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Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine,
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Via Federal eRulemaking Portal

Program Design Branch
Program Development Division
Food & Nutrition Service
U.S. Department of Agriculture
3101 Park Center Drive
Alexandria, Virginia 22302

Re: *Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)*, Notice of Proposed Rulemaking, 84 Fed. Reg. 35,570, FNS–2018–0037 (July 24, 2019) (to be codified at 7 C.F.R. pt. 273).

We, the Attorneys General of the District of Columbia, New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and Wisconsin (the “States”) appreciate the opportunity to provide comments on the Department of Agriculture’s (the “Department”) Food & Nutrition Service (“FNS”) Proposed Rule: *Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)*, Notice of Proposed Rulemaking, 84 Fed. Reg. 35,570, FNS–2018–0037 (July 24, 2019) (to be codified at 7 C.F.R. pt. 273) (“Proposed Rule”). As the chief legal officers for our respective States, the undersigned Attorneys General share a commitment to serving the public interest and promoting the rule of law. With those interests in mind, we are concerned that the Proposed Rule, if finalized, would violate federal law, cause millions of families and individuals, including the elderly, to lose critical nutrition assistance without basis, and cause extensive harm that is not detailed in the Proposed Rule or the accompanying Regulatory Impact Analysis (“RIA”).

The Proposed Rule is an impermissible attempt to use the rulemaking process to flout the legislative process and change how millions of people become eligible for food support provided by the Supplemental Nutrition Assistance Program (“SNAP”). These changes have been repeatedly rejected by Congress, including in the Agriculture Improvement Act of 2018, Pub. L.

No. 115-334, 132 Stat. 4490 (2018) (“2018 Farm Bill”). The Proposed Rule will harm the States, their residents, their local economies, and the public health. As the Department’s own analysis concludes, the Proposed Rule would leave millions of low-income individuals and families without the essential assistance that SNAP provides to ensure that they do not go hungry. This substantial loss of nutrition assistance will cause significant economic and social harms to the States, including greater poverty and hunger, reduced productivity, and a higher incidence of significant health problems. It will also impose far greater burdens on the States than the Department acknowledges, both in administrative costs and costs to other programs that extend benefits to SNAP participants. In addition, if finalized, the Proposed Rule would violate the Administrative Procedure Act. The proposal reverses decades of consistent agency practice without reasoned explanation; fails to adequately consider its impacts on states, cities, and nonprofit food banks; and is inconsistent with the text and purpose of the Food and Nutrition Act. The Proposed Rule also runs afoul of multiple executive orders. We therefore urge the Department to abandon this cruel and unlawful proposal.

I. Background

SNAP, formerly known as the Food Stamp Program,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. In May 2019, more than 36 million people in over 18 million households across all 50 states, the District of Columbia, Guam, and the U.S. Virgin Islands received SNAP benefits.² SNAP gives people with limited income the opportunity to access food, and specifically nutritious food, that they otherwise would not have. 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.³ 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 states⁴ 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.

A. Eligibility for SNAP

Under federal law, households may be eligible for the program if they meet specific SNAP eligibility requirements. The Food & Nutrition Act (the “Act” or “FNA”) requires that income and

¹ The Food Stamp Program 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. For ease of reference, all references to the program will use the SNAP title.

² USDA, FNS, *Supplemental Nutrition Assistance Program (Data as of Sept. 6, 2019)*, <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-9.pdf>.

³ 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).

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

resources not exceed certain limits delineated in the law. *See generally* 7 U.S.C. § 2014. Unless there is an elderly or disabled person in the household, gross income cannot exceed 130 percent of the Federal Poverty Level (“FPL”). For Fiscal Year 2019, for a household of three people in the contiguous 48 states and the District of Columbia, the *gross* monthly income limit is \$2,252.⁵ From this gross monthly income limit, deductions are made for dependent care costs, child support payments, a portion of earned income, medical expenses in some households, and housing expenses exceeding half of net income after all other deductions up to a maximum deduction set by statute. 7 U.S.C. § 2014(e). Net income cannot exceed 100 percent of the FPL (in 2019, \$25,104 for a family of four) to qualify for SNAP benefits. *See* 7 U.S.C. § 2014(c)(1). In addition, a household must have limited liquid assets—no more than \$2,250 (or \$3,500 if there is an elderly or disabled person in the household) in Fiscal Year 2019.⁶ Certain assets, such as a home, most retirement plans, and educational savings accounts, are not counted. 7 U.S.C. § 2014(g)(2)-(8).

Alternatively, households in which all members are either eligible for or receive benefits from other low-income assistance programs that were specified by Congress are automatically eligible for SNAP. *See* 7 U.S.C. § 2014(a). Each of these other low-income assistance programs is authorized by different federal statutes enacted at different times in response to differing circumstances. Each program is aimed at different target populations, has different eligibility requirements, and is administered by different federal or state agencies. Nonetheless, Congress decided that households that have already undergone eligibility determinations for these specific programs do not have to also undergo the income and resource tests for SNAP eligibility—they are categorically eligible for SNAP. The original intent of categorical eligibility was to reduce the administrative burden on state agencies by simplifying the certification process and eliminating the need for state employees to apply two different income eligibility tests for a household applying for cash assistance and SNAP. *Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of Pub. L. 104-193, as Amended by Public Laws 104-208, 105-33 and 105-185*, 65 Fed. Reg. 70,134, 70,160 (Nov. 21, 2000).

Categorical eligibility for SNAP does not mean automatic SNAP benefits. Every household that is deemed eligible for SNAP—whether by meeting the income and resource tests, or by being categorically eligible—must still meet all of the other SNAP rules, including applicable work requirements and reporting requirements, and have net incomes low enough to qualify for SNAP benefits. Each household’s SNAP benefits are based on their *net* income, which must not exceed 100 percent of the FPL, regardless of the method by which the household becomes eligible. *See* 7 U.S.C. § 2014(c)(1); *see also* USDA, FNS, “Categorical Eligibility Questions and Answers” 2 (Jan. 26, 2010). Households with lower net incomes receive greater SNAP benefits. A household may be eligible for SNAP but have a net income that is too high to receive SNAP benefits.⁷

⁵ USDA, FNS, *Income Eligibility and Benefits 2019*, <https://fns-prod.azureedge.net/sites/default/files/media/file/SNAP-Income-Eligibility-2019.pdf>.

⁶ USDA, FNS, *SNAP Fiscal Year 2019 Cost-of-Living Adjustments* (July 27, 2018), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAP-COLA-FY19.pdf>.

⁷ Households of one or two persons who are financially eligible will always receive a nominal monthly benefit, currently set at \$15 a month in the 48 contiguous states and the District of Columbia. But larger households that make up the overwhelming majority of SNAP recipients will not receive SNAP benefits if their net incomes are too high.

B. The Creation of TANF and the Expansion of Categorical Eligibility for SNAP

While categorical eligibility for SNAP in the 1970s, 1980s and early 1990s was based on the receipt of cash assistance, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) changed one federally-funded low-income assistance program in ways that changed categorical eligibility for SNAP. Previously, households that received cash assistance from the Aid to Families with Dependent Children (“AFDC”) program were categorically eligible for SNAP. PRWORA ended AFDC and replaced it with Temporary Assistance to Needy Families (“TANF”), which is a broad-purpose block grant program that gives states wide flexibility to use the funds to operate their own programs to provide benefits and services to address child poverty, including by addressing some of its root causes.⁸ PRWORA both created the TANF program and substituted the TANF program for AFDC in the list of low-income assistance programs that could convey categorical eligibility for SNAP.

In order to receive federal TANF funds, states must spend some of their own dollars—known as Maintenance of Effort (“MOE”) funds—on these state-run programs, and a significant percentage of state MOE funds must be spent on programs for needy families. The design of TANF-funded programs is up to the states, which define the eligibility for their programs, including the definition of “needy” families and individuals. As a result, eligibility for the state-run TANF-funded programs vary from state to state, and differ from the income and asset requirements for SNAP.⁹

TANF programs must accomplish one or more of the four TANF policy goals: (1) to provide assistance to needy families so that children can be cared for in their own homes or in the homes of their relatives; (2) to end dependence of needy parents on government benefits by promoting marriage, job preparation, and work; (3) to reduce the incidence of out-of-wedlock pregnancies; and (4) to promote the formation and maintenance of two-parent families. 42 U.S.C. § 601(a). States accomplish these goals in a variety of ways, including wage supplements for low-income working families with children, child care, education, job training, and transportation. TANF is administered by the U.S. Department of Health and Human Services (“HHS”).

By substituting TANF for AFDC in the federal law that conveys categorical eligibility, PRWORA expanded categorical eligibility for SNAP to households that receive or are eligible for non-cash TANF benefits. If states use TANF and MOE funds to provide non-cash services or benefits to a larger number of state residents who qualify for them, the number of households that are categorically eligible for SNAP also increases. Notably, those households must still meet all

Only a miniscule amount of SNAP benefits—approximately 0.2 percent—went to one- and two-person households with net income exceeding 100 percent of the FPL in 2017. Dorothy Rosenbaum, *SNAP’s “Broad-Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, 4 (July 30, 2019), Ctr. on Budget and Policy Priorities, <https://www.cbpp.org/sites/default/files/atoms/files/7-24-19fa.pdf>.

⁸ See Staff of H. Comm. of Ways & Means, 104th Cong., *SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-193, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION* (Comm. Print 1996) available at <https://www.govinfo.gov/content/pkg/CPRT-104WPRT27305/html/CPRT-104WPRT27305.htm>.

⁹ See U.S. Gov’t Accountability Office, GAO-17-558, *FEDERAL LOW-INCOME PROGRAMS: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules* (June 2017).

SNAP requirements and must also have a net income that is low enough for them to receive SNAP benefits.

C. Expanded Categorical Eligibility: The Department’s Regulations and Guidance

In response to questions from states about implementing categorical eligibility under PRWORA, on July 14, 1999 the Department clarified in guidance that categorical eligibility for SNAP applies to households receiving or eligible to receive non-cash services or benefits funded under a TANF program, as well as households receiving traditional cash assistance.¹⁰ In November 2000, the Department issued regulations further clarifying categorical eligibility for SNAP based on TANF- and MOE-funded programs. *Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of Pub. L. 104-193, as Amended by Public Laws 104-208, 105-33 and 105-185*, 65 Fed. Reg. 70,134 (Nov. 21, 2000).

Recognizing that Congress conferred categorical eligibility based on the receipt of TANF benefits and that TANF has four purposes, the regulations clarified categorical eligibility for SNAP depending on which TANF purposes were served by the TANF benefit. For TANF benefits serving purposes one and two, which by statute must be targeted to “needy families,” the regulations conferred categorical eligibility to all households authorized to receive TANF-funded benefits and services. With respect to TANF benefits serving purposes three and four, which are not limited to “needy families,” the Department instituted income eligibility criteria. Specifically, the Department conferred categorical eligibility to all households authorized to receive TANF-funded benefits and services designed to further TANF purposes three and four, as long as those services have income eligibility criteria of no more than 200 percent of the FPL. 65 Fed. Reg. at 70,160. States are not required to inform FNS about the TANF benefits or services that confer categorical eligibility unless those services are less than 50 percent funded by state MOE funds. 65 Fed. Reg. at 70,161. The regulations also gave states the option to convey categorical eligibility for SNAP to other households in which at least one member receives or is authorized to receive non-cash assistance, as long as the state agency determines that the whole household benefits. *Id.*

The Department referred to categorical eligibility based on non-cash TANF benefits as “expanded categorical eligibility.”¹¹ Since 2009, the Department has differentiated TANF- and MOE-funded non-cash benefits into two categories: narrow and broad-based categorical eligibility (“BBCE”).¹² Narrow categorical eligibility makes households eligible for SNAP if they receive a TANF- or MOE-funded non-cash benefit such as childcare or counseling, that is generally available to a small number of households. BBCE conveys eligibility to a larger number of households based on their eligibility for a TANF- or MOE-funded non-cash benefit such as an informational brochure about TANF-funded services.¹³ BBCE allows states to grant categorical

¹⁰ Elizabeth Laird & Carole Trippe, *Programs Conferring Categorical Eligibility for SNAP: State Policies and the Number and Characteristics of Households Affected: Final Report 3* (Washington, DC: Mathematica Policy Research, 2014).

¹¹ USDA, FNS, *Improving Access to SNAP through Broad-Based Categorical Eligibility*, (Sept. 30, 2009), <https://fns-prod.azureedge.net/sites/default/files/snap/Improving-SNAP-Access-through%20Broad-Based-Categorical-Eligibility.pdf> (“September 2009 Guidance”).

¹² *Id.* Prior to 2009, the Department used the terms “soft categorical eligibility,” and “hard categorical eligibility.” *Id.*

¹³ *Id.*

eligibility for SNAP to low-income households as long as at least one member of the household qualifies for a TANF- or MOE-funded non-cash benefit that serves TANF purposes three or four, and has an income-eligibility criteria of no more than 200 percent of the FPL. Once eligible, applicants must still meet all other SNAP requirements.

The regulations have not changed since they were issued in 2000. At various points since the regulations issued, the Department has issued written guidance on BBCE, and has actively encouraged states to adopt it.¹⁴ The Department promoted BBCE as a way to benefit states by simplifying policies, reducing the amount of time states must devote to verifying assets, and reducing errors.¹⁵ The Department also promoted BBCE as a way to benefit families by extending food assistance to families with slightly higher incomes and high expenses, and promoting asset-accumulation among low-income families.¹⁶

D. Broad-Based Categorical Eligibility is Used by Most States to Reduce Hunger and Food Insecurity in Low-Income Households and Ease Administration of Benefits

States are not required to operate their TANF- and MOE-funded programs in a way that expands categorical eligibility for SNAP, yet most states do.¹⁷ As of July 2019, 42 states, including the District of Columbia, Guam, and the U.S. Virgin Islands, have implemented BBCE.¹⁸ BBCE is used across urban and rural states in all regions of the country, and even in states with more conservative approaches to public assistance programs. States have found BBCE to be a useful way to meet the needs of their low-income residents while also streamlining administration of public benefits.

TANF permits states to define the eligibility criteria for their TANF programs to meet the needs of their communities, and BBCE recognizes that flexibility. The states thus vary widely in how they implement BBCE. For example, six states, including two of the signatories here, set limitations on assets in order to be eligible for the TANF program that conveys BBCE.¹⁹ Notably those limits are higher than SNAP resource limits. Most states have eliminated asset tests to prevent families from losing SNAP eligibility just because they have modest savings or a car that enables them to interview for jobs, attend training programs, get to work, or take children to child care. BBCE helps states encourage families to save for unexpected expenses without fear that they will lose their SNAP benefits, and it reduces the administrative burden on state agencies that comes with verifying assets.

¹⁴ See September 2009 Guidance (encouraging Regional Administrators to “continue promoting expanded categorical eligibility as a way to increase SNAP participation and reduce State workloads”); USDA, FNS, “Supplemental Nutrition Assistance Program: Using Broad-Based Categorical Eligibility to Exclude Refundable Tax Credits Permanently” (Mar. 18, 2010) (encouraging state agencies without BBCE to implement a BBCE program “to simplify administration of SNAP and help low-income households meet their nutritional needs.”) (“March 2010 Guidance”).

¹⁵ September 2009 Guidance at 1; March 2010 Guidance at 2.

¹⁶ *Id.*

¹⁷ Very few states use only what the Department calls “narrow categorical eligibility,” which conveys categorical eligibility for non-cash TANF/MOE-funded services and benefits like subsidized child care or transportation.

¹⁸ USDA, *Broad-Based Categorical Eligibility*, (July 2019), <https://fns-prod.azureedge.net/sites/default/files/resource-files/BBCE2019.pdf>.

¹⁹ *Id.*

Many states have also adjusted the gross income eligibility criteria for their TANF programs within the limits set out for BBCE in the current regulations to reflect the cost of living in their communities. States thus also vary widely on the maximum gross income a household can make and still be eligible. While federal regulations require that non-cash TANF benefits serving TANF goals three and four that convey categorical eligibility have a gross income limit of no more than 200 percent of the FPL, many states use gross income limits much lower than that limit.²⁰ Iowa’s TANF-funded service that conveys BBCE has an income limit of 160 percent of the FPL. New York permits households with dependent care expenses to receive a benefit if the monthly household gross income is not more than 200 percent of the FPL, but households with earned income and no dependents can make no more than 150 percent of the FPL in order to qualify for the TANF-funded program that confers BBCE. Being able to set a higher gross income limit helps states serve needy households by reducing SNAP benefits as their gross incomes rise, but their net incomes (after high expenses are deducted) still qualify them to receive SNAP benefits. With the higher gross income limits allowed under BBCE, states can help their residents avoid a “benefit cliff” where SNAP benefits are cut off when gross income exceeds 130 percent of the FPL, even though the household’s net income still falls below 100 percent of the FPL. With BBCE, states can help families attain self-sufficiency by encouraging them to take higher-paying work without cutting off needed food assistance until their net income is sufficient to support their food needs.

BBCE also reduces program churn in SNAP. When households exit and re-enter back into SNAP within a short time—something that may occur because of changes in household income, assets, or other circumstances—states and families have to dedicate additional resources to reapply and obtain SNAP benefits again. By allowing states to align eligibility for SNAP with the asset and income eligibility criteria for TANF programs, BBCE helps states increase the financial stability of participating households while at the same time reducing SNAP program costs.

Before the economic crisis that began in 2007, only about half of the states expanded categorical eligibility for SNAP using BBCE.²¹ After the USDA issued its guidance in 2009, the majority of states expanded categorical eligibility—39 states implemented BBCE by Fiscal Year 2010, and 43 states implemented it by Fiscal Year 2013. While BBCE increased participation in SNAP, households eligible under BBCE generally received lower benefits from SNAP—an average of \$81 in benefits compared to the average of \$293 in benefits to households who qualified for SNAP directly in Fiscal Year 2010—resulting in a small increase in benefits costs. In Fiscal Year 2010, BBCE increased participation in SNAP by 2.6 percent, but this group of households only increased the SNAP benefits costs borne by the federal government by 0.7 percent.²² While

²⁰ As the Department has recognized, it would be unusual for a household with a gross income in excess of 200 percent of the FPL to meet the net income test of 100 percent of the FPL required to receive SNAP benefits, USDA, FNS, *Categorical Eligibility Questions and Answers*, (Jan. 26, 2010), <https://fns-prod.azureedge.net/sites/default/files/snap/Categorical-Eligibility-QandA-1-26-10.pdf>, and many households with gross incomes above 165 percent of the FPL may qualify for little or no benefits, USDA, FNS, *Categorical Eligibility Questions and Answers*, (Nov. 20, 2009), <https://fns-prod.azureedge.net/sites/default/files/snap/Categorical-Eligibility-QandA-11-20-09.pdf>.

²¹ September 2009 Guidance at 1.

²² U.S. Gov’t Accountability Office, GAO-12-670, *SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: Improved Oversight of State Eligibility Expansions Needed*, 24, 25 (July 2012) (“2012 GAO Report”).

participation in SNAP increased during the economic crisis and the Great Recession, participation has steadily declined for the past five years.²³

By most estimates, most households that become eligible for SNAP through BBCE would also have been eligible for SNAP under standard SNAP rules.²⁴ BBCE simply makes it easier for them to enroll, and easier for states to make SNAP available to them.

E. Efforts to Eliminate or Limit Non-Cash TANF Categorical Eligibility for SNAP

Both before and after the economic crisis that began in 2007, executive administrations and members of Congress have pushed to limit or eliminate categorical eligibility for SNAP based on non-cash TANF benefits and services. The George W. Bush Administration repeatedly proposed eliminating categorical eligibility for SNAP based on non-cash TANF benefits—both narrow categorical eligibility and BBCE—as part of its farm bill proposals in 2002 and 2007, as well as its budget proposals for Fiscal Year 2006 through Fiscal Year 2008.²⁵ Such a proposal passed the House in a budget reconciliation bill in 2005,²⁶ but the provision was not part of the final reconciliation package, the Deficit Reduction Act of 2005.²⁷

The 113th Congress debated eliminating categorical eligibility based on non-cash TANF benefits in the Agricultural Act of 2014 (“2014 Farm Bill”), Pub. L. No. 113-79. Section 4005 of the House proposal would have repealed categorical eligibility based on non-cash TANF benefits, and limited categorical eligibility to SNAP applicants that receive TANF cash assistance, Supplemental Security Income (“SSI”), or state-funded general assistance cash benefits.²⁸ Although the 113th Congress debated this policy, ultimately the new law did not include any changes to categorical eligibility.

The 115th Congress considered limiting categorical eligibility for SNAP based on non-cash TANF benefits in the 2018 Farm Bill. The version of the bill that passed the House would have extended categorical eligibility for SNAP only to households that receive cash assistance or “ongoing and substantial” non-cash benefits or services with an income eligibility limit of not more than 130 percent of the FPL, unless there is an elderly or disabled member of the household.

²³ USDA, FNS, *Supplemental Nutrition Assistance Program Participation and Costs (Data as of Sept. 6, 2019)*, <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-9.pdf>.

²⁴ See, e.g., Dorothy Rosenbaum, *SNAP’s “Broad Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 2 (July 24, 2019); Cong. Research Serv., R42054, *The Supplemental Nutritional Assistance Program (SNAP) Categorical Eligibility*, 15 (Aug. 1, 2019), <https://fas.org/sgp/crs/misc/R42054.pdf> (noting that in Fiscal Year 2016 only 4.2 percent of BBCE households without an elderly or disabled member had incomes above 130 percent of the FPL, and less than 6 percent of all households had income above that threshold).

²⁵ See Gene Falk & Randy Alison Aussenberg, Cong. Research Serv., R42054, *The Supplemental Nutritional Assistance Program (SNAP) Categorical Eligibility*, 12 (Oct. 21, 2011), https://digital.library.unt.edu/ark:/67531/metadc813187/m2/1/high_res_d/R42054_2011Oct21.pdf; U.S. Gov’t Accountability Office, GAO-07-465, *FOOD STAMP PROGRAM: FNS Could Improve Guidance and Monitoring to Help Ensure Appropriate Use of Noncash Categorical Eligibility* (Mar. 2007).

²⁶ H.R. 4241, 109th Cong.

²⁷ P.L. 109-171.

²⁸ H.R. 2642, 113th Cong., § 4005 (2013).

Under the bill, for households with an elderly or disabled household member, the TANF-funded program could have an income eligibility limit of not more than 200 percent of the FPL to convey categorical eligibility.²⁹ The Senate version of the bill contained no such provision, and the conference committee deleted the House provision from the final bill.³⁰ President Trump signed the 2018 Farm Bill on December 20, 2018, as Pub. L. No. 115-334.

F. The Proposed Rule and Its Purported Purpose

The Proposed Rule would require both cash and non-cash TANF benefits to be both “ongoing” and “substantial” in order to convey categorical eligibility for SNAP. 84 Fed. Reg. at 35,570. To be “ongoing,” eligible TANF households would have to receive or be authorized to receive benefits for a minimum of six months. 84 Fed. Reg. at 35,573. To be “substantial,” the TANF benefit would have to be \$50 or more per month. *Id.* Recognizing that TANF does not have a minimum benefit amount, the Proposed Rule would adopt a minimum benefit amount defined by HHS, should HHS ever adopt one that is more than \$50. *Id.* The Proposed Rule would only convey categorical eligibility to non-cash TANF programs that provide subsidized employment, work supports like transportation benefits, or child care subsidies—or what the Department has long called “narrow categorical eligibility,” but with additional requirements that the benefits be both “substantial” and “ongoing.” Under the Proposed Rule, states would be required to notify FNS of all non-cash TANF benefits that confer categorical eligibility, regardless of how much TANF funding pays for those benefits. 84 Fed. Reg. at 35,574-75. The Proposed Rule would completely eliminate BBCE.

The purported purpose of the Proposed Rule is to impose more “consistency across TANF-funded programs whose benefits confer categorical eligibility and to discourage the types of practices that States developed for conferring categorical eligibility with TANF non-cash benefits.” 84 Fed. Reg. at 35,572. But the Proposed Rule seeks to limit *both* TANF-funded cash assistance and TANF-funded non-cash benefits that may confer categorical eligibility. On July 22, 2019, in announcing the Proposed Rule, the Secretary of Agriculture stated that the rule is needed because states have “misused” the flexibility of TANF and BBCE, and “expanded SNAP recipients . . . to include people who receive assistance when they clearly don’t need it.”³¹ Citing a single example of a politically-motivated person who intentionally misused a program intended to help low-income families, Secretary Perdue asserted that the “specific flexibility” that permits BBCE “has become so egregious that a millionaire living in Minnesota successfully enrolled in the program simply to highlight the waste of taxpayer money.”³² The Secretary asserted, “Too often, states have misused this flexibility without restraint.”³³

²⁹ H.R. Rep. No. 115-661, at 66 (2018).

³⁰ H. R. Rep. No. 115-1072, at 631 (2018) (Conf. Rep.).

³¹ Press Release, “USDA Proposes to Close SNAP Automatic Eligibility Loophole,” USDA (July 23, 2019), <https://www.usda.gov/media/press-releases/2019/07/23/usda-proposes-close-snap-automatic-eligibility-loophole>.

³² *Id.* Secretary Purdue was referring to politically-motivated, self-described “millionaire,” Rob Undersander, who had substantial retirement savings, but little in the way of income, who applied for and received SNAP benefits purportedly to demonstrate that BBCE lets wealthy people collect SNAP benefits that they do not need. Helaine Olen, *Billionaires and Millionaires Against Food Stamps*, Wash. Post (July 24, 2019), <https://www.washingtonpost.com/opinions/2019/07/24/billionaires-millionaires-against-food-stamps/>.

³³ *Id.*

II. The Proposed Rule Will Harm the States

The Proposed Rule will harm the States, their residents, other food programs, and local retailers, among others. In addition to the obvious impact on millions of Americans who will lose access to SNAP and the healthy food that it helps to provide, the Proposed Rule reduces access to school nutrition programs, increases demand on other food providers, impairs public health, increases the administrative burden on the States, and decreases economic activity. The harmful consequences of the Proposed Rule are substantial in both the short- and long-term.

A. Harms to Schools and School Nutrition Programs

Subsidized school meals are essential to the well-being of children and families in the States. Children in households that receive SNAP are eligible for free meals at school. Categorical eligibility for SNAP enables and facilitates access to these meals. The Proposed Rule's limitations on categorical eligibility could result in 265,000 children losing their free lunch.³⁴ The Proposed Rule entirely fails to consider this harm.³⁵

The States use SNAP enrollment as an efficient, effective means to automatically certify a large number of children for school meal programs. The community eligibility provision of the school meals program allows all students in eligible schools or school districts to obtain free school meals without a showing of individual eligibility, as long as a certain percentage of students qualify for the meal program. Students often qualify through a process of direct certification, whereby if they are enrolled in another benefit program, such as SNAP or Medicaid, they are automatically enrolled in the school meals program. However, if the percentage of directly certified children dips below the applicable threshold, the entire community loses out. The program also helps to reduce stigma for students and administrative burdens for school districts. Changes to the provision of subsidized school meals will have wide ranging effects. In 2018, more than 74 percent of school lunches and 85 percent of school breakfasts were provided for free or at a reduced price.³⁶ Plus, the percentage of students receiving free or reduced-price lunch is used as a metric of student poverty and impacts eligibility or funding amounts for other programs such as the Fresh Fruit and Vegetable Program.³⁷

The loss of free or reduced-price meals will lead to food insecurity, malnourishment, and a decline in nutritional standards which in turn will have especially detrimental consequences for

³⁴ Dorothy Rosenbaum, *SNAP's "Broad Based Categorical Eligibility" Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 8 (July 24, 2019).

³⁵ See Cong. Research Serv., R42054, *The Supplemental Nutritional Assistance Program (SNAP) Categorical Eligibility*, 18 (August 1, 2019), <https://fas.org/sgp/crs/misc/R42054.pdf>. ("While CBO analyses of past farm bill proposals have often included estimates of children who would lose free meals eligibility, USDA's RIA does not include such an estimate.")

³⁶ USDA, FNS, *National School Lunch Program: Participation and Lunches Served* (Data as of Sept. 6, 2019), <https://fns-prod.azureedge.net/sites/default/files/resource-files/slsummar-9.pdf>; USDA, FNS, *School Breakfast Program Participation and Meals Served* (Data as of Sept. 6, 2019).

³⁷ USDA, FNS, *The Fresh Fruit and Vegetable Program Fact Sheet* (Dec. 2017) <https://fns-prod.azureedge.net/sites/default/files/resource-files/FFVPFactSheet.pdf> ("the FFVP prioritizes schools with the highest percentage of children certified as eligible for free and reduced price meals").

children. According to the existing studies, food-insecure children are almost twice as likely to report being in fair or poor physical and mental health compared to children in food-secure families. Food-insecure children are also more likely to have learning difficulties and reduced academic performance, stomachaches, frequent headaches and colds, iron deficiency anemia, asthma, and mental health problems.³⁸ On the other hand, SNAP helps alleviate the problem of food insecurity. “Researchers have shown that children receiving SNAP are less likely than low-income non-participants to be in fair or poor health or underweight, and their families are less likely to make tradeoffs between paying for health care and paying for other basic needs, like food, housing, heating, and electricity.”³⁹ In contrast, “children who lose some or all of their SNAP benefits are more likely to have poor health and be food insecure compared to children in families that maintain benefits, and families that lose benefits are more likely to forgo medical care or make health care tradeoffs than families who consistently receive SNAP benefits.”⁴⁰

Moreover, school meals are subject to nutritional standards from the USDA and the states. See 42 U.S.C. §§ 1753(b), 1758(a)(1), 1758(f)(1), and 1773(e)(1); 77 Fed. Reg. 4088 (Jan. 26, 2012). These standards ensure that students get the necessary nutrients and nourishment they need to grow and thrive. Without access to a nutritious school lunch, families in need will skip meals or turn to less nutritious options. Malnourishment and malnutrition harm not only individuals, but also the States and their communities through increased burdens on public resources and increased medical expenses for families. The interests of the States are ultimately harmed by poorer nutrition.

B. Harms to State- and Privately-Funded Hunger and Nutrition Programs

The loss of SNAP benefits for millions of low-income Americans will also impose a heavy burden on the States and non-profits to provide alternative sources of food and nutrition. For example, several states, including Illinois (“Link Up Illinois”), Massachusetts (“Healthy Incentive Program”), Michigan (“Double Up Food Bucks”) New Mexico (“Farmer’s Market Double-Up Bucks”), and Vermont (“Crop Cash”), operate programs that in part use state funding to supplement SNAP spending on fruits and vegetables in order to promote healthy eating and foster economic growth. Several cities in the States including New York City (“Health Bucks”) Philadelphia (“Philly Food Bucks”), and Las Vegas (“Vegas Roots”) also run similar programs. A loss of SNAP benefits would impair the mission of these programs, decrease individual purchasing power, and mean less people have access to nutritious local produce. This would force the States to step in to restore access to healthy foods or lead people to look to privately funded programs to fill the gap.

³⁸ See J. T. Cook, et al., *Child Food Insecurity Increases Risks Posed by Household Food Insecurity to Young Children's Health*, J. Nutr, 136(4) 1073-1076 (2006); H.A. Eicher-Miller, et al., *Food Insecurity Is Associated with Iron Deficiency Anemia in US Adolescents*. Am. J. Cun. Num, 90(5), 1358-1371 (2009); D.L. Mangini, et al., *Household Food Insecurity Is Associated with Childhood Asthma*, J. NLJTR, 145(12), 2756-2764 (2015); K.A. McLaughlin, et al., *Food Insecurity and Mental Disorders in a National Sample of US Adolescents*, J Am Acad Child Adolesc. Psychiatry, 51(12), 1293-1303 (2012).

³⁹ Steven Carlson and Brynne Keith Jennings, *SNAP is Linked with Improved Nutritional Outcomes and Lower Health Care Costs*, Ctr. On Budget and Policy Priorities, (Jan. 17, 2018), <https://www.cbpp.org/research/food-assistance/snap-is-linked-with-improved-nutritional-outcomes-and-lower-health-care>

⁴⁰ *Id.*

Food pantries and the non-profit service providers from whom they receive referrals will also bear a substantial burden under the Proposed Rule. When families lose SNAP benefits, food pantries notice increased demand. For instance, during the recent government shutdown, food pantries saw a huge rise in customers during a traditionally quiet period due to delays in receiving SNAP benefits.⁴¹ As discussed infra in Section II.F., the States and their residents will lose millions of dollars in benefits and money spent at grocery stores and other retailers. In 2017, Kentucky food banks provided over 64 million meals and fed at least 1 in 7 residents.⁴² Food banks, food pantries, and other food programs do not have the funds or resources needed to compensate for additional demand due to the loss of SNAP benefits.⁴³ In addition, non-profit service providers that would normally refer people to SNAP will instead be required to direct people to the already overburdened food pantries. Non-profits are stretched thin and cannot handle the increased demand that will result from the Proposed Rule.

C. Harms to the Public Health and to State-Funded Medical Benefits

States' medical, disability, and other systems will be further burdened when individuals who lose SNAP benefits due to the Proposed Rule are malnourished.⁴⁴ Food insecurity is linked to some of the most common and potentially costly health conditions such as diabetes, obesity, and complications in pregnancy. Studies have shown that SNAP is associated with better health and, correspondingly, reduced health care costs. While food-insecure households spend 45 percent more on medical care compared to food-secure households, low-income adults enrolled in SNAP spent 25 percent less on medical care compared to those not enrolled. In addition, the use of SNAP benefits is associated with fewer sick days and outpatient visits among adults overall. As noted above in Section II.A., food insecurity among children is associated with learning difficulties and reduced academic performance, stomachaches, frequent headaches and colds, iron deficiency anemia, asthma, and mental health problems. Food insecurity increases the likelihood of chronic disease for all segments of the population. The costs of treating these maladies will be borne by the States and their medical providers in the form of increased treatment times and expenses.

Moreover, if finalized, the Proposed Rule would mire elderly individuals in food insecurity, which would leave them susceptible to detrimental health effects. The RIA itself acknowledges that approximately "13.2 percent of all SNAP households with elderly members will lose benefits (7.4 percent will fail the income test and 5.8 percent will fail the resource test)." RIA at 16. By losing their SNAP benefits, these low-income households with elderly individuals will likely have

⁴¹ See Jessica Allred, *Food Banks Warn They Will Not be Able to Meet Demand if Food Stamp Cuts Take Effect*, Talk Poverty (Mar. 26, 2019) <https://talkpoverty.org/2019/03/26/food-banks-warn-will-not-able-meet-demand-food-stamp-cuts-take-effect/>; Kristin Toussaint, *Government Shutdown will Cause 'SNAP Gap' Posing Challenge for NYC Food Pantries*, Metro (Feb. 5, 2019) <https://www.metro.us/news/local-news/new-york/government-shutdown-snap-gap-food-bank-for-nyc-report>

⁴² Tamara Sandberg, Op-Ed., *Food Banks in Kentucky Need More Federal Support, KAFB Director Says*, Courier Journal (Nov. 16, 2018) <https://www.courier-journal.com/story/opinion/contributors/2018/11/16/kentucky-association-food-banks-director-we-need-more-federal-support/2026181002/>.

⁴³ See *id.* (noting that 76 percent of New York City food pantries only have one month or less of cash on hand).

⁴⁴ See, e.g., S. Berkowitz, H. Seligman, J. Rigdon, et al., *Supplemental Nutrition Assistance Program (SNAP) Participation and Health Care Expenditures Among Low-Income Adults*, JAMA Internal Medicine (2017; 177(11):1642-49).

to cope with increased food insecurity, which in turn means they will have to cope with increased health problems. Studies have shown that food insecurity is significantly higher among low-income seniors than seniors with higher incomes.⁴⁵ Food-insecure seniors are more likely to experience health complications than food-secure seniors: food-insecure seniors are more than twice as likely to suffer from depression, “47 percent more likely to report congestive heart failure, almost 90 more likely to report asthma, and more than 65 percent likely to have had a heart attack.”⁴⁶

Not only do these elderly individuals face higher health risks as a result of food insecurity, but lack of food security often leads them to abandon their health care. Despite the higher health risks associated with decreased nutrition, food-insecure seniors must often choose between food and expensive medication. Rates of cost-related medication underuse⁴⁷ among low-income seniors increase as their food insecurity increases: the rates are “25 percent for those experiencing marginal food security (low level of food insecurity); 40 percent for those experiencing low food security; and 56 percent for those experiencing very low food security (most severe level of food insecurity).”⁴⁸ Receiving SNAP benefits prevents these low-income elderly individuals from facing food insecurity and provides them with sufficient resources to purchase food *and* medication. In fact, studies have shown that elderly SNAP recipients are “less likely to forgo needed medicine due to cost.”⁴⁹ Additionally, participation in SNAP by elderly individuals has been linked to “reduced hospital and nursing home admissions.”⁵⁰ However, the Proposed Rule’s elimination of BBCE would leave thousands of low-income elderly individuals without adequate nutrition to maintain their health and would deprive them of necessary financial resources to receive adequate medical treatment.

D. Administrative Burden on States in Administering SNAP

The Proposed Rule will harm the States by increasing administrative costs and burden on staff while forcing them to redirect resources away from essential program activities towards administrative tasks.⁵¹ In 2009, the Department urged the states to adopt BBCE in order to

⁴⁵ James P. Ziliak and Craig Gunderson, *The Consequences of Seniors Hunger in the United States: Evidence from the 1999-2014 NHANES*, Feeding America & Nat’l Foundation to End Senior Hunger, 8 (2017) (“29.8 percent of seniors with incomes below the poverty line are food insecure and 18.0 of seniors with incomes between the poverty line and 200% of the poverty line are food insecure. In contrast, the food insecurity rate for seniors with incomes above 200% of the poverty line is 3.6 percent.”).

⁴⁶ *Id.* at 5.

⁴⁷ Cost-related medication underuse is defined as “skipping medications, taking less medicine than prescribed, delaying filling a prescription, using lower cost medications, and not being able to afford medicine.” Food Research & Action Center, *Hunger & Health: Impact of Poverty, Food Insecurity, and Poor Nutrition*, 5 (2017).

⁴⁸ *Id.*

⁴⁹ Oliva Dean and Lynda Flowers, *Fact Sheet: Supplemental Nutrition Assistance Program (SNAP) Provides Benefits for Millions of Adults Ages 50 and Older*, AARP Public Policy Institute, 1 (Apr. 2018).

⁵⁰ *Id.*

⁵¹ The State of Washington predicts that it will spend over 6,000 hours working towards compliance with the Proposed Rule and that on an annual ongoing basis the Proposed Rule will require its employees to expend over 12,300 additional hours of administrative work.

“increase SNAP participation and reduce State workloads.”⁵² In addition, the GAO has consistently found that categorical eligibility policies can save state and federal resources while improving productivity.⁵³ The Proposed Rule will eliminate these efficiency gains and will increase administrative costs. In addition to the added cost of verifying and means testing more applications due to the imposition of an asset test, churn will rise as families would need to newly file or refile applications as their income and assets fluctuate around the proscribed amounts. Each instance where administrative churn requires filing a new application costs the States an average of \$80.⁵⁴ In addition, unlike the current regulations that only require states to inform FNS about the TANF benefits or services that confer categorical eligibility if those services are less than 50 percent funded by state MOE funds, 65 Fed. Reg. at 70,161, the Proposed Rule would require all states to notify FNS of all non-cash TANF benefits that confer categorical eligibility, regardless of how much TANF funding pays for those benefits. 84 Fed. Reg. at 35,574-75. This, too, will increase the administrative burden on states that wish to convey categorical eligibility to TANF beneficiaries.

The States estimate that overall administrative costs will spike drastically. First, according to the Department, adopting BBCE saves 7 percent in administrative costs per case. In addition, the States will have to educate and notify the public of the rule change, modify their currently existing administrative systems and processes, and retrain staff at significant expense. This includes both the public facing portals and the backend systems to verify assets. For example, Wisconsin estimates that it will cost over \$2.3 million to modify their client assistance portal and anticipates an increase of \$17.7 million in ongoing expenses related to their asset verification system. New Mexico predicts that it will cost \$230,000 to train agency staff on implementation of the new rule, and when Pennsylvania implemented an asset test in FY 2014, they paid approximately \$2.3 million more in administrative costs. Every dollar that the States spend on administrative costs as a result of the Proposed Rule is money taken away from needy families. Furthermore, the Proposed Rule shifts administrative costs and burdens onto the States for minimal savings as BBCE only accounts for 2 percent of SNAP costs.⁵⁵

E. Harms to Other State-Funded or Administered Programs That Depend on SNAP Eligibility

The States adopted BBCE policies at the insistence of the Department and have relied on it to harmonize their benefits administration and confer eligibility to a host of other state-funded or administered programs.⁵⁶ For example, in Hawaii, Illinois, New Jersey, Pennsylvania, Washington, and Wisconsin, the Low Income Housing Energy Assistance Program, which provides home energy assistance to low-income families, relies in part on SNAP BBCE. Under

⁵² September 2009 Guidance (“Please encourage your States to adopt broad-based categorical eligibility to improve SNAP operations in your States.”).

⁵³ 2012 GAO Report at 28.

⁵⁴ USDA, *FNS Office of Policy Support, Understanding the Rates, Causes, and Costs of Churning in the Supplemental Nutrition Assistance Program (SNAP) Final Report*, xii, (Nov. 2014), <https://fns-prod.azureedge.net/sites/default/files/ops/SNAPChurning.pdf>.

⁵⁵ Dorothy Rosenbaum, *SNAP’s “Broad Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 2 n.4 (July 24, 2019).

⁵⁶ September 2009 Guidance.

the Proposed Rule, impacted households would have to apply for and be enrolled in the program manually rather than relying on the automatic referral and enrollment process for SNAP recipients.⁵⁷ Another state program that utilizes automatic enrollment is the Lifeline Program, which offers affordable communication services to low-income families in Nevada, Vermont, and Wisconsin. Even in the absence of automatic enrollment, individuals will lose access to other state-funded programs whose eligibility requirements mirror the rules for SNAP. This would include the California Food Assistance Program, which provides nutrition benefits to lawfully present immigrants not yet eligible for SNAP, and its Supplemental Nutrition Benefit, which provides nutrition benefits to certain households that also receive SSI or State Supplementary Payment.

F. Harms to State and Local Economies

The Proposed Rule fails to account for the harm to the local and national economies that will occur when millions of people are no longer eligible for SNAP benefits. SNAP is a highly efficient program that produces benefits to businesses and individuals beyond the direct recipients. 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.⁵⁸ During strong economic times, \$1 in redeemed SNAP benefits means more than \$1.20 in the local economy.⁵⁹ During a recession, \$1 in redeemed SNAP benefits generates more than \$1.70 in economic activity.⁶⁰ Under the Proposed Rule, each State predicts they will have over 3,000 households lose benefits, with California, New York, and Pennsylvania estimating that over 100,000 households will be affected. In terms of individual recipients, most of the States including California, Connecticut, Illinois, Massachusetts, Michigan, New York, New Jersey, Nevada, Oregon, Pennsylvania, and Washington predict that over 40,000 of their residents will lose benefits. For instance, Michigan predicts that over 75,000 households and nearly 145,000 people will lose benefits, causing the state to miss out on over \$101 million in economic activity. Pennsylvania families could lose out on as much as \$100 million per year in benefits, and when the economic multiplier is included, Pennsylvania is losing nearly \$170 million in economic activity. About 68,000 New Jersey residents would lose SNAP benefits under the Proposed Rule,

⁵⁷ In Wisconsin the program is called Wisconsin Home Energy Assistance Program (WHEAP)

⁵⁸ See generally Mark M. Zandi, *Assessing the Macro Economic Impact of Fiscal Stimulus 2008*, (Jan. 2008) <https://www.economy.com/mark-zandi/documents/Stimulus-Impact-2008.pdf>; Kenneth Hanson, “The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP,” US DA.. (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*, US DA.. (Dec. 2011), https://www.fns.usda.gov/sites/default/files/bc_facts.pdf; *Chart Book: SNAP Helps Struggling Families Put Food on the Table*, Ctr. 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>.

⁵⁹ Alan S. Blinder & Mark Zandi, *The Financial Crisis: Lessons for the Next One*, Ctr. on Budget and Policy Priorities (Oct. 15, 2015), <https://www.cbpp.org/research/economy/the-financial-crisis-lessons-for-the-next-one>.

⁶⁰ *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*, USDA., 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.”).

including 26,000 children, and the state would also lose more than \$33 million annually in benefits and money spent in grocery stores, farmer's markets, and other food retailers.⁶¹

SNAP generates revenue for grocery stores both large and small. SNAP expenditures make up about 10 percent of all grocery expenditures nationwide,⁶² and an even higher percentage in low-income areas where SNAP benefits are used for a greater portion of sales.⁶³ SNAP helps many food retailers operating on thin margins to remain in business, which improves food access for all residents. SNAP also supports employment in rural areas and small towns, where it created and bolstered about 567,000 jobs in 2017, including almost 50,000 in agriculture.⁶⁴ 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.⁶⁵ This greater purchasing power also benefits state governments, which see increased revenue from additional sales tax when more people are eligible for SNAP benefits.⁶⁶

The Proposed Rule also threatens to harm the national economy by terminating SNAP benefits for people who currently receive benefits in the 43 states that have expanded categorical eligibility under PRWORA. By the Administration's own calculations, the Proposed Rule would take food away from at least 3.1 million low-income Americans, resulting in a loss of at least \$10.5 billion in SNAP benefits over 4 years.⁶⁷ 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.⁶⁸ Historically, SNAP has helped to shorten recessions and dampen the effects of an economic downturn. Without the mitigating effects of the \$10.5 billion in SNAP benefits for millions of Americans, the impact of the next recession will escalate.

⁶¹ For estimates of the number of households and SNAP participants in each state affected by the Proposed Rule and the average amount benefits they stand to lose, see *New Research Analyzes State-Level Impact of USDA Proposal to End SNAP Broad-Based Categorical Eligibility*, <https://www.stateofobesity.org/new-research-analyzes-state-level-impact-of-usda-proposal-to-end-snap-broad-based-categorical-eligibility/> (last visited Sept. 19, 2019).

⁶² Elizabeth Wolkomir, *SNAP Boosts Retailers and Local Economies*, Ctr. on Budget and Policy Priorities (Apr. 6, 2018), <https://www.cbpp.org/research/food-assistance/snap-boosts-retailers-and-local-economies>.

⁶³ 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>.

⁶⁴ *Id.*

⁶⁵ Wolkomir, *supra* n.62.

⁶⁶ 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).

⁶⁷ The RIA purports to project costs for 2019, however, the Proposed Rule will not and cannot be in effect in 2019, and the RIA does not estimate the number of SNAP dollars that will be lost from the economy for five years, as it purports to. For that reason alone, the RIA is deeply flawed.

⁶⁸ See Marcy Gordon, *74% of Economists in Survey See US Recession by end of 2021*, Associated Press (Aug. 19, 2019), <https://apnews.com/3d77bbfda266497699554a754c124735>.

III. The Proposed Rule Would, if Finalized, Violate the Administrative Procedure Act.

The Administrative Procedure Act (“APA”) provides that agency action is unlawful and must be set aside if it is “not in accordance with law;” “in excess of statutory jurisdiction, authority, or limitations;” or “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §§ 706(2)(A), (C). The Proposed Rule contravenes the clear intent of Congress set out in PRWORA and the FNA; it seeks to regulate TANF programs and exceeds the Department’s statutory authority; and is arbitrary and capricious for a number of reasons, including that it would change longstanding agency policy without a legitimate rationale and it fails to consider all of the costs of the proposed changes.

A. The Proposed Rule Conflicts with the Clear Intent of Congress.

The Proposed Rule is contrary to the purpose of the FNA and PRWORA, it limits categorical eligibility for SNAP in a way that Congress did not, and it implements changes that Congress has repeatedly rejected. When agency action contradicts the congressional intent of an underlying law, the action can be set aside as “not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Comm. Inc.*, 537 U.S. 293, 300 (2003). Here, the Proposed Rule’s addition of limitations on eligibility that are not based on statute, that undermine the purpose of federal laws, and that have been repeatedly rejected by Congress are not in accordance with the underlying intent of the FNA, PRWORA, and subsequent amendments.

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 3 million people who struggle to make ends meet will lose their eligibility for SNAP because they do not meet SNAP’s gross income or asset limitations. RIA at 3. But even more people will lose benefits under the Proposed Rule. Despite the fact that most households that are currently categorically eligible for SNAP meet the gross income and asset requirements to be eligible for SNAP, the additional burden of verifying assets takes more time and requires more paperwork, which will cause more households to lose benefits on a short- or long-term basis. Some families may not apply at all, while other families may have their benefits delayed due to the verification process. All of these low-income families and individuals will go hungry. The Proposed Rule thus conflicts with the very purpose of the FNA.

The Proposed Rule also conflicts with the purpose of Congress when it enacted PRWORA. When Congress ended AFDC and replaced it with TANF, it could have limited the types of TANF benefits that would confer categorical eligibility for SNAP, but it did not. Rather, Congress substituted the receipt of benefits under TANF for AFDC in the statute listing the programs that convey categorical eligibility for SNAP without limitation. *See* 7 U.S.C. § 2014(a). TANF does not require states to use TANF/MOE funds to serve only TANF’s first two goals, or to provide any specific type of benefit to serve any of TANF’s goals. Rather, Congress permitted states the flexibility to address the causes of child poverty in ways that best serve the residents of their states. Congress permitted states to convey categorical eligibility for SNAP based on state-run TANF programs. Congress did not require that TANF benefits be “substantial” or “ongoing,” or that they only be of particular types in order to convey categorical eligibility. The Department expressly

disagrees with this congressional intent and asserts that new regulations are necessary “to ensure that TANF-funded programs conferring categorical eligibility align more closely with SNAP eligibility standards outlined in the [FNA].” 84 Fed. Reg. at 35,572. By proposing a rule that would effectively prevent states from conveying categorical eligibility to recipients of TANF- and MOE-funded benefits and services that serve the third and fourth goals of TANF or that do not meet the arbitrary new requirements that the benefits be “substantial” and “ongoing,” the Department is attempting to alter the statutory changes made by Congress with PRWORA. The Proposed Rule thus plainly conflicts with PRWORA.

Prior administrations and members of Congress understood that congressional action would be required to accomplish the changes to categorical eligibility for SNAP that the Department seeks to make in the Proposed Rule. Even though the George W. Bush Administration tried no fewer than five times to limit categorical eligibility for SNAP based on non-cash TANF benefits,⁶⁹ the administration never once proposed to limit categorical eligibility by regulation. The reason for this is clear: The FNA itself makes households that receive TANF benefits categorically eligible for SNAP. The breadth of the changes made to FNA by PRWORA did not and does not limit the types or amounts of TANF benefits that can trigger SNAP eligibility. Even an administration that was eager to limit categorical eligibility for SNAP understood that it did not have the authority to do so without a change in the statute. That statutory change could come to TANF itself, or it could be in the FNA, but it cannot be done by regulation alone without a change in statutory language.

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 categorical eligibility based on non-cash TANF benefits, some of which is 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 non-cash TANF benefits that can convey categorical eligibility for SNAP. While Congress explicitly chose not to limit categorical eligibility for SNAP in any way, the Department seeks to limit *both* the cash and non-cash TANF benefits that can convey categorical eligibility for SNAP. Dissatisfied with the perceived lack of statutory limitations on TANF benefits that can convey categorical eligibility for SNAP, the Department seeks to end-run the legislative process and implement requirements that Congress refused to adopt through legislation and go even further than has ever been considered by Congress by adding limitations on the TANF cash assistance that can convey categorical eligibility for SNAP.

Congress refused to make these statutory changes and intended for categorical eligibility for SNAP to continue to be granted to recipients of TANF benefits and services. The Proposed Rule plainly conflicts with the intent of Congress.

B. The Proposed Rule Exceeds the Authority of the USDA

While the Department is authorized to promulgate regulations to clarify definitions in the FNA, *see* 7 U.S.C. § 2013(c), it does not have the authority to regulate TANF programs; HHS is the agency authorized to regulate TANF. *See* 42 U.S.C. § 616. But with the Proposed Rule, the

⁶⁹ *See supra* n.25.

Department seeks to usurp HHS's authority and discourage states from designing and administering TANF-funded programs in ways the Department apparently believes to be less legitimate than other uses of TANF funds, and it seeks to incentivize states to design their TANF programs in ways that the Department thinks are somehow more legitimate. Not only is this contrary to congressional intent, it exceeds the authority Congress delegated to the Department. Agency actions that do not fall within the scope of a statutory delegation of authority are *ultra vires* and will be invalidated by reviewing courts. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *SEC v. Sloan*, 436 U.S. 103, 118–19 (1978); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 334, (1961); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (“An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority.”); 5 U.S.C. § 706(2)(C).

Congress purposefully granted states a significant amount of flexibility in their administration of their TANF block grants. The purpose of the block grant is “to *increase* the flexibility of States in operating a program designed to” fulfill one of the four purposes of TANF. 42 U.S.C. § 601(a) (emphasis added). Reflecting this increased flexibility, states are authorized to use their TANF block grants “in any manner reasonably calculated” to accomplish the statutorily defined goals of TANF. 42 U.S.C. § 604(a)(1). HHS itself recognized this increased flexibility mandated by PRWORA and its limiting effect on federal regulatory authority over this new welfare program. In the Final Rule on TANF promulgated on April 12, 1999, the agency explained the new relationship between the federal government and states under PRWORA. HHS acknowledged that PRWORA provides states “broad flexibility to set eligibility rules and decide what benefits are most appropriate...without getting the ‘approval’ of the Federal government.” *Temporary Assistance for Needy Families Program (TANF)*, 64 Fed. Reg. 17,720, 17,722 (Apr. 12, 1999). In turn, PRWORA “limits Federal regulatory and enforcement authority.” *Id.*⁷⁰

Since the enactment of TANF, HHS has continued to allow states a great degree of flexibility in their discretion to administer TANF benefits. HHS regulations of TANF have not created any minimum amount or timeframe for TANF benefits. The Department itself acknowledges that “[t]here is no minimum benefit amount currently required by TANF, in keeping with the flexibility afforded to States by that program.” 84 Fed. Reg. at 35,573. Further, even under current HHS regulations, states have maintained broad latitude to spend TANF and MOE funds “on benefits, services, or activities aimed to achieve *any* of the goals of TANF.”⁷¹ These non-cash benefits are not just limited to subsidized employment, work supports, and childcare supports. As the federal agency authorized with administering TANF, only HHS may promulgate rules regarding its implementation. The Department may not step in where HHS has declined to regulate. *See Dep't of Treasury v. Fed. Labor Relations Auth.*, 837 F.2d 1163, 1167 (D.C. Cir.

⁷⁰ Federal law does impose a limited number of requirements on states' use of TANF funds. These requirements almost exclusively apply to the use of TANF funds to provide “assistance.” Although federal law does not define “assistance,” HHS has defined it as “cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).” 45 C.F.R. § 260.31; *see also* Cong. Research Serv., “The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements,” RL 32748 at 11-12 (Dec. 14, 2017).

⁷¹ Cong. Research Serv., “The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements,” RL 32748 at 20 (Dec. 14, 2017) (emphasis added).

1988) (agency interpretation of a statute whose administration has been entrusted to another agency is not entitled deference).

If finalized, the Proposed Rule would discourage states' discretion in administering TANF in a far more severe manner than has any HHS regulation, which would undermine the flexibility that Congress sought to provide to the states in their administration of TANF block grants. To continue experiencing the same level of administrative streamlining that categorical eligibility provides to state agencies, states will likely adapt the manner in which they administer TANF to match the Department's new requirements for categorical eligibility. Rather than providing their residents with non-cash benefits tailored to meet their unique circumstances, states may limit non-cash benefits to those prioritized by the Department—subsidized employment, work supports, and childcare supports. To maximize the number of residents who would be categorically eligible for SNAP, states would be incentivized to restrict the types of non-cash benefits to those that have a more readily available market valuation and a more discernible time period to comply with the Proposed Rule's thresholds. This incentive improperly end-runs HHS's regulatory authority to govern state agencies' administration of TANF and undermines the flexibility that HHS regulations have preserved. As such, the Proposed Rule exceeds the Department's authority.

C. The Proposed Rule Fails to Provide a Legitimate Justification for Departing from the Longstanding Policy of the USDA.

The Proposed Rule fails to provide a reasoned explanation for its radical departure from the Department's longstanding policy recognizing states' authority to expand categorical eligibility for SNAP and encouraging them to do so. Indeed, the Proposed Rule abandons decades-old policy without any support whatsoever. This alone would make the Proposed Rule arbitrary and capricious if it were finalized. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (federal agency has a "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); *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012). Furthermore, agency changes to longstanding policies that have engendered reliance interests over time must "show that there are good reasons for the new policy," and provide a "detailed justification" for its new direction to survive arbitrary and capricious review. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). Because the Proposed Rule contradicts the USDA's own longstanding position that has engendered significant reliance interests by the States without reasoned support or detailed justification, it is arbitrary and capricious under the APA.

The Proposed Rule asserts that there are two "issues" with categorical eligibility for TANF benefits: (1) it permits states to convey categorical eligibility based on "nominal non-cash benefits or services, such as TANF-funded brochures or hotline numbers;" and (2) federal auditors "raised program integrity concerns about the wide adoption of categorical eligibility policies and the prevalence of TANF benefits with minimal value." 84 Fed. Reg. at 35,572. However, the Department fails to provide any evidence that the TANF benefits provided by the states do not comply with the TANF program itself, or with the Department's own guidance regarding categorical eligibility. Moreover, the Department's concern with whether states convey categorical

eligibility for SNAP based on TANF benefits seems entirely misplaced given that eligibility alone does not confer SNAP *benefits*. The Department’s fixation on categorical eligibility as a “loophole” when there is no evidence of a problem with ineligible individuals who have high net incomes receiving SNAP benefits is an effort to articulate a problem where there is none. It does not justify such a drastic change in policy.

As support for changing its longstanding policies regarding categorical eligibility, the Department cites to a 2012 “audit” by the Government Accountability Office (“GAO”) that cited some accounts of states conferring categorical eligibility to households “without actually providing the TANF-funded benefit or service” that conveys categorical eligibility. 84 Fed. Reg. at 35,572 (citing U.S. Gov’t Accountability Office, GAO-12-670, *SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: Improved Oversight of State Eligibility Expansions Needed* 34-35 (July 2012) (“2012 GAO Report”). The Department also cites an audit by the USDA Office of Inspector General (“OIG”) for the proposition that households who were determined categorically eligible based on the receipt of a TANF-funded brochure “did not actually receive the brochure unless they specifically requested it.” *Id.* (citing USDA Office of Inspector General, “FNS Quality Control Process for SNAP Error Rate Audit Report 27601-0002-41,” (Sept. 2015) *available at* <https://www.usda.gov/oig/webdocs/27601-0002-41.pdf> (“2015 OIG Report”). The Department cites absolutely no evidence of “issues” or “concerns” with other types of categorical eligibility, including categorical eligibility based on TANF cash assistance and TANF non-cash services and benefits that serve TANF’s second goal of promoting work and job-preparedness.

Leaving aside that the Department’s own regulations only require that households receive *or be authorized to receive* a TANF-funded benefit that conveys categorical eligibility, 7 C.F.R. § 273.2(j)(2)(i), neither the 2012 GAO Report nor the 2015 OIG Report supports or even suggests eliminating BBCE or changing any other type of categorical eligibility for SNAP. Rather, the GAO recommended only that the Secretary of Agriculture require FNS to improve oversight of BBCE by reviewing state procedures for implementing BBCE, disseminating guidance, and revisiting agency guidance. 2012 GAO Report at 40-41. The OIG Report stated that BBCE policies must “ensure that SNAP applicants received *or were authorized to receive* services” from a program that meets the regulatory requirements regarding funding percentages, program purposes, and gross monthly income levels. 2015 OIG Report at 37 (emphasis added). In other words, both reports emphasized communicating and ensuring compliance with BBCE requirements. As the Department notes, it did precisely that when it issued guidance in 2016. 84 Fed. Reg. at 35,572 (citing USDA, FNS, “Clarification on Characteristics of Broad-Based Categorical Eligibility Programs,” (Dec. 27, 2016) *available at* fns-prod.azureedge.net/sites/default/files/snap/clarification-bbce-memo.pdf). Despite the lack of any evidence of current program integrity problems with categorical eligibility broadly, the Department now proposes to “narrow the scope of potential TANF benefits conferring categorical eligibility,” including all cash and non-cash TANF benefits. There is simply no legitimate justification for drastically changing the Department’s categorical eligibility policy now.

Because one of the key performance measures for SNAP is the rate of participation among eligible households, the Department has encouraged states to increase participation in the program among eligible households. 2012 GAO Report at 6. The States have relied on the current regulations and on agency guidance that encouraged states to adopt BBCE policies “to simplify

the administration of SNAP and help low-income households meet their nutritional needs.”⁷² If the Proposed Rule is finalized, the Department’s lack of reasoned explanation would be considered particularly egregious given that the Proposed Rule’s radical departure from long-established policy will upend strong reliance interests by the States. The States have designed their TANF programs, their application processes, and their internal training, staffing, and administrative systems based on the Department’s longstanding interpretation of the categorical eligibility statutory provision and its guidance to the states.

While the Department issued guidance in 1999 and regulations in 2000 permitting states to adopt BBCE policies, few states implemented them in the first ten years after PRWORA was enacted. 2012 GAO Report at 11-12. By Fiscal Year 2006, only seven states had implemented BBCE policies. *Id.* But when the economy took a downturn in 2007, the Department began encouraging states to adopt BBCE policies. *Id.* at 11. Indeed, an early GAO report noted that several states were *not* conferring categorical eligibility to households receiving or authorized to receive TANF non-cash services, as required by federal regulations, and recommended that FNS provide guidance and technical assistance to states so that households would get the categorical eligibility for SNAP to which they were entitled.⁷³ Even after more than half of the states implemented BBCE, the Department actively encouraged other states to implement BBCE “to increase SNAP participation and reduce State workloads.”⁷⁴ The Department issued guidance encouraging states to implement BBCE two more times in 2009, and twice in 2010.⁷⁵ At the Department’s urging, more than a dozen additional states took advantage of the BBCE option and expanded categorical eligibility for SNAP for their residents. 2012 GAO Report at 11-12. The majority of states now have BBCE policies—all of which would be eliminated by the Proposed Rule. The reliance interests of the States are overwhelming, and there is no justification for the Department’s sudden and drastic change. The 2012 GAO Report relied on by the Department as justification for the Proposed Rule cautioned that “any changes to BBCE should carefully weigh the potential . . . costs, which . . . include the increased burden on state and local staff.” *Id.* at 40.

The only other justification offered for the Proposed Rule—yet not in the Proposed Rule itself—is the Secretary of Agriculture’s assertion that states have “misused” the flexibility of TANF and BBCE, which he claims “has become so egregious that a millionaire living in Minnesota successfully enrolled in the program.”⁷⁶ The Secretary’s assertions—citing one bad actor as support for eliminating benefits for more than 3 million people and imposing substantial costs on the states—not only misrepresent the households that receive SNAP benefits, but also fail to acknowledge the Department’s own role in expanding BBCE for SNAP. Rather than citing to

⁷² March 2010 Guidance at 1.

⁷³ U.S. Gov’t Accountability Office, *FOOD STAMP PROGRAM: FNS Could Improve Guidance and Monitoring to Help Ensure Appropriate Use of Noncash Categorical Eligibility* (Mar. 2007).

⁷⁴ September 2009 Guidance at 1.

⁷⁵ USDA, FNS, “Categorical Eligibility Questions and Answers” (Nov. 20, 2009); USDA, FNS, “Categorical Eligibility Questions and Answers” (Dec. 15, 2009); USDA, FNS, “Categorical Eligibility Questions and Answers” (Jan. 26, 2010); USDA, FNS, “Supplemental Nutrition Assistance Program: Using Broad-Based Categorical Eligibility to Exclude Refundable Tax Credits Permanently” (Mar. 18, 2010).

⁷⁶ *See supra* nn. 31-32. Because this individual’s income was low enough to qualify for SNAP benefits, there is no evidence cited by Secretary Perdue that this individual would not otherwise be eligible for SNAP benefits, especially because his purported riches were reportedly part of a retirement account that would not be counted as an asset even under traditional SNAP eligibility requirements. 7 U.S.C. § 2014(g)(7).

any actual misuse or abuse by states, all the evidence available to the Department is that states have used BBCE at the Department’s urging in the very ways that it intended—to permit states to meet the needs of their food-insecure communities while easing their own administrative burden. The adverse consequences of upending these reliance interests are substantial. *See supra* Section II. The Proposed Rule arbitrarily disregards these strong reliance interests of the states and their residents, and would be arbitrary and capricious, if finalized. *See Encino Motorcars*, 136 S. Ct. at 2126.

D. The Proposed Rule is Arbitrary and Capricious

Agency action can be arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43-44 (1983). The Department’s stated reasons for the Proposed Rule are unsupported and inconsistent with the available evidence. The Proposed Rule fails entirely to consider the significant upheaval it would cause and grossly fails to appropriately assess its costs. There is no evidence cited to support the termination of SNAP eligibility for millions of people. Rather, all the available evidence shows that the group of people who will lose SNAP benefits under the Proposed Rule are low-income individuals and families struggling to make ends meet and saving for a brighter future or to cover emergency personal or medical expenses.

1. *The Department Provides No Grounds for Limiting Categorical Eligibility to “Ongoing” and “Substantial” Support from TANF.*

The Proposed Rule provides no legitimate justification for the creation of a threshold for TANF benefits to confer categorical eligibility for SNAP. The FNA does not contain the qualifiers “ongoing” or “substantial” when defining which TANF benefits may confer categorical eligibility. *See* 7 U.S.C. § 2014(a) With the exception of some limitations provided for income eligibility (e.g., 200 percent of the FPL for benefits provided for TANF categories three and four), the Department’s regulations regarding categorical eligibility have purposefully allowed the states flexibility in administering TANF benefits in order to allow as many low-income families as possible to receive categorical eligibility while easing the administrative burden on states in determining eligibility for benefits.

The primary justification provided for creating the new limitations of “ongoing” and “substantial” support from TANF is the concern that some current state practices in administering qualifying TANF benefits “threaten[] the integrity of categorical eligibility.” 84 Fed. Reg. at 35,573. However, the Department provides very little data to uphold this assertion. Only a very small percentage of families are above the federal thresholds for SNAP but still benefit from categorical eligibility where they may not otherwise be able to receive benefits.⁷⁷ Additionally, these households have had very little impact on SNAP costs. In fact, a report from the Government

⁷⁷ The Regulatory Impact Analysis found that 4.9 percent of households would fail the Federal SNAP income test and 4.1 percent would fail the Federal resource test. 84 Fed. Reg. at 35,575.

Accountability Office found that SNAP benefit costs increased less than 1 percent as a result of BBCE in FY 2010.⁷⁸

Moreover, the Proposed Rule ignores a critical step in the administration of SNAP benefits – although a household may be eligible to receive SNAP benefits, the benefit must still be calculated based on the household’s net income. If a household of three or more people has a net income above 100 percent of the FPL, they will not receive any SNAP benefits even though they are categorically eligible.⁷⁹ Even categorically eligible households “must complete a SNAP application, have an interview with a state official, document their financial and other circumstances, report changes in their circumstances, and regularly reapply for SNAP.”⁸⁰ Only a miniscule amount of SNAP benefits – approximately 0.2 percent – went to households with net income of more than 100 percent of the FPL in 2017.⁸¹ A GAO report found that households that would not have been eligible for SNAP without BBCE received a monthly SNAP benefit of \$81, as compared to the \$293 monthly SNAP benefit received by all other SNAP households.⁸² As discussed below, however, most of this small group of SNAP recipients will benefit from the cushion that categorical eligibility provides to allow them to become more self-sufficient rather than endure the harms of the benefit cliff. The Department cannot, therefore, reasonably argue that without the thresholds created by the Proposed Rule, the integrity of categorical eligibility and SNAP is imperiled.

2. *The Proposed Rule Sets an Arbitrary Minimum TANF-Funded Benefit as the Basis for Categorical Eligibility.*

In setting the new limitations on which TANF-funded benefits can confer categorical eligibility, the Proposed Rule arbitrarily establishes that the minimum value of these benefits must be \$50 in order to be considered “substantial,” and the recipient must be qualified to receive the benefit for at least six months in order for it to be considered “ongoing.” However, the Proposed Rule provides no legitimate justification for these new minimums.

⁷⁸ U.S. Gov’t Accountability Office., *FEDERAL LOW-INCOME PROGRAMS: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules*, 35 n.54 (June 2017), <https://www.gao.gov/assets/690/685551.pdf>.

⁷⁹ One and two-person households may receive a minimum SNAP benefit if their gross income is no higher than 200 percent of the FPL, but their net income exceeds 100 percent of the FPL. However, this minimum benefit is only \$15, far less than the average monthly benefit of \$134 for one-person households and \$247 for two-person households. See Ctr on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits*, (Oct. 16, 2018), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits>.

⁸⁰ Dorothy Rosenbaum, *SNAP’s “Broad-Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 4 (July 30, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-24-19fa.pdf>.

⁸¹ *Id.*

⁸² 2012 GAO Report at 25, <https://www.gao.gov/assets/600/593070.pdf>; see also *The Potential Implications of Eliminating Broad-Based Categorical Eligibility for SNAP Household: Hearing Before the Subcomm. on Nutrition, Oversight, & Dep’t Operations of the H. Comm. on Agric.*, 116th Cong. 7 (2019) (statement of Lisa Davis, Senior Vice President, Share Our Strength’s No Kid Hungry Campaign), <https://agriculture.house.gov/uploadedfiles/hhrg-116-ag03-wstate-lisadavisl-20190620.pdf> (hereinafter “Davis Testimony”).

The Proposed Rule establishes a minimum amount of \$50 as its threshold for a “substantial” TANF-funded benefit, but it provides no justification or calculation for why \$50 should be the minimum. As the Department itself recognizes, there is no minimum TANF benefit, 84 Fed. Reg. at 35,573, and some TANF benefits do not have “a ready market valuation,” *id.* at 35,574. The Department fails to provide a legitimate explanation for why \$50 should be the minimum amount for both cash *and* non-cash assistance. The only discernible explanation is that the amount was determined in consultation with HHS, but there is no explanation for how either agency reached the amount. *See id.* at 35,573. The Department provides no data in support of the proposed minimum amount, such as the average value of TANF benefits provided, or the percentages of benefits conferred of only nominal value as compared to benefits with a determinable monetary value. The only statistic provided in the RIA in support of the \$50 minimum is that less than 0.2 percent of all SNAP households receive less than \$50 in TANF *cash* assistance. RIA at 12. This statistic does not account for the value of non-cash TANF assistance provided to SNAP households.

After choosing this arbitrary \$50 minimum value despite acknowledging that there is no minimum TANF benefit, the Department notes that it is *possible* that HHS will, sometime in the future, set a minimum TANF benefit. 84 Fed. Reg. at 35,573. But rather than adopting any TANF limitations *in toto*, the Proposed Rule only incorporates an HHS-imposed minimum TANF benefit for categorical eligibility *if* that minimum TANF benefit exceeds the arbitrary \$50 amount set by the Proposed Rule. This only further demonstrates that the \$50 amount is completely arbitrary and is not a reasonable interpretation of 7 U.S.C. 2014(a).

Moreover, the Department acknowledges that there are TANF benefits provided that do not have an easily determinable market valuation, including “education and training, job search assistance, or work experience [that] are provided on an hourly or weekly basis to program participants.” 84 Fed. Reg. at 35,574. However, these benefits serve to increase employment and financial stability, serving the second goal of TANF. Under the Proposed Rule, these types of services cannot convey categorical eligibility because they do not have a ready market valuation of at least \$50. While the Department requests comment as to “whether and how the benefits from such hourly-based programs could be valued for the purposes of conferring categorical eligibility, or other ways to determine whether such benefits could be ongoing and substantial,” *id.*, it fails to provide a rationale for why market valuation is necessary and why only certain types of non-cash assistance may be used to confer categorical eligibility. This lack of rationale underscores the arbitrariness of the proposed standard for “substantial.”

In addition to the arbitrary standard set for the “substantial” TANF-funded benefits, the Proposed Rule seeks to limit the types of benefits that may confer categorical eligibility to those that are “ongoing,” which it defines as 6 months without providing any legitimate justification for doing so. The only explanation provided for how this number was reached is that “it is the certification period length for many SNAP households and a mid-point for the most common certification period length of 12 months.” 84 Fed. Reg. at 35,573. Despite the Department’s assertion that this six-month threshold would “maintain program alignment,” *id.*, it provides no information about average certification periods for TANF benefits or any other comparison to TANF benefit administration. Moreover, such rigid alignment ignores that TANF and SNAP serve different purposes and thus may require different certification periods, and that categorical

eligibility is meant to ease burdens for both households and state agencies by streamlining income eligibility determinations. In the RIA, the Department adds that “[i]f a shorter timeframe were used, States might need to shorten certification periods in order to ensure that households’ circumstances have not changed.” RIA at 12. This purported justification fails to account for the requirement under SNAP for households to report certain changed circumstances, such as an increase in income, that would affect eligibility for SNAP.⁸³ Some households are even required to report their circumstances on a monthly basis.⁸⁴ This failure to consider important aspects of benefit program administration highlights the arbitrary and capricious nature of the proposed “ongoing” threshold.

3. The Proposed Rule Does Not Serve Its Purported Goal of Moving Families Toward Self-Sufficiency.

Eliminating BBCE undermines multiple goals of SNAP, including to promote food security, to encourage self-sufficiency, and to incentivize increased earnings. In fact, by eliminating BBCE, the Proposed Rule would essentially guarantee that low-income households near the federal income limits will remain in poverty without receiving much-needed assistance and be disincentivized to seek increased income and to save that income. BBCE can provide these households with a leg up by (1) providing a buffer against a benefit cliff and (2) encouraging families to accrue savings.

States have used categorical eligibility in part to prevent certain low-income households from facing a “benefit cliff.” In households with gross incomes slightly below 130 percent of the FPL, even a small increase in gross income can push the household’s income beyond the federal income limit, causing them to lose their SNAP benefits. The benefit cliff occurs because some of these households have significant expenses, which severely limit money that can be spent on food. When calculating SNAP benefits, deductions are made to gross income for such expenses, which include childcare or other dependent care expenses, child support, medical expenses (for household members who are elderly or have a disability), and excess shelter costs.⁸⁵ These deductions result in a higher SNAP benefit amount. When these households lose their SNAP benefits, they still have to pay for their significant expenses, but may not be earning sufficient additional income to offset the loss of their SNAP benefits. Because a benefit cliff can leave households worse off financially even when earning slightly higher income, households may be forced to avoid higher-paying work to ensure that they have sufficient funds available for food. As such, the benefit cliff traps these households in a cycle of poverty.

With BBCE, states have been able to gradually phase SNAP recipients off their benefits, thus eliminating the benefit cliff. These households can accept higher-paying jobs and still receive SNAP benefits. Because these households must still undergo a benefit calculation, their SNAP benefits will be reduced, albeit at a gradual rate rather than cut off altogether. Reports have shown

⁸³ 7 C.F.R. § 273.12; USDA, FNS, *Facts About SNAP* (Aug. 14, 2019), <https://www.fns.usda.gov/snap/facts>.

⁸⁴ *See* 7 C.F.R. § 273.21.

⁸⁵ Excess shelter costs are the portion of housing costs that exceed half of net income after all other deductions. Ctr. on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits*, (Oct. 16, 2018), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits>.

that “[f]or every additional dollar a SNAP recipient earns, his or her benefits decline by only 24 to 36 cents, providing families with a strong incentive to work longer hours or to seek and accept higher paying employment.”⁸⁶ With BBCE, therefore, SNAP recipients can seek higher incomes without worrying that an increased income will leave them hungry or worse off financially.

Eliminating BBCE could also hinder SNAP households’ ability to achieve self-sufficiency by discouraging households from saving money, which can be used to offset unexpected expenses or to invest in resources that can lead to increased job stability. Federal SNAP asset limits restrict the amount of assets that a household may possess to qualify for SNAP. Currently, households without a member who is elderly or disabled cannot have assets of more than \$2,250, and households with a member who is elderly or disabled cannot have assets of more than \$3,500.⁸⁷ Assets that can contribute to food purchases, including savings accounts, count towards this asset limit.⁸⁸ In fact, a study conducted by the Urban Institute found that “if BBCE policies were eliminated, 16 percent of SNAP-eligible units with incomes below the SNAP federal eligibility limit would be ineligible because of the federal asset test.”⁸⁹ To avoid losing SNAP eligibility, then, many households would be discouraged from saving their money, or they may even spend down their savings to ensure that they qualify for SNAP.⁹⁰ This incentive to spend down savings could be particularly harmful for households with low-income retirees who can no longer rely on employment to replenish their lost savings.

States with BBCE can relax or even eliminate these asset limits, thereby permitting households to save extra income and preventing families from being trapped in a cycle of poverty. By saving money, these households can be prepared for an unforeseen expense – such as a medical emergency—without compromising their ability to pay for food.⁹¹ Another study conducted by the Urban Institute found that “being in a state with relaxed asset limits via BBCE increases the likelihood of living in a household that has a bank account” and “increases the likelihood that a person is in a household with at least \$500 in a bank account.”⁹² These savings can help a family obtain a car, which may allow them to find and maintain employment; pay for their children’s education, which can help them in turn seek higher paying employment; and to stave off debt that could tie up funds for years to come.⁹³ If allowed to go into effect, the Proposed Rule’s elimination

⁸⁶ Davis Testimony, *supra* n. 82 at 9.

⁸⁷ Ctr. on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits*, (Oct. 16, 2018), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits>.

⁸⁸ *Id.*

⁸⁹ Caroline Ratcliffe, et al., *Asset Limits, SNAP Participation, and Financial Stability*, Urban Institute, ix (June 2016), <https://www.urban.org/sites/default/files/publication/81966/2000843-Asset-Limits-SNAP-Participation-and-Financial-Stability.pdf>

⁹⁰ *Id.* at x-ix.

⁹¹ Dorothy Rosenbaum, *SNAP’s “Broad-Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 9 (July 30, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-24-19fa.pdf>.

⁹² Caroline Ratcliffe, et al, *The Unintended Consequences of SNAP Asset Limits*, 2 (July 2016), Urban Institute, <https://www.urban.org/sites/default/files/publication/82886/2000872-The-Unintended-Consequences-of-SNAP-Asset-Limits.pdf>.

⁹³ Dorothy Rosenbaum, *SNAP’s “Broad-Based Categorical Eligibility” Supports Working Families and Those Saving for the Future*, Ctr. on Budget and Policy Priorities, 9 (July 30, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-24-19fa.pdf>.

of BBCE would undercut households' ability to move towards self-sufficiency, thereby undermining one of the ultimate goals of SNAP.

E. The Department Failed to Consider the Costs of Terminating SNAP Benefits for Millions of People.

The Department's proposal relies on an inaccurate and arbitrary cost-benefit analysis. Executive Order 12866, Executive Order 13563, and guidance from the White House Office of Management and Budget require that agencies quantify the costs and benefits of their proposed regulations wherever possible. *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”); Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. & Budget, Circular A-4, at 18-27 (Sept. 17, 2003). And “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). When “an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

As discussed above in Section II, the Proposed Rule fails to adequately account for its true costs, including increased harms to the States' economies; increased burden on State agencies through the added cost of verifying and means testing more applications; decreased State administrative efficiency as families newly file or refile applications for benefits; and harms to the public health and children's nutrition. Agency action is invalid where it “fail[s] to adequately account” for relevant costs and benefits. *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 53-55 (D.D.C. 2019).

The Department admits that “there is a potential for civil rights impacts to result if the proposed action is implemented because more elderly individuals may not otherwise meet the SNAP eligibility requirements,” *id.* at 35,576, yet the Department has neither published its Civil Rights Impact Analysis at all nor included it on the public docket of this rulemaking for examination and comment. The Administrative Procedure Act requires agencies to publish notice of all proposed rulemakings in a manner that “give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .” 5 U.S.C. § 553(c); *see also id.* § 553(b); *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (“[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.”). The Proposed Rule fails even this basic procedural requirement.

Taken together, the Department's flawed cost-benefit analysis bears the characteristics of arbitrarily “put[ting] a thumb on the scale by [over]valuing the benefits and [under]valuing the costs,” *Ctr. for Biological Diversity v. Nat’l Highway Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008), which would render any final rule unreasonable in its entirety. *Nat’l Ass’n of Home Builders*, 682 F.3d at 1040.

IV. 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 participation in SNAP by households that are, by any measure, low-income and in need of nutrition assistance. At no point does the Department demonstrate that it considered all of the costs and harms that this rulemaking would cause to be imposed on the States. 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,



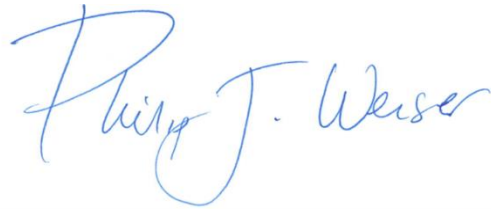
KARL A. RACINE
Attorney General for the District of Columbia



LETITIA JAMES
Attorney General of New York



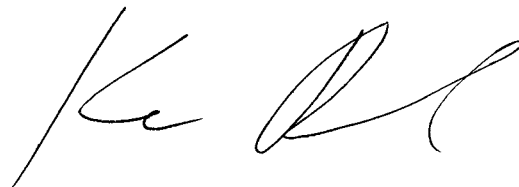
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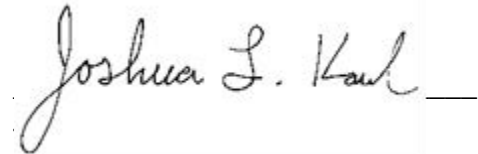
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