UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BREAD FOR THE CITY, DAMON SMITH, and GENEVA TANN, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE and THE UNITED STATES OF AMERICA, *Defendants.*	)	Civil Action No. 1:20-cv-127

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs hereby move the Court to issue a preliminary injunction that will stay the effective date of a U.S. Department of Agriculture rule pending the final judgment in this case. The rule would (by the agency's own estimate) terminate food stamp benefits for 688,000 low-income people nationwide. The rule is scheduled to take effect on April 1, 2020. If the Court does not preserve the status quo by issuing a preliminary injunction before that date, Plaintiffs (and many others across the nation facing food insecurity) will be irreparably harmed. Plaintiffs also are likely to succeed on the merits of their claims, and the balance of equities and public interest overwhelmingly favor issuance of a preliminary injunction.

In support of this motion, Plaintiffs submit the attached Memorandum of Points and Authorities.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF
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INTRODUCTION

This preliminary injunction motion requests the Court to stay a U.S. Department of Agriculture ("USDA") Final Rule that would (by the agency's own estimate) terminate food stamp benefits for 688,000 low-income people nationwide. The food stamp program—now called the Supplemental Nutrition Assistance Program, or "SNAP"—enables truly needy individuals to avoid debilitating hunger by buying food that they otherwise would have to do without. SNAP food-assistance benefits are modest. Benefits for an individual living in the District of Columbia range from about $1.00 per day to $6.50 per day depending upon income.

The Final Rule is intended to limit these SNAP benefits for "Able-Bodied Adults Without Dependents," or "ABAWDs". ABAWDs are 18 to 49 year-old individuals who are not legally disabled and do not care for a child. In 1996, Congress enacted a federal statutory provision preventing ABAWDs from receiving SNAP benefits for more than three months in a three-year period unless they work (or engage in job training) at least 20 hours per week. Congress intended to incentivize ABAWDs to seek employment where possible. However, Congress understood that the time limits would be unconscionable if ABAWDs lacked job opportunities sufficient to provide a realistic prospect of meeting the work requirement. Under those circumstances, ABAWDs would lose vital benefits after a short time through no fault of their own. Therefore, Congress authorized States (including the District of Columbia) to apply to USDA for a waiver of the time limits in specified areas, based upon proof of insufficient job opportunities.

The Final Rule is intended to, and will, curtail ABAWD time-limit waivers dramatically, thereby terminating SNAP benefits for hundreds of thousands of ABAWDs. USDA notes that overall unemployment rates are currently low and asserts that ABAWDs should have little difficulty finding jobs, within the time limit. Yet the overall unemployment rate is not a legitimate measure of the job opportunities for ABAWDs, who confront numerous barriers to employment

not faced by average citizens. Probing beneath the veneer of USDA's "low unemployment" justification exposes an unlawful rule lacking a rationally-defensible basis for assessing ABAWD job opportunities. The Final Rule exceeds USDA's statutory authority by blocking States from using well-established probative, case-specific evidence to prove that particular areas lack sufficient jobs for ABAWDs. In place of this credible evidence, the Final Rule substitutes arbitrary and capricious standards for job sufficiency based upon unrepresentative unemployment rates (including rates from areas where the ABAWDs do not live).

Plaintiffs Damon Smith and Geneva Tann (who are ABAWDs living in the District of Columbia) and Bread for the City (a prominent food-assistance organization in the District of Columbia) challenge USDA's rule on these and other grounds because they will be irreparably harmed if the agency effectuates the rule as currently scheduled, on April 1, 2020. Because Plaintiffs have satisfied the four-part test for a preliminary injunction, the Court should stay the effective date of the Final Rule pending final judgment in this case.

STATUTORY AND REGULATORY BACKGROUND

In 1964, Congress established the federally-funded, state-administered Food Stamp Program to enable low-income beneficiaries to buy food, thereby "safeguard[ing] the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 U.S.C. § 2011; 7 C.F.R. § 271.1. Since its inception, the Program has helped fight food insecurity among low-income households, lifted millions of the individuals in these households above the poverty line and supported local economies.[1] Effective October 1, 2008, the Program was renamed the Supplemental Nutrition Assistance ("SNAP") Program, and the federal

[1] https://www.feedingamerica.org/take-action/advocate/federal-hunger-relief-programs/snap

Food Stamp Act was renamed the Food and Nutrition Act of 2008 ("SNAP Act"). Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 4001–02, 122 Stat. 1853 (2008).

SNAP benefits can only be used to buy food and are paid directly from the State to the entity that sells the food to the beneficiary. The federal government provides complete funding to States for all SNAP benefits and also covers at least 50 percent of a state's costs to administer the program. 7 U.S.C. §§ 2013(a), 2019, 2025(a); 7 C.F.R. §§ 277.1(b), 277.4. Under the SNAP Act, the term "State" includes the District of Columbia. 7 U.S.C. § 2012(r).

A. 1996 Amendments to the SNAP Act

In 1996, Congress amended the SNAP Act and created new restrictions on the receipt of SNAP benefits by ABAWDs. The 1996 amendments provide that ABAWDs can only receive SNAP benefits for three months in a three-year period unless they are working or participating in training for 20 hours or more per week. 7 U.S.C. § 2015(o)(2); *see also* 7 C.F.R. § 273.24(b) (2019).

However, Congress understood that it needed to blunt the harsh effects of this time limit when sufficient jobs were not available for ABAWDs. In congressional debate, John Kasich, the co-author of the provision, clarified that the time limit would only apply "if you are able-bodied, if you are childless, and if you live in an area where you are getting food stamps and *there are jobs available*."[2] To ensure that the time limit would only apply if ABAWDs had meaningful job opportunities, Congress granted States (including the District of Columbia) broad authority to seek waivers from the time limit for "any group of individuals in the State," which USDA may approve if the "area in which the individuals reside (i) has an unemployment rate above 10 percent; or (ii)

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

does not have a sufficient number of jobs to provide employment for the individuals." 7 U.S.C. § 2015(o)(4).

B. USDA's Administration of the Time-Limit Waiver Process From the Time of the 1996 Statutory Amendments Through 2019

From 1996 through 2019, USDA followed essentially the same process for administering time-limit waivers. Initially the agency operated under a 1996 guidance that noted that because the statute has two independent standards justifying a waiver—(1) an unemployment rate of over 10 percent or (2) a lack of sufficient jobs—"the statute recognizes that the unemployment rate alone is an imperfect measure of the employment prospects of individuals with little work history and diminished opportunities."[3]

Addressing the statutory standard based on lack of sufficient jobs, the guidance provided a non-exhaustive list of the types and sources of data that a State could submit to support its waiver request, recognizing that "there are no standard data or methods to make the determination of the sufficiency of jobs" and that "the decision to approve waivers must be made on an area-by-area basis."[4] The guidance also emphasized that States should be given "broad discretion" to "decide if a waiver request is appropriate" for the State or a part of the State, and to define "areas that best reflect the labor market prospects of program participants and State administrative needs."[5]

In 2001, USDA promulgated the regulations that are still in effect (and unchanged in pertinent part) as of the date of this Motion. The 2001 regulations codify the relevant parts of the

[3] USDA, "Guidance for States Seeking Waivers for Food Stamp Limits," December 3, 1996, *available at* https://fns-prod.azureedge.net/sites/default/files/resource-files/HistoricalPolicyDocument_GuidanceforStatesSeekingWaiversforFoodStampLimits_December1996.pdf (hereinafter the "1996 Guidance").

[4] *Id*.

[5] *Id*.

1996 guidance with respect to waivers based upon a lack of sufficient jobs. A State can submit "whatever data it deems appropriate to support its request," with the only restriction that "States must submit [unemployment or labor force] data that relies on standard Bureau of Labor Statistics (BLS) data or methods" to support waiver requests based on one of these factors. 7 C.F.R. § 273.24(f)(2) (2019).[6] Like the 1996 guidance, the regulations set forth a "non-exhaustive list" of types of information a State agency could submit to support a claim of "lack of sufficient jobs" for ABAWDs in a given area. The regulations also note two categories of waivers that are "readily approvable." And the regulations allow the States to define the areas to be covered by waivers, as long as States can provide supporting data and analyses. *Id.* §§ 273.24(f)(2), (f)(3), (f)(6).

C. The Final Rule Challenged in This Case

In December 2019, USDA issued the Final Rule challenged in this case, which will become effective on April 1, 2020 unless enjoined by this Court. The Final Rule followed a February 2019 Proposed Rule that proposed substantially restricting ABAWD time-limit waivers (thereby significantly reducing the number of individuals who receive SNAP food assistance). USDA justified the Proposed Rule with the assertion that time-limit waivers allegedly are less necessary now than in the past. According to USDA, the nation's currently-low overall unemployment rate shows that most ABAWDs have adequate job opportunities to work 20 hours per week, which the agency believes should allow ABAWDs to avoid triggering the time limit that would terminate their SNAP benefits. Proposed Rule, 84 Fed. Reg. 980, 981 (Feb. 1, 2019).

[6] The restriction to BLS data or methods was required under an independent "established Federal policy requir[ing] Federal executive branch agencies to use the most recent National, State or local labor force and unemployment data from the BLS for all program purposes." 66 Fed. Reg. 4438, 4462 (Jan. 17, 2001).

The Proposed Rule generated more than 100,000 comments, the vast majority of which objected to the Proposed Rule. The objecting commenters included more than 20 States and territories and organizations like the Legal Aid Society of the District of Columbia and the Center for Budget and Policy Priorities. Commenters emphasized that a low overall unemployment rate does not measure job opportunities for ABAWDs, who typically face substantial barriers to employment—*e.g.*, insufficient education and criminal histories—that average citizens do not confront.[7] They also argued that because ABAWDs have substantial difficulty seeking employment even in a time of low overall unemployment rates, the proposal would unfairly deny food assistance to people who desperately need assistance but cannot find jobs.[8]

In the Final Rule, USDA rejected most of these comments and made sweeping changes to the time-limit waiver process, materially altering the procedures and standards the agency has consistently followed for more than 20 years. One significant change is new "core standards" that substantially displace the flexible, case-by-case determinations through which USDA has historically determined whether specific areas lack sufficient jobs. Under the "core standards," waiver determinations will (with limited exceptions) turn exclusively on an area's unemployment rate. Final Rule, 84 Fed. Reg. 66,782, 66,811 (Dec. 5, 2019) (to be codified at 7 C.F.R. § 273.24 (f)(2)). This exclusive reliance on unemployment rates is an abrupt departure from the agency's longstanding acknowledgement that an "unemployment rate alone is an imperfect measure of the employment prospects of individuals with little work history and diminished opportunities," that

[7] *See infra* pp. 18-21 (citing Exhibit A).

[8] *Id*.

"there are no standard data or methods to make the determination of the sufficiency of jobs," and that "the decision to approve waivers must be made on an area-by-area basis."[9]

If the Final Rule goes into effect, it will (by USDA's own estimate) terminate the SNAP benefits of "688,000 individuals (in FY2021)." 84 Fed. Reg. at 66,807. And "approximately 77 percent of counties [will] los[e] their current time limit waiver." *Id*. Under the currently-effective regulations, "less than half of ABAWDs live in areas that are not covered by a waiver and thus face the ABAWD time limit," yet "about 88 percent of ABAWDs will live in such areas" once the Final Rule takes effect. *Id*. These individuals will then lose their benefits because they "will not meet the work requirement or be otherwise exempt." *Id*.

Thousands of those individuals who stand to lose their benefits live in the District of Columbia. Although the District currently has a waiver (as it has had every year since 1997), the waiver expires on March 31, 2020, one day before the Final Rule is scheduled to go into effect. We explain below why the District will not qualify for a waiver at that point under the Final Rule. As a result, approximately 13,050 ABAWDs currently living in the District will lose their SNAP benefits if the Court does not enjoin the Final Rule.

FACTUAL BACKGROUND

A. Plaintiff Bread For The City

Plaintiff Bread for the City ("Bread") is an award-winning front-line agency serving District residents experiencing poverty. Declaration of George A. Jones ("Jones Decl.") ¶4. Bread operates two Centers in the District of Columbia that provide comprehensive direct services, including food, clothing, medical care, legal services, and social services, reaching more than

[9] 1996 Guidance at 3.

31,000 individuals each year. *Id*. With the exception of the medical clinic, all of Bread's services are free. *Id*. Bread also engages in community organizing and public advocacy. *Id*.

Every year, Bread's food program serves thousands of low-income individuals and families living in the District. *Id*. ¶8. In the twelve-month period ending June 30, 2019, Bread's two food pantries provided groceries to more than 16,000 unique households. *Id*. Many of Bread's clients have received or currently receive SNAP benefits. *Id*. The attached Declaration of George A. Jones explains in detail the harm that Bread will suffer if the Final Rule goes into effect.

D. Plaintiff Damon Smith

Plaintiff Damon Smith is 45 years old and lives alone in subsidized housing in the District of Columbia. Declaration of Damon Smith ("Smith Decl.") ¶¶1-4. Mr. Smith does not qualify for, and thus does not receive, any disability benefits. *Id*. ¶14. He is receiving food stamps in the amount of $194.00 a month. *Id*. ¶21. His attached Declaration explains in detail the barriers he faces finding employment and the harm he will suffer if the Final Rule goes into effect.

E. Plaintiff Geneva Tann

Plaintiff Geneva Tann is 28 years old and resides with her 95 year old grandmother in the District of Columbia. Declaration of Geneva Tann ("Tann Decl.") ¶¶1-3. Ms. Tann is receiving food stamps in the amount of $194.00 a month. *Id*. ¶21. Ms. Tann does not receive any disability benefits. *See id*. ¶11. She is currently unemployed. *Id*. ¶¶5, 7. Her attached Declaration explains in detail the barriers she faces finding employment and the harm she will suffer if the Final Rule goes into effect.

ARGUMENT

To justify issuance of a preliminary injunction, Plaintiffs must show: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in Plaintiffs' favor; and (4) that an injunction

is in the public interest. *Nat'l Ass'n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10, 13 (D.D.C. 2016) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). Applying these factors, this Court is authorized to stay the effective date of an administrative rule pending judicial review to prevent irreparable harm. 5 U.S.C. § 705; *Casa De Md. v. Trump*, 2019 U.S. Dist. LEXIS 177797, at * 10 (D. Md. Oct. 14, 2019). Historically, courts in this Circuit have applied a "sliding-scale" approach to the preliminary injunction analysis under which "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)); *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1292 (D.C. Cir. 2009).[10] In this case, Plaintiffs have justified entry of a preliminary injunction regardless of whether the Court considers a sliding scale or all four factors standing alone.

Plaintiffs are likely to prevail on the merits of their claims because USDA has exceeded its statutory authority, acted arbitrarily and capriciously, and failed to comply with Administrative Procedure Act ("APA") notice and comment requirements. Plaintiffs Damon Smith and Geneva Tann face the imminent threat of irreparable harm if the Final Rule is implemented, because they likely will lose their SNAP benefits and be faced with debilitating food insecurity. Plaintiff Bread faces the imminent threat of irreparable harm if the Final Rule goes into effect, because it will be forced to divert scarce staff and resources away from their other time-sensitive client services and advocacy efforts in order to meet the heightened needs of ABAWD clients who suddenly find themselves ineligible for SNAP benefits. Conversely, USDA will suffer no harm from an order requiring it to maintain the status quo and delay implementation of the ABAWD time-limit Final

[10] Following the Supreme Court's 2008 decision in *Winter*, the D.C. Circuit has questioned whether the sliding-scale approach is still valid but has never squarely reached the issue. *See, e.g*., *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth*., 897 F.3d 314, 334 (D.C. Cir. 2018).

Rule pending the outcome of this litigation. Finally, the public interest favors maintaining the status quo and ensuring that members of the community timely receive essential SNAP benefits.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs Are Likely to Prove That USDA Exceeded Its Statutory Authority by Promulgating a Prospective Categorical Rule That Substantially Displaces the Waiver Adjudication Process Mandated by Statute

The applicable statute specifies that USDA must determine States' ABAWD time-limit waivers on a case-by-case basis, according to an evaluation of the employment opportunities for a specific group of individuals within a particular geographic area. *See* 7 U.S.C. § 2015(o)(4). Plaintiffs are likely to prove that USDA exceeded its statutory authority by promulgating a prospective categorical rule that substantially displaces this waiver adjudication process mandated by statute. USDA's decision to regulate by prospective categorical rule instead of through adjudication of particularized facts violates the well-established requirement that the agency must follow the regulatory process dictated by Congress.

The drafters and proponents of the APA intentionally "shaped the entire Act around" the "distinction between rule making and adjudication." Attorney General's Manual on the Administrative Procedure Act (1947) ("Attorney General's Manual") at 15; *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (1947 Attorney General's Manual on the Administrative Procedure Act is "the Government's own most authoritative interpretation of the APA"). When an agency regulates through rulemaking, it implements legal requirements through prospective rules that are "essentially legislative in nature, not only because [they] operate[ ] in the future but also because [they are] primarily concerned with policy considerations." Attorney General's Manual at 14. In stark contrast, when an agency regulates through adjudication, it implements legal requirements case by case based upon the facts before it, such as when an agency

determines "a person's right to benefits under existing law" by deciding "whether he is within the established category of persons entitled to such benefits." *Id*. at 14-15. The time-limit waiver process at issue here is a classic example of an adjudication.

It is significant in this case that rulemaking and adjudication are *mutually exclusive* regulatory processes—the APA defines "adjudication" to mean the process for formulating an agency order in a "matter *other than* rule making." 5 U.S.C. §§ 551(6), (7) (emphasis added). In section 2015(o)(4), Congress directed USDA to determine waiver requests by adjudication, not rulemaking. Congress did give USDA general rulemaking authority, but in a different section of the statute. That different section requires the agency to exercise its general rulemaking authority in a manner "consistent with" the rest of the statute. 7 U.S.C. § 2013(c). The rest of the statute obviously includes section 2015(o)(4), which mandates utilizing (not displacing) a case-by-case adjudication process for waiver applications. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress" (*Bowen*, 488 U.S. at 208), because "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The Court should conclude that Plaintiffs are likely to succeed on the merits of their claim that USDA has exceeded its statutory authority in issuing the new regulation.

1. The Statute Requires USDA to Render Decisions on Waiver Applications Through Case-Specific Determinations Based Upon the Particular Facts Submitted by a State

The text of the statute's waiver provision expressly requires USDA to render decisions on waiver applications case by case, based upon the evidence that specific States submit to prove that they have met the statutory waiver standard. In response to a State's application, USDA makes a determination that considers the specific employment opportunities for individuals living within a particular geographic area that the State identifies in its waiver application:

> On the request of a State agency and with the support of the chief executive officer of the State, the Secretary may waive the applicability of [the time limit] to any group of individuals in the State if the Secretary makes a determination that the area in which the individuals reside—
>
> (i) has an unemployment rate of over 10 percent; or
>
> (ii) does not have a sufficient number of jobs to provide employment for the individuals.

7 U.S.C. § 2015(o)(4). The "individuals" receiving the benefit of a waiver are the people to whom the time limit "appl[ies]" in the absence of a waiver (*i.e.*, ABAWDs). The statute places no limitations on the evidence that a State can submit to prove that the statutory waiver standard has been satisfied.[11]

This case focuses on USDA's determinations, under section 2015(o)(4)(A)(ii), about whether a "sufficient number of jobs" exist for ABAWDs living in an area with an unemployment rate of 10 percent or less.[12] Courts interpreting statutes must "construe language in its context and in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The statute's text requires USDA to make these "determination[s]" on the basis of the "sufficien[cy]" of the "number of jobs" in a particular geographic "area" in which an identifiable "group" of "individuals reside." 7 U.S.C. § 2015(o)(4)(A)(ii). Such singular determinations are, by their very nature, case-specific decisions based upon the particular facts presented to USDA.[13]

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[11] The statute defines "State" to include the District of Columbia. 7 U.S.C. § 2012(r).

[12] ABAWDs living in areas with an unemployment rate of over 10 percent independently qualify for a waiver under section 2015(o)(4)(A)(i).

[13] Other SNAP statutory provisions similarly use the term "determination" to refer to a case-specific decision based upon the facts presented to the decisionmaker. *See, e.g.*, 7 U.S.C. § 2015(b) (addressing a "determination" that is a court or agency finding that an individual committed wrongful acts); *id*. § 2015(c) (addressing a "determination" that is a USDA decision regarding a specific household's eligibility for SNAP benefits); *id*. § 2020(e)(10) (addressing a "determination" that is a USDA decision following a hearing concerning a specific household's participation in SNAP); *id*. § 2023(a)(5) (addressing a "determination" that a specific store should

2. The Final Rule's "Core Standards" Eviscerate the Statutory Waiver Process by Prejudging Waivers and Sharply Restricting the Evidence States Can Submit to Justify Them

USDA has announced that it intends, through the Final Rule, to "ensure that waivers are applied on a more limited basis" by implementing "stricter criteria for waiver approvals." 84 Fed. Reg. 980, 981, 982 (proposed Feb. 1, 2019). USDA implements this objective primarily through restrictions called "core standards." *See* 84 Fed. Reg. at 66,811 (Dec. 5, 2019) (to be codified at 7 C.F.R. 273.24(f)(2)). The core standards substantially displace case-specific waiver determinations with a categorical prospective rule that prejudges waiver applications and sharply restricts the evidence States can submit to justify them.

Specifically, the core standards make the granting of waivers turn *entirely* upon unemployment rates. Under the core standards, USDA will grant a waiver request if the area at issue has either (1) a recent 12-month average employment rate over 10 percent; or (2) a 24-month average unemployment rate that is 20 percent or more above the national unemployment rate but not less than 6 percent. 84 Fed. Reg. at 66,811 (citing 7 C.F.R. § 273.24 (f)(2)). With very limited exceptions, USDA will deny waiver requests that do not meet either of those two unemployment-rate criteria. *See id*. (citing 7 C.F.R. § 273.24(f)(3), (f)(6)).[14]

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be disqualified from the SNAP program). These other provisions corroborate the foregoing interpretation of section 2015(o)(4)(A)(ii), because it is the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Yousuf v. Samantar*, 451 F.3d 248, 256 (D.C. Cir. 2006) (quoting *Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 570 (1995)); *Powerex Corp. v. Reliant Energy Servs., Inc*., 551 U.S. 224, 232 (2007) (same).

[14] The Final Rule provides narrow exceptions to the core-standard criteria for waiver requests that involve "areas with exceptional circumstances or areas with limited data or evidence, such as Indian Reservations and U.S. Territories." 84 Fed. Reg. at 983; 84 Fed. Reg. at 66,811 (citing 7 C.F.R. §§ 273.24(f)(3), (f)(6)). However, USDA intends that the core standard criteria will "serve as the basis for approval for the vast majority of waiver requests," and that only very unusual and "extreme, dynamic circumstances" will satisfy the core-standard exception for "exceptional

The Final Rule's sole reliance on unemployment rates clashes directly with the bipartite design of the statute's waiver provision. Congress specified an unemployment rate (of over 10 percent) as only one of two independent criteria for waiver approvals. 7 U.S.C. § 2015(o)(4)(A)(i). The second of the two statutory criteria is a flexible determination of job sufficiency for ABAWDs, involving the case-specific assessment of particular facts as described above, which need not include unemployment-rate information. *Id*. at § 2015(o)(4)(A)(ii). The Final Rule generally tracks the first statutory criterion (an unemployment rate of over 10 percent). 84 Fed. Reg. at 66,811 (citing 7 C.F.R. § 273.24 (f)(2)(i)). But the Final Rule eviscerates the second statutory criterion, replacing the flexible statutory adjudication process with a predetermined cutoff for waivers: an unemployment rate 20 percent above the national rate and not less than 6 percent. *Id*. (citing 7 C.F.R. § 273.24 (f)(2)(ii)).[15]

a. The Final Rule Curtails the Waiver Determination Process by Precluding Consideration of Substantial Probative Evidence

For two decades, USDA has consistently decided waiver applications based on "whatever data [the State] deems appropriate" to submit to the agency to prove a lack of sufficient jobs under section 2015(o)(4)(A)(ii). *See* 7 C.F.R. § 273.24(f)(2) (2019). By contrast, the Final Rule substantially restricts the waiver determination process by strictly limiting it to a consideration of

circumstances." 84 Fed. Reg. at 983, 985. The Final Rule would be meaningless if the agency frequently found "exceptional circumstances" justifying a departure from the core standards.

[15] Each of the specific unemployment rates incorporated into the Final Rule is a U-3 rate (or "official employment rate"), which is only one of six measures of "labor underutilization" published by the Bureau of Labor Statistics. The U-3 rate measures the total number of unemployed persons as a percent of the civilian labor force. USDA rejected a proposal to use the more comprehensive U-6 rate as a measure that would more accurately capture the economic reality of ABAWDs. The U-6 rate is defined as total unemployed persons plus "marginally attached workers" plus "total employed part time for economic reasons." 84 Fed. Reg. at 66,788-89.

unemployment rates, thereby precluding the agency from considering other probative evidence that an area lacks sufficient jobs. 84 Fed. Reg. at 66,811 (citing 7 C.F.R. §§ 273.24(f)(2)(2019)).

USDA expressly concedes that its Final Rule is intended to "limit[ ] the number of ways that a State may demonstrate a lack of jobs." 84 Fed. Reg. 66,782, 66,788. And USDA even implicitly concedes that these limitations will require the agency to deny waivers even when there is legitimate, probative evidence that the areas at issue lack sufficient jobs. In particular, the text of the Final Rule lists three types of evidence that USDA (with limited exceptions) will not consider in adjudicating waiver applications: (1) proof of a "low and declining unemployment-to-population ratio," (2) proof of a "lack of jobs in declining occupations or industries", or (3) an "academic study or other publication describing the area as lacking a sufficient number of jobs to provide employment for its residents." 84 Fed. Reg. at 66,811 (citing 7 C.F.R. §§ 273.24(6)(i)(B), (i)(C), (i)(D)). USDA imposes this substantial restriction while simultaneously *acknowledging* that all three types of proof can be "sufficient data or evidence" that an area lacks sufficient jobs (and will be accepted to justify waivers in limited areas such as U.S. Territories or Indian reservations). *Id*. (citing 7 C.F.R. § 273.24(6)(i)). It is not surprising that USDA expressly acknowledges the legitimacy of these modes of proof. For the two decades that ABAWD time-limit waivers have existed, USDA has consistently accepted all three types of evidence to prove lack of sufficient jobs. *See* 7 C.F.R. §§ 273.24(f)(2), (2)(ii) (2019)).

Similarly, under the Final Rule, USDA will not consider another type of evidence: a determination, by the Labor Department's Unemployment Insurance Service, that the applicant State qualifies for extended unemployment benefits on the basis of high rates of unemployment. In the Proposed Rule, USDA explained that such Labor Department determinations are significant, probative evidence that a State lacks sufficient jobs:

> The Department has consistently approved waivers based on qualification for extended unemployment benefits because it has been a *clear indicator of lack of sufficient jobs* and an especially responsive indicator of sudden economic downturns, such as the Great Recession.

84 Fed. Reg. at 985 (emphasis added). The Proposed Rule actually *elevated* the significance of such Labor Department determinations in comparison with the existing regulation, changing them from a factor that USDA can consider to a factor that automatically justifies a waiver. *Compare* 7 C.F.R. § 273.24(f)(2)(ii) (2019) *with* Proposed Rule § 273.24(f)(2)(iii) (cited in 84 Fed. Reg. at 992). Nevertheless, the Final Rule precludes USDA from even considering such determinations when deciding whether to issue a waiver for lack of sufficient jobs. 84 Fed. Reg. at 66,790.[16]

The Court should conclude that the Final Rule's exclusive reliance on unemployment rates substantially restricts the waiver determination process, by categorically precluding waivers in areas where States can demonstrate a lack of sufficient jobs, through legitimate, probative and "clear indicators."

[16] The agency's enthusiastic endorsement of the extended unemployment-benefit determination in the Proposed Rule, and dramatic about-face in the Final Rule, created a situation in which the public did not have proper notice that it should comment on the significance of that determination as proof that an area lacks sufficient jobs. *See* 84 Fed. Reg. at 66789 (acknowledging that "the Department did not receive many comments with regard to retaining the extended unemployment benefits standard" and citing to all but one comment as "supportive" of retaining the standard). In APA parlance, the Final Rule was not the "logical outgrowth" of the Proposed Rule. "A final rule is a logical outgrowth of the proposed rule 'only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'" *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 626 F.3d 84, 94-45 (D.C. Cir. 2010) (citation omitted). A rule violates the notice-and-comment requirements of 5 U.S.C. § 553 where, as here, the final rule is not the "logical outgrowth" of the proposed rule. *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012). The Court should conclude that Plaintiffs are likely to demonstrate that the final rule is invalid on that ground as well.

b. The Final Rule Undermines the Waiver Determination Process by Imposing a 6 Percent Unemployment-Rate Floor That Does Not Account for the Specific Employment Barriers Faced by ABAWDs

Under the "core standards," USDA *must* automatically deny a waiver for an area that has a 24-month average unemployment rate of less than 6 percent. 84 Fed. Reg. at 66,811 (citing 7 C.F.R. 273.24(2)(ii)).[17] This "6 percent floor" provision undermines the statutory waiver determination process, by requiring USDA to deny waivers based upon that unemployment rate, even if the affected States could prove that the pertinent areas lack "a sufficient number of jobs to provide employment for" the group of ABAWDs living in a specified area. 7 U.S.C. § 2015(o)(4)(A)(ii).

When the statute refers to sufficient jobs, it is addressing the employment opportunities *specific to ABAWDs*. The statute states that USDA must "determin[e]" whether the area has "a sufficient number of jobs to provide employment *for the individuals.*" 7 U.S.C. § 2015(o)(4) (emphasis added). The "individuals" whose job prospects USDA must determine are the specific people to whom the SNAP work requirement is "applicab[le]" (*i.e.*, ABAWDs). *Id*. That determination is a complex one that cannot be short-circuited with a single bright-line rule. USDA expressly concedes that there is no specific objective "measure" available for determining the number of jobs available for ABAWDs in a given geographic area. 84 Fed. Reg. at 66,788, 66,789.

[17] The Final Rule imposes this core-standard restriction by describing the criteria for waivers that USDA *will* approve and then indicating that the agency will not approve waivers under other criteria (unless there is an "exceptional circumstance" or an unusual geographic area (such as a U.S. Territory or Indian reservation) that lacks specified types of unemployment data). 84 Fed. Reg. 66,811 (citing 7 C.F.R. § 273.24(f)(2), (f)(3), (f)(6)). In pertinent part, the Final Rule states that USDA will approve a waiver for an area with a "24-month average unemployment rate 20 percent or more above the national rate for a recent 24-month period, but in no case may the 24-month average unemployment rate of the requested area be less than 6 percent." 84 Fed. Reg. 66,811 (citing 7 C.F.R. § 273.24(f)(2)(ii)). Under this core standard, USDA will automatically deny a waiver for an area with an unemployment rate of less than 6 percent. We explain below why USDA would deny a waiver for the District of Columbia under this standard.

In addition, USDA does not appear to dispute that ABAWDs "face barriers to employment that the general population does not." 84 Fed. Reg. at 66,786. Yet USDA has not accounted for these barriers in adopting the 6 percent floor, which is an area's *overall* average unemployment rate (quantifying the collective job opportunities for all sectors of the population).

Assuming *arguendo* that the general population may have a sufficient number of job opportunities in an area with an unemployment rate below 6 percent, the job opportunities are far fewer for ABAWDs. Even if the number of available jobs in an area actually matched the number of unemployed people, the number of jobs available to ABAWDs would be overstated, because of issues such as low skill sets, geographic or transportation limitations, discrimination, work history, or a criminal record.[18] The categorical 6 percent floor subverts the waiver process, by cutting off a State's ability to prove that the specific individuals who are ABAWDs lack sufficient job opportunities (even when there is an overall average unemployment rate below 6 percent).

The administrative record demonstrates numerous factors that States should be able to—but under the Final Rule cannot—rely upon to prove a lack of sufficient jobs for ABAWDs, in areas where the average overall unemployment rate is below 6 percent. *First*, ABAWDs face barriers to employment based upon educational levels lower than those of the general population. 54 percent of SNAP beneficiaries have only a high school diploma (or equivalent), and 24 percent do not even have a high school diploma.[19] It is well established that adults with lower educational

[18] Center on Budget and Policy Priorities, Proposed Rule: Supplemental Nutrition Assistance Program: Requirements and Services for Able-Bodied Adults Without Dependents RIN 0584-AE57, Pg. 27 (April 1, 2019) (attached as Exhibit A) at 27. The Center on Budget and Policy Priorities submitted this document to USDA as comments in the rulemaking proceeding for the new regulation, thereby entering the document into the administrative record in this case.

[19] Exhibit A at 33.

attainment have higher unemployment rates than their more educated counterparts.[20] An overall average employment rate of 6 percent says little to nothing about the employment opportunities for uneducated or undereducated ABAWDs.

Second, studies show that a significant portion of ABAWDs were formally incarcerated or have a criminal record. For example, in a Franklin County, Ohio education and training program, one third of ABAWD participants reported a criminal record.[21] Formerly incarcerated people face steep barriers to employment, including lower levels of education, gaps in work experience, occupational licensing prohibitions, and general hiring aversions based on incarceration status.[22] Because it is an overall average unemployment rate, the 6 percent floor ignores these substantial limitations on job opportunities for certain ABAWDs.

Third, ABAWDs disproportionately include members of minority groups who face employment barriers from discrimination—over 40 percent of SNAP participants targeted by the waiver are African American or Latino.[23] For example, for the past several decades, unemployment rates among African American workers have been roughly double the unemployment rates for white workers with comparable education levels.[24] From 2013 to 2017, Rochester, MN had an average overall unemployment rate of 3.9 percent and an average African American unemployment rate of 20.2 percent,[25] which far exceeded the average unemployment

[20] *Id*. at 34.

[21] *Id*.

[22] *Id.* at 48–49.

[23] *Id*. at 36.

[24] Exhibit A at 36.

[25] *Id.* at 61.

rate during the Great Depression (approximately 14 percent).[26] Thus, in the District, as is the case with many areas with a less than 6 percent average unemployment rate (cut off from waivers through the 6 percent floor), there is likely a much higher unemployment rate for African-American ABAWDs.

Fourth, SNAP beneficiaries tend to work in occupations subject to higher rates of instability, underemployment, gaps in employment, and unemployment, so even ABAWDs who meet the 20 hour per week requirements for one month may not do so consistently.[27] In 2018, service jobs had an unemployment rate 23 percent higher than the national average; for those in food service, the unemployment rate was 56 percent higher.[28] These jobs also tend to have higher rates of turnover and underemployment.[29] And these workers are more likely to face geographic or transportation barriers to employment, because available jobs are often located far from affordable housing where SNAP beneficiaries live.[30] The 6 percent floor does not account for these barriers to ABAWD employment.

Finally, ABAWDs typically suffer from physical or mental health issues or substance abuse disorders that are severe enough to impair their ability to work for 20 hours or more per week on a consistent basis but would not lead to an award of disability benefits.[31] One study

[26] *Id*. at 63 n. 155.

[27] *Id*. at 39–40.

[28] *Id*. at 40.

[29] Exhibit A at 39–41.

[30] *Id*. at 45.

[31] In order to qualify for federal disability benefits through the Social Security Administration, an individual must have a disability that causes severe impairments and has lasted or is expected to last for twelve months or more. The disability must be so severe as to preclude a threshold level of the individual's prior work or any work in the national economy. *See* 42 U.S.C. §§ 423(d), 1382c(a)(3)(A)-(B), (F)-(G). In addition, if the Social Security Administration finds that substance

conducted by the Ohio Association of Food Banks found that for workers in Franklin County, Ohio, one third of participants in a work assistance program cited mental or physical limitation, including depression, PTSD, mental or learning disabilities, and physical injury as a factor in their unemployment.[32] Similarly, a 2017 study of SNAP employment and training found that 30 percent of participants noted health issues as a barrier to employment.[33] ABAWDs facing these issues may not be sufficiently disabled to qualify for disability benefits but will still face substantial difficulties finding jobs, even in an area with an overall average unemployment rate of less than 6 percent.

In sum, the Final Rule uses a general unemployment rate as a proxy for the ABAWD unemployment rate, without any evidence that those rates are the same, and in the face of irrefutable administrative-record evidence that ABAWDs have a substantially greater difficulty finding employment than average citizens. The adjudication process established in the statute permits States to prove the specific employment barriers faced by ABAWDs, but the Final Rule does not, displacing the adjudication process with an arbitrary categorical rule.

3. USDA Lacks the Statutory Authority to Promulgate a Rule That Substantially Displaces the Waiver Adjudication Process Established by Congress

USDA lacks the statutory authority to promulgate a rule that substantially displaces the waiver adjudication process established by Congress. It is axiomatic that agencies are "'bound, not only by the ultimate purposes Congress has selected, but by the *means* it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Colo. River Indian Tribes v. Nat'l*

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abuse is a "contributing factor material" to a finding of disability, an otherwise eligible individual will not be eligible for benefits. *Id*. at §§ 423(d)(2)(C), 1382c(a)(3)(J).

[32] Exhibit A at 43.

[33] *Id*.

Indian Gaming Comm'n, 466 F.3d 134, 139 (D.C. Cir. 2006) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)) (emphasis added). Here case-by-case decision-making (*i.e.*, adjudication) is the particular means that Congress specified to make decisions about waivers. USDA had no statutory authority to substitute a different process (*i.e.*, rulemaking) that denies waivers through prospective rules. Where, as here, "a statute commands an agency without qualification to carry out a particular program in a particular way, the agency's duty is clear; if it believes the statute untoward in some respect, then 'it should take its concerns to Congress,' for '[i]n the meantime it must obey [the statute] as written.'" *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011) (citation omitted).

a. Section 2015(o)(4) Does Not Authorize USDA to Displace Case-by-Case Adjudication with Prospective Rulemaking

The statutory waiver provision (7 U.S.C. § 2015(o)(4)) does not authorize USDA to displace case-by-case adjudication with prospective rulemaking. The "entire [Administrative Procedure] Act is based upon a dichotomy between rule making and adjudication." Attorney General's Manual at 14. And rulemaking and adjudication are mutually exclusive regulatory processes. 5 U.S.C. §§ 551(6), (7) (defining "adjudication" to mean the process for formulating an agency order in a "matter *other than* rulemaking") (emphasis added). When "Congress has spoken" and directed which of the two processes to use, that direction is binding, and the agency has no discretion to deviate from it. *Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001).

Congress expressly directed USDA to decide waiver applications through adjudication, not rulemaking. USDA's "determination" of States' waiver applications under section 2015(o)(4)(A)(ii) is a classic example of an informal "adjudication" within the meaning of the APA. Adjudications are case-by-case agency decisions, based upon particular sets of facts, that result in the issuance of an "order." *See generally* 5 U.S.C. § 551(7). The APA definition of

"adjudication" includes an agency process to grant or deny a "statutory exemption or other form of permission." 5 U.S.C. §§ 551(6)-(9).[34] The waiver process here is an "adjudication," because it results in a USDA order granting a time-limited exemption from statutory time limits. And the process is an "informal" adjudication, because there is no statutory requirement for the agency to follow the APA's formal procedural rules set forth at 5 U.S.C. § 554.[35] By establishing this adjudication process, Congress did not authorize USDA to replace it with rulemaking, which is the polar opposite of adjudication.

b. USDA's General Rulemaking Authority Does Not Empower the Agency to Deny Waivers Through Categorical Rules That Materially Constrain the Adjudication Process Required by Statute

USDA has separate general rulemaking authority that permits the agency to issue "regulations consistent with this chapter [that USDA] deems necessary or appropriate for the effective and efficient administration of the supplemental nutrition assistance program." 7 U.S.C. § 2013(c). This general rulemaking authority also does not empower the agency to deny waivers through categorical rules that materially constrain the adjudication process required by statute. Regulations issued under this general rulemaking authority must be "consistent with" the statutory waiver provision requiring case-by-case adjudication. Yet the Final Rule is fundamentally *inconsistent* with the statutory waiver provision, by materially constraining—indeed displacing—the adjudication process.

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[34] The APA specifies that "adjudication" includes "licensing", which among other things means the "process respecting the grant" or "den[ial]" of "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. §§ 551(6)-(9).

[35] The waiver process also is an informal adjudication simply because it is an "agency action that is neither the product of formal adjudication or a rulemaking." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). Informal adjudications are "a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981).

Section 2013(c) did not authorize USDA to proceed in this manner. It is "well established that an agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority." *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018). A "'general grant of rulemaking power . . . [cannot] trump the specific provisions of the act.'" *Id*. (quoting *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992)); *see also Air Alliance Houston*, 906 F.3d 1049, 1061 (agency "may not 'accommodate' two statutes by allowing one to 'override' the more specific requirements of the other") (citation omitted).

In *Sullivan v. Zebley*, 493 U.S. 521 (1990) the Supreme Court applied the foregoing principles when it invalidated a disability-benefits rule that purported to curtail an adjudication process established by statute. The statute required an individualized adjudication of a beneficiary's disability, yet the agency rule established a "decision process restricted to comparing claimants' medical evidence to a fixed, finite set of medical criteria" that could not "respond adequately to the infinite variety of medical conditions." *Id*. at 539. The Supreme Court held that the agency's rule was "'manifestly contrary to the statute'" and "exceed[ed] [its] statutory authority." *Id*. at 541 (citation omitted). *Zebley* directly parallels the present case. Plaintiffs are likely to succeed on the merits of their claim that USDA had no statutory authority to issue a rule that substitutes a "fixed, finite set" of unemployment-rate criteria for an adjudication process designed to assess "the infinite variety" of circumstances affecting ABAWDs' job opportunities.[36]

[36] Because the Final Rule effectively displaces the adjudicative process, it is distinguishable from regulations that merely supplement an adjudicative process by enhancing its efficiency. Courts have validated some such supplemental regulations when the agency has statutory authority to issue them, and when they allow an agency to give a uniform response to a repetitive issue that will not differ from adjudication to adjudication. These courts conclude that for the sake of efficiency, an agency should not have to relitigate issues that will always come out the same way regardless of a claimant's specific situation. In reviewing the legitimacy of such regulations, courts consider, among other things, whether claimants have a fair opportunity to argue that the general rules should not apply to them.

Furthermore, USDA cannot avoid the foregoing limitations on its statutory authority by asserting that the Final Rule is simply a new interpretation of the critical statutory phrase "sufficient number of jobs." *See, e.g.*, 84 Fed. Reg. at 66,788 (asserting that USDA has "broad discretion" under section 2015(o)(4) to "define" what does and does not constitute lack of "sufficient jobs"). In its Federal Register preamble, USDA does not even attempt to scrutinize the statute's text, using any of the traditional rules of statutory construction, to justify its Final Rule. And for good reason. The plain meaning of the statute's text is that the agency must assess "sufficient number of jobs" in the context of facts regarding a specific "area" identified by the State in its waiver application. 7 U.S.C. § 2015(o)(4)(A)(ii).

By USDA's logic, the agency could eliminate waivers under section 2015(o)(4)(A)(ii) *entirely* by claiming that it is "interpreting" a lack of sufficient jobs to mean an unemployment rate

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For example, in *Heckler v. Campbell*, 461 U.S. 458 (1983), the Supreme Court held that the Department of Health and Human Services (HHS) had properly issued supplemental regulations that enhanced the efficiency of Social Security disability adjudications. The regulations contained vocational guidelines that set forth factual information concerning certain types and numbers of jobs that exist in the national economy. HHS had specific statutory authority to issue regulations governing the evidence presented in those adjudications. *Id*. at 466. The subject matter of the regulations was a "general factual issue" that was "not unique to each claimant" and could be "resolved as fairly through rulemaking as by introducing . . . testimony" at each adjudication. *Id*. at 468. The Supreme Court held that HHS had authority to the issue the regulations, in order to "determine issues that do not require case-by-case consideration," and in order to avoid making the agency "continually . . . relitigate" issues that would turn out the same way in each case. *Id*. at 467. It was significant to the Court's decision that the supplemental regulations still gave "claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them." *Id*. & n.11; *see also id*. at 462 n.5.

In stark contrast, in this case (1) USDA's Final Rule effectively displaces the adjudication process, on questions of job sufficiency that the statute's text recognizes *are* unique to each affected area and State claimant; (2) the issues will *not* necessarily turn out the same way from State claimant to State claimant; (3) the questions *cannot* be resolved as fairly through rulemaking as through adjudication; and (4) there are *minimal* opportunities to demonstrate that the rules do not apply in a particular case.

above 10 percent (which is the separate waiver-approval standard established by section 2015(o)(4)(A)(i)). That "interpretation" would rewrite the statute, by effectively repealing section 2015(o)(4)(A)(ii) and making waivers available only under the 10 percent unemployment-rate standard of section 2015(o)(4)(A)(i). It is obvious that USDA could not properly stretch the concept of statutory "interpretation" to fit that scenario. The Final Rule is only a somewhat subtler rewrite of the statute, erroneously cloaked as a statutory interpretation.

What USDA is really trying to implement is a new *policy decision* (limiting the number of SNAP beneficiaries) and not a new statutory interpretation. *See, e.g.*, 84 Fed. Reg. at 66,785, 66,788 (referring to 6 percent floor as the most "justified option" and a "reasonable policy change[ ]"). Yet the statute does not give USDA the authority to make such a policy decision, because the statute's text explicitly makes "sufficient" jobs for ABAWDs a matter to determine case-by-case, in the context of specific contextual information submitted by a State. USDA has "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325-26 (2014) (internal quotation marks and citation omitted). Put another way, USDA "'cannot rely on its gap-filling authority to supplement'" a statute when "'Congress has not left the agency a gap to fill'" because there is "'statutory language on point.'" *WildEarth Guardians v. EPA*, 830 F.3d 529, 539 (D.C. Cir. 2016) (quoting *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063-64, (D.C. Cir. 2014)). Plaintiffs are likely to prove that USDA lacked statutory authority to issue the new regulation in its current form.

B. Plaintiffs Are Likely to Prove That the Final Rule is Arbitrary and Capricious Because it Bases Waivers for the District Of Columbia Upon Job Opportunities That Are Primarily Outside the District Of Columbia

The District of Columbia will be uniquely affected by the Final Rule, which bases waivers for the District upon job opportunities located primarily *outside* of the District. That is not true for any other "State." The disconnect between the area covered by the waiver and the areas where the job opportunities are renders the new regulation arbitrary and capricious.

The new regulation relies upon geographic areas defined by the U.S. Department of Labor as Labor Market Areas (LMAs) to address the territorial scope of waivers and related unemployment-rate data. If an LMA is within a single State, USDA bases the waiver determination upon unemployment-rate data from the LMA, and a waiver (if granted) is limited to the territory of the LMA. 84 Fed. Reg. at 66,811 (citing 7 C.F.R. § 273.24(f)(4)(i)). Some LMAs include territory in more than one State. For these "interstate" LMAs, USDA bases the waiver determination upon employment-rate data from the entire LMA, but the waiver (if granted) is limited to the "intrastate" territory of the LMA. *Id*. (citing 7 C.F.R. § 273.24(f)(4)(ii)). There is only one "interstate" LMA in the country in which an entire State falls within the LMA (together with territory from other States). That "State" is the District of Columbia. *Id*. at 66,796. The new regulation says that a waiver determination for the District will be "based on data from the entire interstate LMA"—not just from the District. *Id*. at 66,811 (citing 7 C.F.R. § 273.24(f)(4)(ii)).

The composition of this "entire interstate LMA" virtually guarantees that waivers for District of Columbia residents will be based primarily upon job opportunities (measured by the unemployment rate) outside the District. The reason is that the "entire interstate LMA" that includes the District of Columbia also includes *substantially larger* areas and populations outside the District. In particular, the LMA includes sixteen counties in Virginia, five counties in Maryland, and one county in West Virginia. *See* Bureau of Labor Statistics, *Local Area*

Unemployment Statistics Frequently Asked Questions, *available at* https://www.bls.gov/lau/laufaq.htm#Q06. Because the vast majority of the LMA's territory is outside the District, more than 85 percent of the LMA's labor force lives outside the District. As a result, the unemployment rate for the entire LMA (which is the statistic pertinent to the waiver) is primarily derived from employment data outside the District.[37]

Basing the District of Columbia's waivers primarily upon job opportunities outside the District is arbitrary and capricious. *First*, this approach skews the considered unemployment rate downward, so that it is not an accurate representation of unemployment in the District. USDA is well aware that within a given geographic area, there may be "multiple labor markets with significant variation in economic conditions" such that an overall unemployment rate covering those multiple markets "may mask 'slack' job markets (insufficient jobs)." 84 Fed. Reg. at 66,790. Even a passing glance at the counties in the LMA reveals that it covers numerous affluent suburban areas (*e.g.*, Fairfax County, Virginia and Montgomery County, Maryland) that are starkly different than the urban environment of the District, which has numerous pockets of chronic high unemployment.[38] It therefore is not surprising that the unemployment rate for the District of

[37] The District's civilian labor force was approximately 415,000 in November 2019 compared to approximately 3.08 million in the "suburban ring" comprising the remainder of the Metropolitan Statistical Area. https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/Nov_2019_DC_Area_Monthly.pdf. According to the District of Columbia Department of Employment Services (DOES), the November 2019 unemployment rate for the "suburban ring" of the Washington, DC Metropolitan Statistical Area was 2.5 percent while the whole MSA unemployment rate was only slightly higher at 2.8 percent. *See* https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/Nov_2019_DC_Area_Monthly.pdf.

[38] In November 2019, unemployment in the District's poorest wards (Wards 7 and 8) was 8.6 percent and 11.4 percent respectively. While still high, these figures were down from January 2015 where the rates were 12.9 percent and 16.1 percent respectively. *D.C. Labor Market Indicators: November 2019*, District of Columbia Department of Employment Services, at 6. In November 2019, the unemployment rates of all wards in the District exceeded the LMA rate of

Columbia (at 5.0 percent) taken alone is more than one and one-half times the (2.8 percent) unemployment rate for the entire LMA.[39]

Nevertheless, under the Final Rule, the unemployment rate for the "entire interstate LMA" would be the sole basis for deciding whether the District of Columbia receives a waiver on the ground that it lacks a sufficient number of jobs to provide employment for ABAWDs who live there. The agency's decision to use such a deeply defective measure for job sufficiency for District of Columbia ABAWDs is arbitrary and capricious. *See, e.g.*, *Allentown Mack Sales & Serv., Inc.,* 522 U.S. 359, 374 (1998)) (agency action is arbitrary and capricious if the "process by which it reaches" a result is not "logical and rational").

Second, USDA's decision to rely exclusively on unemployment rates as a basis for deciding waiver applications magnifies the arbitrariness and capriciousness of relying on a skewed unemployment rate. If the District had the opportunity to expose the deficiencies of the LMA-wide rate (and introduce other more probative evidence) in an adjudication, the impact of the LMA-wide rate would be greatly reduced. But as explained above, USDA has effectively displaced an adjudicative process with a categorical rule that precludes consideration of evidence other than unemployment rates.

2.8 percent. *Id.*; https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/Nov_2019_DC_Area_Monthly.pdf.; *see also* Legal Aid Society of the District of Columbia, Proposed Rule: Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents (ABAWDs) at 84 Fed. Reg. 980 (February 1, 2019) (attached as Exhibit B) at 4-5. The Legal Aid Society submitted this document to USDA as comments in the rulemaking proceeding for the new regulation, thereby entering the document into the administrative record in this case.

[39] https://www.bls.gov/web/metro/laummtrk.htm (non-seasonally adjusted unemployment rate for DC-MD-VA-WV Metropolitan Statistical Area); https://www.bls.gov/web/laus/ststdnsadata.txt (non-seasonally adjusted unemployment rate for DC) (November 2019, preliminary data).

Third, the Final Rule depends upon an arbitrary and capricious (and therefore erroneous) construction of the statute's waiver provision. Specifically, USDA has no reasonable basis for concluding that job data from an entire interstate LMA constitutes data about job-sufficiency in "the area in which the individuals reside" within the meaning of the statute. 7 U.S.C. § 2015(o)(4)(A)(ii)

By the terms of the statute, waivers (1) are based upon "the request of a State agency . . . with the support of the chief executive officer of the State"; (2) apply to a "group of individuals in the State"; and (3) are based upon a determination about job-sufficiency in "the area in which the individuals reside." 7 U.S.C. § 2015(o)(4)(A). It would literally be possible to define "the area in which the individuals reside" by reference to a region of the United States, the entire United States, or even the continent of North America. But defining the "area" that broadly would be out of context, with no rational connection to the territory covered by the waiver. The most natural reading of the statutory language, in context, is that the "area in which the individuals reside" must be *within* the applicant State. But even assuming *arguendo* that locations outside the State could qualify, there must be a very close connection between the area in which the ABAWDs subject to a waiver reside and the area where pertinent job opportunities are (otherwise the ABAWDs could not pursue them).

USDA claims that it has legitimately identified interstate LMAs as "areas in which the individuals reside" because areas within an LMA (even those located in another State) allegedly are a "reasonable commuting distance" for ABAWDs. 84 Fed. Reg. at 66,796. But USDA presents no analysis or facts establishing that ABAWDs have any capacity whatsoever to travel to other States within an LMA for work. USDA does not explain, for example, how ABAWDs would travel from the District to distant parts of Maryland, Virginia or even West Virginia for a job,

particularly given the barriers to transportation that ABAWDs confront.[40] Because there is no factual or analytical support for USDA's decision to define an entire interstate LMA as the "area" for data pertinent to a waiver for District of Columbia resident ABAWDs, that provision in the regulation is arbitrary and capricious. *See, e.g.*, *Haselwander v. McHugh*, 774 F.3d 990, 992 (D.C. Cir. 2014) (decision that is "devoid of any evidentiary support" is arbitrary and capricious); *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (statutory interpretation that is arbitrary and capricious is unreasonable under *Chevron* step two); *cf. DL v. District of Columbia*, 924 F.3d 585, 592 (D.C. Cir. 2019) (holding that attorney rates from the "community" of the District of Columbia do not include rates from a Census-Bureau area covering the District and portions of Virginia, Maryland and West Virginia).

[40] For example, Plaintiff Damon Smith has no driver's license and cannot afford public transportation outside the District. Smith Decl. ¶¶15-17. Plaintiff Geneva Tann has no car and no viable public transportation options beyond a five-mile radius of her District home. Tann Decl. ¶12. Numerous sources document these types of transportation barriers more generally. *See, e.g.,* Exhibit A at 45; Bruce Ormond Grant, *Reducing Barriers for Job Seekers*, D.C. Policy Center (May 23, 2018), at https://www.dcpolicycenter.org/publications/reducing-barriers-for-job-seekers-in-d-c-and-the-metro-region/ ("Wards 7 and 8 have the lowest median household incomes in the District, while also reporting the highest poverty rates (27.7 percent and 36.8 percent, respectively); these are also the neighborhoods with the longest commutes and circuitous public transit infrastructure."); Elizabeth Kneebone and Natalie Holmes, *The Growing Distance Between People and Jobs in Metropolitan America*, Metropolitan Policy Program at Brookings (March 2015), at 1 ("Overall, 61 percent of high-poverty tracts (with poverty rates above 20 percent) and 55 percent of majority-minority neighborhoods experienced declines in job proximity between 2000 and 2012"); Rucker Johnson, *Landing a job in urban space: the extent and effects of spatial mismatch*, Regional Science and Urban Economics 331 (Feb. 2006), at 333 ("[J]ob accessibility for less-educated workers is greatest in predominantly white suburbs more than 10 mi[les] from the centroid of black residential concentration, and . . . these job-rich areas are not served by public transportation.")

C. Plaintiffs Are Likely to Prove That USDA's Deeply Flawed Consideration of Public Comments Rendered the New Regulation Arbitrary and Capricious and Therefore Invalid

Plaintiffs also are likely to prove that USDA's deeply flawed consideration of public comments rendered the Final Rule arbitrary and capricious. Under the APA, rules that are not the "product of reasoned decisionmaking" are arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 52 (1983); 5 U.S.C. § 706(2)(A). In this case, USDA had to follow this "reasoned decision-making" requirement when it promulgated the Final Rule using the APA's notice-and-comment process.[41] Because USDA did not engage in reasoned consideration of public comments filed in the rulemaking proceeding, Plaintiffs are likely to prove that the rule is arbitrary and capricious and therefore invalid. *See, e.g*., *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012).

One aspect of reasoned decision-making is the "fundamental requirement of administrative law . . . that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." *Tourus Records, Inc. v. Drug Enf't Admin*., 259 F.3d 731, 737 (D.C. Cir. 2001) (internal quotation marks and citation omitted). It is significant in this case that simple "conclusory statements will not do; an 'agency's statement must be one of *reasoning*.'" *Amerijet International, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (quoting *Butte v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)). Conclusions that an agency does not "analyze or explain" render a rule arbitrary and capricious even if the agency asserts that it "'carefully considered all of the comments.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126

[41] The notice-and-comment process applies to "legislative" rules such as this one, which "effect a substantive regulatory change." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec*., 653 F.3d 1, 6-7 (D.C. Cir. 2011); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011); *see also* 5 U.S.C. § 553. USDA appears to concede that the APA required notice and comment procedures here.

(2016) (citation omitted). Simply "'stating that a factor was considered' – or found – 'is not a substitute for considering' or finding it." *Gerber v. Norton*, 294 F.3d 173, 185 (quoting *Getty v. Fed. Sav. & Loan Ins. Corp*., 805 F.2d 1050, 1055 (D.C. Cir. 1986)). In the preamble to the Final Rule, USDA repeatedly refers to significant comments and rejects them in a conclusory fashion, without providing a meaningful rationale. In so doing, USDA acted arbitrarily and capriciously.

Three examples illustrate USDA's deeply flawed decision-making approach. *First*, USDA acknowledged that some commenters opposed an unemployment-rate floor because "unemployment rates fail to accurately capture the availability of jobs specifically for ABAWDs who face particular barriers to employment" that include disparities for communities of color, those who have criminal justice records, people facing industry-related job volatility, and individuals with low educational attainment. 84 Fed. Reg. at 66,786. USDA conceded that "ABAWDs may face barriers to employment and have more limited employment prospects than the general public due to low educational attainment or other factors" and that "there is no measure available for determining the number of available jobs specifically for ABAWDs participating in SNAP in any given area." But in response to the comments, USDA simply stated that it is "resolute that establishing an unemployment rate floor . . . is necessary to ensure that the standard is designed to accurately reflect a lack of sufficient jobs in a given area." 84 Fed. Reg. at 66,787. USDA did not provide any analysis explaining *why*. And USDA's additional vague reference to its "operational experience" as a justification for the floor also fails the test for reasoned decision-making. *Id*.

Second, USDA made conclusory statements in response to comments that referred to the statute's text and legislative history in arguing that Congress intended for "insufficient jobs" to be

an independent waiver criterion that did not rely upon an unemployment rate.[42] According to these commenters, Congress intended the "insufficient jobs" criterion "as a recognition of the shortcomings of the unemployment rate for measuring job opportunities for the individuals subject to the time limit, and established that it could use flexibility in determining whether a State demonstrates a lack of jobs."[43] USDA provided no statutory analysis in response to these comments. Instead, the agency simply asserted that it "does not find setting an unemployment rate floor to be in conflict with legislative intent" and that it believes its Final Rule is "well within the authority under [7 U.S.C. §2015(o)(4)(A)], which provides the Secretary with broad discretion on how to define what does and does not constitute a lack of sufficient jobs." 84 Fed. Reg. at 66,788.

Finally, USDA provided no reasoned response to comments arguing that Congress intended not to have any unemployment-rate floor, because it voted down a 2018 statutory amendment that proposed imposing a 7 percent floor. 84 Fed. Reg. at 66, 785-86. USDA ignored this argument about congressional intent and simply responded generally to numerous objections to the 7 percent floor, in vague and conclusory language: "[t]he Department took these comments into consideration in its decision to adopt DOL's 6 percent floor, instead of a 7 percent floor." 84 Fed. Reg. 66, 786. Because these "conclusory statements will not do" (*Amerijet*, 753 F.3d at 1350), Plaintiffs are likely to prove that USDA's decision-making was arbitrary and capricious.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

The Court should issue a preliminary injunction, because the harm Plaintiffs face is "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm . . . [that is] beyond remediation." *League of*

[42] Exhibit A at 27.

[43] *Id*. at 28.

Women Voters of the U.S. v. Newby, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citations and internal quotation marks omitted, alterations adopted). The Final Rule will render it virtually impossible for the District to obtain a new waiver of the ABAWD time limits when its current District-wide waiver expires on March 31, 2020. Under the Final Rule, the District cannot qualify for a waiver unless the unemployment rate of its "interstate LMA" is six percent or higher. 84 Fed. Reg. at 66,811 (citing 7 C.F.R. §§ 273.24(f)(2)(ii), (f)(4)(ii)). And that unemployment rate is now 2.8 percent. *See supra* p. 29 n.39. Therefore, when its waiver expires on March 31, 2020, the District will be ineligible to obtain a new waiver. The District's ABAWDs—including Plaintiffs Damon Smith and Geneva Tann—stand to lose their SNAP benefits.

According to the District of Columbia Department of Human Services ("DHS"), that each month, approximately 14,500 of the 110,000 SNAP beneficiaries in the District are ABAWDs. DHS estimates that of those, approximately 13,050 would lose their SNAP benefits if the Final Rule goes into effect, precluding the District from obtaining a new waiver. Declaration of Laura Zellinger ("Zellinger Decl.") ¶8. The impending irreparable harm is obvious and palpable. *See, e.g.*, Smith Decl. ¶22-25. Deprivation of the individuals' statutory benefits constitutes irreparable harm *per se*, and the "certain and great" harm to their safety and well-being from loss of food assistance cannot possibly be remediated later. *Newby*, 838 F.3d at 8. The chain reaction initiated by loss of the waiver also will irreparably harm service-providing organizations like Bread, requiring them to irreversibly divert scarce resources away from other aspects of the holistic services that they provide in order to address the consequences of USDA's failure to comply with the SNAP Act. *See* Jones Decl. ¶¶9-14.

F. Individuals Suffer Irreparable Injury When They Are Unlawfully Deprived of SNAP Benefits

1. Forgoing Food Constitutes Irreparable Harm

Absent a preliminary injunction, the Final Rule will force the Plaintiffs Damon Smith and Geneva Tann, and thousands of similarly-situated ABAWDS, to "forego[] food or other necessities," a harm that is a "clearly irreparable." *Garnett v. Zeilinger*, 313 F. Supp. 3d 147, 157 (D.D.C. 2018) (internal quotation marks and citation omitted; also quoting *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) ("Back payments cannot 'erase either the experience or the entire effect of several months without food, shelter or other necessities'")). As this Court noted in *Garnett,* "the deprivation of food is extremely serious and is quite likely to impose lingering, if not irreversible, hardships upon recipients." *Id*. *See also Apotex, Inc. v. FDA*, No. 06-cv-627, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006) (loss of "a statutory entitlement . . . is a harm that has been recognized as sufficiently irreparable"); *Kyne v. Leedom*, 148 F. Supp. 597, 601 (D.D.C. 1956) (loss of a "statutory right" "works irreparable harm"). The harm is all the greater because SNAP applicants and recipients cannot sue the government for money damages resulting from the deprivation of SNAP benefits. *See Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 104 F. Supp. 2d 58, 76 (D.D.C. 2000) (irreparable harm existed where plaintiffs could not sue the government to recoup lost benefits).

Nor could monetary damages, even if available, fully compensate these individuals for the severe harm suffered as a result of loss of benefits: inadequate resources to feed themselves and resulting hunger, malnutrition, and psychological distress. Plaintiff Damon Smith knows this hunger well. When he has been homeless and not receiving SNAP benefits, he subsisted on inconsistent food sources and went hungry. Smith Decl. ¶22. Mr. Smith already suffers significant emotional distress not knowing how he will eat if the Final Rule precludes his access to SNAP

benefits. Smith Decl. ¶23. If he loses his benefits, Mr. Smith will be forced to rely on scarce soup kitchen resources and the unpredictable generosity of strangers in order to eat. *Id*. ¶22. Similarly, if Ms. Tann loses her SNAP benefits, she knows from experience that she will face significant hardship to obtain food, with associated emotional distress. Tann Decl. ¶¶ 11, 22.

2. There are Insufficient Employment and Job Training Opportunities for ABAWDs in the District

The Individual Plaintiffs' unique personal challenges render it substantially unlikely for them to obtain the employment or job training needed to retain their SNAP benefits in the absence of a District-wide waiver. Accordingly, any argument that the Individual Plaintiffs could avoid the loss of benefits and resulting irreparable harm by "working or participating in education and training for 20 hours or more per week" fails in the District.

According to DHS unemployment rates in a BLS-defined LMA, standing alone, do not reflect the high unemployment rates amongst the ABAWD population or the unique barriers to unemployment ABAWDS face in the District. *See e.g.,* Zellinger Decl. ¶¶9, 11, 12. *First*, DHS explained that there is a stark disparity between the types of jobs available in the district and the low-income ABAWD population's skill-set. *Id.* ¶12. A majority of jobs in the District require at least a bachelor degree, while "[m]ost low-income District residents have a high school degree or less. *Id.* Those few jobs that are available to low-skilled workers provide low pay and unpredictable hours, making it difficult for ABAWDS to achieve the 20-hour work week requirement. *Id.* *Second*, the unemployment rate in the District's LMA does not reflect the particularly high rates of unemployment in three specific Wards, where more than half of SNAP households live in the District, and that are majority African-American: Ward 5 (58 percent African-American), Ward 7 (92 percent African-American), and Ward 8 (92 percent African-American). *See* Exhibit B at 4-5. ABAWDS in these Wards face particular challenges to finding

employment within a feasible commuting distance and, as described above, African Americans traditionally face greater challenges in obtaining employment particularly where opportunities are scarce. *Id*. However, the Final Rule prevents the District from requesting a waiver for residents of these specific Wards because the Final Rule only permits waiver requests on behalf of entire LMAs.

The Individual Plaintiffs' particular circumstances render it substantially unlikely for them to obtain the employment opportunities necessary to retain their SNAP benefits in the absence of a District-wide waiver. For Mr. Smith, his inability to obtain necessary employment is not mere speculation—despite his physical and mental health challenges and lack of personal transportation, Mr. Smith has tried unsuccessfully for years to obtain steady employment. Smith Decl. ¶¶6, 9, 18. Similarly, Ms. Tann has worked with a temporary placement agency, to no avail, finding that her mental health diagnoses, court-mandated mid-day appointments, and lack of personal transportation prevent her from obtaining and keeping steady employment. Tann. Decl. ¶¶7-13, 16-20, 23. The Individual Plaintiffs' lack of employment is chronic due to systemic factors at play in the District and their individual circumstances; they, like many other ABAWDs in the District, rely on the ability to obtain food through SNAP benefits. That is only possible because the District has a waiver in place. Both Individual Plaintiffs are able to alleviate the threat of food insecurity by relying upon the District's waiver.

The Individual Plaintiffs also cannot avoid loss of their benefits through participation in job training programs. As an initial matter, job training opportunities in the District are too scarce to meet the needs of the estimated 13,050 ABAWDs that will lose benefits as a result of the Final

Rule.[44] And even if sufficient job training opportunities were available, such training would be a band-aid, not a solution. Upon completion of training, ABAWDS would remain insufficiently qualified for the vast majority of employment opportunities in the District—training cannot provide the college degree required to gain entry to majority of job openings in the District that require this credential. Moreover, job training does nothing to alleviate the Individual Plaintiffs' personal challenges to obtaining steady employment, discussed at length above. *See supra* pp. 18-21, 31 n.40, 38.

For each of the foregoing reasons, the Individual Plaintiffs will suffer irreparable harm when the District is denied a waiver of the ABAWD time limitation. The Individual Plaintiffs will, within a matter of weeks after the Final Rule becomes effective, lose their SNAP benefits for three years and once again be subject to food insecurity and the realities of hunger. They will be unable to avoid this result because job opportunities for low-skilled workers and job training opportunities are too scarce to serve the several thousand ABAWDS in need of such opportunities in the District.

[44] While this rulemaking continues to allow ABAWDs to qualify for SNAP benefits with participation in a qualified state employment and training ("E&T") program, that backstop is not a realistic option for most ABAWDs. These programs are severely underfunded and States are not obligated to provide a slot to every individual that requests to participate in a training program. States retain substantial flexibility over what services they offer and to whom. Because States have requested waivers for areas were E&T programs were not available, the areas that are losing waivers are the very areas that are least likely to have E&T programs. USDA acknowledged that the rulemaking did nothing to increase the availability of E&T programs and placed that burden squarely on the States. 84 Fed. Reg. at 66,807 ("The Department expects State agencies to do what they can to increase the employability of ABAWDs and help them find and gain work."). This leaves Plaintiffs in the District of Columbia without realistic access to E&T Programs. DHS states that the District only has capacity to serve 10 percent of its ABAWD population through such programs: it currently serves 1,200 people and has the capacity to serve 2,000 people in 2020. Zellinger Decl. ¶15. Further, the District has used all of its federal funding to reach only one in ten ABAWDs. *Id.*

G. Bread For The City Will Suffer Irreparable Harm Resulting from the Diversion of Its Resources Away from Provision of Holistic Services and Legislative Advocacy

The Final Rule also will irreparably harm the Organizational Plaintiff Bread if it goes into effect on April 1, 2020. The D.C. Circuit has held that an organization suffers irreparable harm where "the actions taken by the defendant have perceptibly impaired the organization's programs" and "the defendant's actions directly conflict with the organizations mission." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 177 (D.D.C. 2017) (quoting *League of Women Voters*, 838 F.3d at 8); *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). The Final Rule directly conflicts with Bread's mission to aid and empower low-income D.C. residents through the provision of comprehensive social services including food and nutritional support. *See* Jones Decl. ¶4. The Final Rule will "perceptibly impair[]" Bread's ability to provide "comprehensive direct services" including "food, clothing, medical care, legal services, and social services." *Id*. Its holistic missions will be irremediably frustrated if the Final Rule goes into effect on April 1, 2020. In particular, the Final Rule will force Bread to divert resources away from its comprehensive portfolio of services, community organizing and advocacy efforts, in order to address a single need: clients facing hunger and related hardships. *See* Jones Decl., ¶¶ 9-14. Therefore, Bread has shown proof satisfying both requirements for organizational harm.

Several Courts have recognized that the forced diversion of resources constitutes irreparable harm to an organization. *See, e.g*., *Open Cmtys.,* 286 F. Supp. 3d at 178; *Ind. State Conf. of the NAACP v. Lawson*, 326 F. Supp. 3d 646, 662 (S.D. Ind. 2018) ("Where organizational plaintiffs are compelled to divert and expend their resources to address a defendant's allegedly wrongful conduct, this is enough to satisfy their burden of showing a likelihood of suffering irreparable harm."); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018) (holding that organizational plaintiffs had established irreparable harm where they alleged

"ongoing harms to their organizational missions, including diversion of resources" in order to educate clients regarding the agency action). Bread will be forced to "expend . . . precious time and resources to remedy" the growing need for food assistance across the ABAWD population in the District. *See* Jones Decl. ¶9. And due to the dramatic increase in the number of clients requiring food assistance, Bread will have no choice but to reduce its budget for other social service programs. *Id*. ¶¶9-10.

Once Bread has expended its staff time and resources, "there can be no do over and no redress." *Newby*, 838 F.3d at 9. Bread's injury cannot be remedied by a larger budget in the future. The clients that Bread is unable to help due to the strain on its staff time and resources cannot be helped retroactively. Bread's clients require assistance with urgent food, legal, housing, and medical problems. If Bread cannot serve these clients now because it lacks the resources to do so based on USDA's failures, these clients will go unserved, and Bread's mission will continue to be frustrated. *See* Jones Decl. ¶4 (describing Bread's mission to empower low-income District residents through provision of comprehensive services).

Finally, Bread also faces significant harm to its legislative advocacy and community organizing functions, from which limited staff and resources will be diverted in order to meet the dramatically increased need for food assistance. Jones Decl. ¶14. As a result of budgetary constraints and resulting layoffs, Bread already has more than a dozen unfilled program and operational positions. *Id*. ¶10. Notwithstanding those challenges, it is currently able to staff its substantial advocacy efforts on local legislative issues, including those relating to the Racial Equity Achieves Results Act and work with the DC Alliance Coalition. *Id*. ¶14. The additional strain on Bread's resources imposed by the repercussions of the Final Rule will prevent Bread from proactively advocating for these policy changes that address the root causes of poverty. *Id*. ¶14.

Courts have recognized that the loss of resources for advocacy efforts is irreparable. *Casa De Md. v. Trump*, 2019 U.S. Dist. LEXIS 177797, at *49-50 (D. Md. Oct. 14, 2019).

Accordingly, Plaintiffs have demonstrated the irreparable harm element of the preliminary injunction standard.

III. THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFFS' FAVOR AND INJUNCTIVE RELIEF WILL NOT SUBSTANTIALLY HARM USDA'S INTERESTS

The balance of equities plainly weighs in Plaintiffs' favor. The Individual Plaintiffs face substantial irreparable harm through the loss of subsistence benefits, while USDA faces no cognizable risk of harm if the Court issues a preliminary injunction in this case, which would simply delay implementation of the Final Rule. Likewise, absent preliminary injunctive relief, Bread will be forced to continue depleting its scarce resources, take resources away from other projects central to its missions, and overextend its staff to compensate for USDA's failures. Such harm greatly outweighs any harm to USDA from delaying the Final Rule's implementation.

In *Briggs v Bremby*, a case challenging SNAP application processing delays, the court held that the balance of hardships tipped "decidedly" in favor of plaintiffs. The court explained that "the Plaintiffs' vital and essential interest in the timely receipt of food stamps and the resultant harm suffered through loss of timely benefits" clearly "outweigh[ed] any injury caused by requiring the Defendant to do what was already required under the Act." *Briggs*, No. 3:12-cv-324, 2012 WL 6026167, at *19 (D. Conn. Dec. 4, 2012), *amended on reconsideration on other grounds*, 2014 WL 1246696 (D. Conn. Mar. 24, 2014). Similarly, in this case, the concrete and irreparable injuries faced by Plaintiffs far outweighs any injury to USDA from being unable to implement its unlawful, arbitrary and capricious Final Rule.

As we explain above in Section I, the Final Rule exceeds USDA's statutory authority, is arbitrary and capricious, and violates notice and comment rulemaking requirements. The Court

should reject any claim that an injunction—which simply would delay the Final Rule's implementation date— would unduly burden USDA, because USDA would merely be required to comply with federal law:

> Because the defendants are required to comply with the Food Stamp Act under the terms of the Act, we do not see how enforcing compliance imposes any burden on them. The Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it. We also fail to see how enforcing a statute designed to promote the public welfare disserves the public.

Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986). Instead, Plaintiffs ask only that the Court maintain the status quo. In such cases, the balance tips in favor of the Plaintiffs. *E.g.*, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129-30 (D.D.C. 2012) (stating that where the "consequences would result in a change in the status quo," the balance of equities tipped in favor of the plaintiffs); *see also Sherley v. Sebelius*, 644 F.3d 388, 398 (D.D.C. 2011) (denying a preliminary injunction where it would upend the status quo); *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245-46 (D.D.C. 2014) (granting a preliminary injunction where doing so "preserve[d] the relative positions of the parties" and preserved the status quo (quoting *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014)). Accordingly, the balance of equities weighs in favor of granting a preliminary injunction.

IV. GRANTING A PRELIMINARY INJUNCTION WOULD ADVANCE THE PUBLIC INTEREST

The injunctive relief requested by Plaintiffs also would obviously advance the public interest. Courts have repeatedly recognized that the public interest favors maintaining the status quo and enjoining the unlawful deprivation of basic subsistence benefits. *See, e.g., Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (concluding that public interest favored granting a preliminary injunction regarding deprivation of Social Security benefits and explaining that "[o]ur

society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges"); *Booth v. McManaman*, 830 F. Supp. 2d 1037, 1045 (D. Haw. 2011) ("[O]rdering Defendant to comply with federally mandated timeliness requirements would serve to advance social welfare by ensuring that eligible low-income households receive needed assistance to provide food for themselves and their families.").

CONCLUSION

The Court should issue a preliminary injunction staying the effective date of the Final Rule pending final judgment in this case.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BREAD FOR THE CITY, DAMON SMITH, and GENEVA TANN, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, and THE UNITED STATES OF AMERICA, *Defendants.*	Civil Action No. 1:20-cv-127

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Motion for Preliminary Injunction, Memorandum in Support of Motion for Preliminary Injunction, Declarations of George Jones, Damon Smith, and Geneva Tann and Proposed Order, and a courtesy copy of Plaintiff's Complaint will be served by hand on January 16, 2020 on:

UNITED STATES OF AMERICA
c/o Ms. Jessie K. Liu
United States Attorney for the District of Columbia
United States Attorney's Office
555 4th Street, NW
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