protected classes. Waivers should not be determined predominantly by the unemployment rate.

V. Conclusion

We urge you to reconsider the Proposed Rule as it is plainly contrary to the law and the intent of Congress. Moreover, the Department does not present any facts that justify the need to dramatically decrease ABAWD SNAP participants; rather available evidence suggests the contrary. At no point does the Department demonstrate that it considered the multitude of costs and harms this rulemaking would have on the States or protected groups. To the contrary, the evidence presented in the rule itself militates against its adoption. For all of the above reasons, we urge the Department to withdraw the Proposed Rule in its entirety.

Sincerely,



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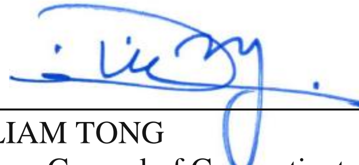

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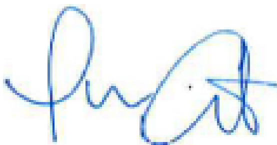

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https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm.

[74] *Id.*

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