

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
DISTRICT OF COLUMBIA, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	C.A. No. 1:20-CV-00119-BAH
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE, et al.,)	
)	
<i>Defendants.</i>)	
_____)	
BREAD FOR THE CITY, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	C.A. No. 1:20-CV-00127-BAH
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE, et al.,)	
)	
<i>Defendants.</i>)	
_____)	

**AMICUS BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFES**

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF DISCLOSURE

Pursuant to Local Rule 7(o) of the Local Rules of the United States District Court for the District of Columbia and Federal Rule of Appellate Procedure 29:

I, the undersigned, counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the National Women's Law Center ("NWLC"), certify that to the best of my knowledge and belief, the Lawyers' Committee and NWLC do not have parent corporations, no publicly held company holds 10% or more of stock of the Lawyers' Committee or NWLC, and no parents, subsidiaries, or affiliates thereof have any outstanding securities in the hands of the public.

STATEMENT OF COUNSEL

Pursuant to Local Rule 7(o) and Federal Rule of Appellate Procedure 29, counsel for *amicus curiae* states that none of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part. No persons other than *amicus* made a monetary contribution to the preparation or submission of this brief.

Dated: July 8, 2020
Washington, D.C.

Respectfully submitted,
/s/ Abid R. Qureshi
Abid R. Qureshi, Esq.
Counsel for Amicus Curiae

I. INTRODUCTION

In December 2019, United States Secretary Sonny of Agriculture Perdue announced that the Trump Administration’s (“the Administration”) purported success in revitalizing the economy and creating jobs had rendered work requirement waivers for able-bodied adults without dependents (“ABAWDs”) in the Supplemental Nutrition Assistance Program (“SNAP”) unnecessary: “We’ve got more jobs based on . . . Trump’s economy than we’ve got people to apply for them.”¹ Unfortunately, that was a gross overstatement of reality, particularly as applied to Black and Latinx people, whose unemployment numbers were approximately 70% and 30% higher, respectively, than the average rate for all racial and ethnic groups.²

Just six months since Secretary Perdue’s statement, Black and Latinx people have suffered a string of economically devastating blows. A world-wide pandemic has ravaged communities of color that already face astonishingly low access to quality healthcare services and health insurance. That same pandemic has also forced an unprecedented number of Black and Latinx people out of the workforce through widespread layoffs across industries that disproportionately employ people of color.³ In March 2020, just before the Final Rule was set to be promulgated, Secretary Perdue claimed that if ABAWDs “can’t find work in an economy of 3.5 percent unemployment, I don’t

¹ Kevin Stankiewicz, *Food-stamp changes are about getting people back to work not kicking them out, says USDA Chief*, CNBC (Dec. 4, 2019), <https://www.cnbc.com/2019/12/04/agriculture-secretary-sonny-perdue-food-stamp-changes-not-about-kicking-people-out.html>

² TED, *Unemployment rate was 3.6 percent in October 2019*, U.S. Bureau of Labor Statistics (Nov. 6, 2019), <https://www.bls.gov/opub/ted/2019/unemployment-rate-was-3-point-6-percent-in-october-2019.htm>

³ See, e.g., Maria Godoy, *What Do Coronavirus Racial Disparities Look Like By State?*, NPR (May 30, 2020), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>

know when they can.”⁴ His comment callously ignored the fact that the unemployment rate for Black people (5.8%) was 65% higher, and for Latinx people (4.4%) was more than 25% higher, than the overall unemployment rate.⁵ And just weeks after his comment, the overall unemployment rate had jumped more than 25%, to 4.4%. The unemployment rate for Black people (6.7%) and Latinx people (6.0%) was more than 52% and 36% higher than the overall rate, respectively. *Id.* April saw “the highest rate and the largest over-the-month increase in the history of the data (available back to January 1948).”⁶ Many of those who have remained employed now serve on the “frontline,” in low-income service jobs, forcing them to literally choose life or livelihood.

At the same time, recent acts of police brutality against Black people have been a stark reminder of the vast extent of longstanding systemic racial injustice and racial inequality across *all* facets of American life, including the criminal justice system, education, transportation, housing, and our economy. This vulnerability has resulted in significant hurdles to economic security for Black people across industries for generations.⁷ These economic hurdles, in turn, have

⁴ Chuck Abbott, *SNAP eligibility rules will tighten despite coronavirus outbreak*, Fern’s AG Insider (Mar. 10, 2020), https://thefern.org/ag_insider/snap-eligibility-rules-will-tighten-despite-coronavirus-outbreak/

⁵ Economic News Release, Employment Situation News Release, U.S. Bureau of Labor Statistics, https://www.bls.gov/news.release/archives/empsit_03062020.htm (last modified Mar. 6, 2020)

⁵ Economic News Release, Employment Situation News Release, U.S. Bureau of Labor Statistics, https://www.bls.gov/news.release/archives/empsit_04032020.htm (last modified Apr. 3, 2020)

⁶ TED, Unemployment rate rises to record high 14.7 percent in April 2020, U.S. Bureau of Labor Statistics (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm>

⁷ *See, e.g.*, Josh Bivens & Monique Morrissey, *EPI comments regarding SNAP work requirements*, Econ. Pol’y Inst. 6-10 (Apr. 2, 2019), <https://tinyurl.com/Bivens-19> (employment); William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 Wake Forest J.L. & Pol’y 441, 442-46 (2016) (criminal justice); Rakesh Kochhar & Anthony Cilluffo, *Key findings on the rise in income inequality within America’s racial and ethnic groups*, Pew Res. Ctr. (Jul. 12, 2018), <https://tinyurl.com/Kochhar-18> (income).

resulted in Black people being overrepresented in SNAP—a critical safety net that not only ensures individuals do not go hungry, but keeps millions of citizens out of poverty or from being driven further into poverty.⁸ These inequities, which have existed for 400 years, should have factored into the United States Department of Agriculture’s (“USDA”) assessment of opportunities for the very people who rely on SNAP. They did not.

The Final Rule’s requirement that states utilize Labor Market Areas (“LMAs”), over-reliance on Bureau of Labor Statistics (“BLS”) data, and the implementation of the 6% floor are particularly harmful to ABAWDs of color. As detailed below, these provisions, which eliminate or restrict time-limit waivers, necessarily create a disproportionate effect on ABAWDs of color who face various and compounding barriers to employment.⁹ In taking this action, USDA failed to consider, in violation of the Administrative Procedure Act (“APA”), how clear and systemic inequities hinder ABAWDs of color from maintaining their SNAP benefits under existing requirements. USDA also failed to consider how removing these crucial benefits will drive ABAWDs of color further into poverty, thus exacerbating the vast inequities described above. It is precisely because of such prolific inequality that the decision to foreclose time-limit waivers is not a neutral decision divorced from race or ethnicity. Accordingly, this Court should grant Plaintiffs’ Motion for Summary Judgment.¹⁰

⁸ Steven Carlson, et al. *Who Are the Low-Income Childless Adults Facing the Loss of SNAP in 2016?*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 8, 2016), <https://tinyurl.com/CarlsonFeb2016>

⁹ See Danielle Kwon et al., *Using Labor Market Areas to Determine ABAWD Waiver Eligibility Limits SNAP’s Local Flexibility*, URBAN INST. 3 (Apr. 2020), <https://tinyurl.com/Kwon2020>; Colin Gray et al., *Employed in a SNAP? The Impact of Work Requirements on Program Participation and Labor Supply* 24 (Sept. 2019), <https://tinyurl.com/Gray-2019>

¹⁰ No party’s counsel authored this brief in whole or in part, and no person contributed money intended to fund the preparation or submission of this brief.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a non-partisan, non-profit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. The National Women's Law Center ("NWLC") is a non-profit legal organization dedicated to the advancement and protection of women's legal rights and to the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to protect and advance the progress of women and their families in core aspects of their lives, including employment, income security, education, and health and reproductive rights, with an emphasis on the needs of women and families with low incomes and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the federal courts to secure the equal treatment of women and girls under the law, as well as commented on a range of rulemakings threatening access to anti-poverty programs for women and families.

As leading civil rights organizations, the amici have a vested interest in opposing limitations to SNAP because the Final Rule would deprive low-income people of color, especially women of color, of critical benefits. Amici also have a vested interest in opposing improper limitations associated with SNAP because such requirements fail to consider the ways in which systemic racism and sex discrimination has erected hurdles to gainful and consistent employment for many communities of color.

III. ARGUMENT

In addition to the reasons set forth in Plaintiffs' Motion for Summary Judgment, this Court should vacate the Final Rule for two reasons.

First, USDA gave no consideration to the reliance interests of ABAWDs and only cursory consideration to the Final Rule’s disparate impact upon protected classes, in violation of the APA. As illustrated below, eliminating SNAP benefits for nearly 700,000 individuals would shatter the reliance interests of ABAWDs who live in waived areas. This is especially true for Black and Latinx people, who, respectively, represent 25% and 20% of ABAWDs but comprise only 13.4% and 18.5% of the overall population.¹¹ *See* Bolen Decl. ¶ 23 (ECF No. 3-2). This fact is not in dispute. The government even conceded that “implementation of the final rule may impact Black and Latinx people at a higher rate due to factors more strongly associated with potential program users in these minority groups.” 84 Fed. Reg. 66782, 66808 (Dec. 5, 2019). Moreover, USDA’s Food and Nutrition Services Civil Rights Division noted that it did not have data necessary to evaluate the full extent of the Rule’s disparate impact and expressly recommended mitigation strategies to lessen any such impact. USDA failed to gather additional data or apply a single mitigation strategy prior to promulgating the Final Rule—and may never do so. For these reasons, the Final Rule is arbitrary and capricious in violation of the APA.

Second, the record is clear that USDA failed to substantively consider evidence demonstrating the harm to ABAWDs of color. And the harm is great. For example, the Final Rule’s LMA provision ignores that the sheer size of some LMAs creates unrealistic commuting expectations for ABAWDs of color. Because LMAs often group together areas with high unemployment rates with areas of low unemployment, ABAWDs of color who live in areas with high unemployment will be precluded from accessing critical SNAP benefits. This provision is unreasonably burdensome, as ABAWDs living in areas with insufficient jobs must now commute

¹¹ Quick Facts, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited July 7, 2020).

great distances to find part-time employment to sustain their SNAP benefits. Moreover, the 6% unemployment floor and restriction to BLS unemployment data reduces a nuanced unemployment analysis to a cursory review of general unemployment rates. Coupled with the LMA provision, the 6% floor will eliminate broad swaths of waived areas, primarily consisting of communities of color. Several experts and stakeholders submitted comments depicting these disparities. USDA did not substantively respond to a single one. Accordingly, the government's failure to consider and address the disparate impact on communities of colors caused by these changes was an abuse of discretion in violation of the APA.

A. The Final Rule Is Arbitrary and Capricious Because It Did Not Consider the Reliance Interests of ABAWDs Living In Waived Areas.

The Final Rule violates the APA because it completely ignores the legitimate reliance interest that ABAWDs, specifically ABAWDs of color, have on the current regulatory scheme. When an agency changes a policy, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Dep’t of Homeland Sec. v. Regents of the Univ of Cal.*, No. 18-587, 2020 WL 3271746, at *14 (June 18, 2020) (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). “It would be arbitrary and capricious to ignore such matters.” *Id.* Once the agency has identified potential reliance interests, it must assess “whether they [are] significant, and weigh any such interests against competing policy concerns.” *Id.* at *15. Identifying and weighing reliance interests may lead the agency to make a “difficult decision,” depending on the extent of a population’s reliance on a prior policy. *Id.* at *15. But “[m]aking that difficult decision was [USDA’S] job.” *Id.*

1. ABAWDs, Who Are Disproportionately People of Color, Have A Reliance Interest In Work-Requirement Waivers.

The Final Rule is arbitrary and capricious because USDA adopted the Rule without considering the “legitimate reliance” interests of ABAWDs, who are disproportionately Black and

Latinx people, created by its “longstanding policy.” *See id.* As this Court highlighted, the government’s “conclusory reasoning and summary dismissal” of commenters’ concerns are “particularly troubling in light of the reliance interests involved.” *District of Columbia v. USDA*, No. 20-119 (BAH), 2020 WL 1236657, at *21 (D.D.C. Mar. 13, 2020) (citing *Encino, supra*). This Court also found that these interests are relevant to the most basic needs “as fundamental as access to nutrition.” *Id.* The sheer extent of the interests involved is stunning, as 700,000 individuals are expected to lose the SNAP benefits upon which they “have depended . . . to avoid hunger.” *Id.*

SNAP is a “critical automatic stabilizer and safety net program,” which ensures that those who lack resources do not go hungry.¹² These benefits “radiate outward,” as SNAP frees up financial resources to cover the costs of rent, utilities, clothing, and health care.¹³ Others also rely on SNAP benefits ABAWDs receive. Many ABAWDs support and feed noncustodial children and other family members.¹⁴ These individuals, too, will suffer under the Final Rule.¹⁵

¹² Lauren Bauer et al., *Who Stands to Lose if the Final SNAP Work Requirement Rule Takes Effect?*, Brookings Inst. 7 (Apr. 2020), <https://tinyurl.com/Bauer2020>

¹³ *See* Bartfeld et al., *The Basics of SNAP Food Assistance*, Inst. for Res. on Poverty 2 (Nov. 2015), <https://tinyurl.com/Bartfeld2015>; Bauer et al., *supra*, at 1-2; Steven Carlson et al., *SNAP Works for America’s Children*, Ctr. on Budget & Pol’y Priorities 14 (Sept. 29, 2016), <https://tinyurl.com/CarlsonSept2016>; *see also* *Regents*, 2020 WL 3271746, at *14.

¹⁴ *See* Food & Nutrition Serv., *SNAP Work Requirements*, USDA, <https://tinyurl.com/FNS-USDA> (last visited July 7, 2020).

¹⁵ Carlson et al., *Who Are the Low-Income Childless Adults* 1, 5 (“Nearly one-quarter [of ABAWDs] are non-custodial parents, and 13 percent are caregivers for a parent, relative, or friend.”); Ctr. on Budget & Pol’y Priorities (Feb. 8, 2016), <https://tinyurl.com/CarlsonFeb2016>; *see also* Maggie Dickinson, *The Ripple Effects of Taking SNAP Benefits from One Person*, *The Atlantic* (Dec. 10, 2019) (noting that many ABAWDs use their SNAP benefits to feed children who reside with another parent), <https://tinyurl.com/Dickinson19>

All of these reliance interests are heightened for ABAWDs of color.¹⁶ Indeed, studies have shown that if the Final Rule had taken effect in 2018, nearly an equal percentage of Black and Latinx ABAWDs (45%) would have lost benefits compared to white ABAWDs (45%), despite non-Hispanic white individuals comprising the majority of the ABAWD population.¹⁷ *See id.*; Quick Facts, *supra*; Wheaton, *supra*, at 9 tbl.2. For example, in Washington, D.C., where 93% of SNAP participants are Black, the devastating effects of the Final Rule would be far from race-neutral.¹⁸ If the Rule took effect in 2018, Black ABAWDs living in the District, but within the Washington-Arlington-Alexandria LMA, would have confronted a 3-month time limit with an unemployment rate of 12.9%—well-above the 6% floor, discussed further below.¹⁹ USDA failed to recognize the reliance interests that are “*more strongly associated* with potential program users in these minority groups,” which is arbitrary and capricious. *See Regents*, 2020 WL 3271746, at *14-15; *Encino Motorcars*, 136 S. Ct. at 2126.

2. *USDA’s Baseless Rationale and Policy Concerns Do Not Outweigh the Serious Reliance Interests of ABAWDs, Including ABAWDs of Color.*

USDA claims that the Rule is justified based on a concern that waivers are being granted for ABAWDs who do not “truly need them.” 84 Fed. Reg. at 66,783. However, USDA has provided no meaningful evidence that these ABAWDs have no such “need,” merely citing to the

¹⁶ *See* Carlson et al., *Who Are the Low-Income Childless Adults*, *supra* at 1 (finding that about forty percent of all ABAWDs identify as Black or Latinx); ECF 26-2 (Civil Rights Impact Analysis (“CRIA”)) at 75 (same); Quick Facts, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045219>

¹⁷ *See also* Laura Wheaton, *Estimated Effect of Recent Proposed Changes to SNAP Regulations*, Urban Inst. 9 tbl.2 (Nov. 2019), <https://tinyurl.com/Wheaton-2019> (finding that 274,500 white ABAWDs would lose benefits compared to 273,600 combined Black and Hispanic individuals).

¹⁸ Decl. of Edward Bolen ¶ 29, *District of Columbia v. USDA*, No. 20-119 (ECF No. 3-2).

¹⁹ Janelle Jones, *In 14 states and DC, the African American unemployment rate is at least twice the white unemployment rate*, Econ. Pol’y Inst. 1 (May 17, 2018), <https://tinyurl.com/Jones-2018>

fact that “about half of the ABAWDs on SNAP live in waived areas, despite low unemployment levels across the majority of the country.” *Id.* As this Court recognized, the existence of low unemployment levels *nationally* does not reflect the need for waivers in certain *local areas*.²⁰ Given that nearly half of ABAWDs are people of color who bear the burden of systemic racial inequality and face outsized barriers to stable employment, these SNAP recipients are more likely to be found in areas that are economically distressed. Moreover, studies show that ABAWDs who can work do so, despite the severe and disproportionate barriers to employment they must confront.²¹ Thus, states are indeed using waivers where the need is greatest.

Next, USDA has provided no meaningful evidence that “States have taken advantage” of SNAP. *Id.* Even if true, this would not outweigh the reliance interests of ABAWDs in these areas. 84 Fed. Reg. at 66,794. Indeed, USDA has not explained how such conduct constitutes a “misuse” of SNAP. *Id.* at 66,796. To be clear, USDA does not claim that states are requesting waivers for regions that do not meet the waiver requirements.²² Rather, USDA seeks a rule change because it believes the states’ ability to obtain waivers within the current parameters is a “problem.” *Id.* at 66,794. Thus, USDA’s apparent justification for the rule change is little more than a naked policy preference for fewer waivers.

²⁰ See *District of Columbia*, 2020 WL 1236657, at *3; accord *Bivens & Morrissey supra*, at 6-7.

²¹ See Carlson et al., *Who Are the Low-Income Childless Adults*, *supra*, at 10, 15; Bartfeld et al., *supra*, at 2; Elaine Waxman & Nathan Joo, *Reinstating SNAP Work-Related Time Limits*, Urban Inst. 6 (Mar. 2019), <https://tinyurl.com/Waxman2019>; Joel Cuffey et al., *Food Assistance and Labor Force Outcomes of Childless Adults: Evidence from the CPS*, Econ. Res. Serv. 17, USDA (2015), <https://tinyurl.com/Cuffey2015>; see generally Ed Bolen et al., *More Than 500,000 Adults Will Lose SNAP Benefits in 2016 as Waivers Expire*, Ctr. on Budget & Pol’y Priorities (Mar. 18, 2016), <https://tinyurl.com/Bolen2016>

²² If so, the Secretary would be well within his authority to decline to waive the work requirement for those areas and no rule change would be necessary. See 7 U.S.C. § 2015(o)(4)(A).

USDA has provided nothing more than “conclusory reasoning” to explain how resolving this “problem” justifies penalizing hundreds of thousands of ABAWDs. *District of Columbia*, 2020 WL 1236657, at *21. USDA’s failure to provide proper reasoning is particularly stark in light of the health and economic crises facing our country. The Final Rule is expected to exacerbate the impact of these dual crises, particularly for communities of color, by contributing to an unrelenting cycle of poverty with intensified food insecurity, poorer physical and mental health outcomes, and increased levels of housing instability.²³ Because USDA failed to mitigate the serious reliance interests of ABAWDs of color against its purported policy justifications, the Final Rule is arbitrary and capricious.

B. USDA Did Not Consider the Final Rule’s Disproportionate Impact Upon Communities of Color In Violation of Its Own Regulations and the APA.

1. USDA Departmental Regulations Require a Thorough Analysis of Potential Harms to ABAWDs of Color.

USDA failed to abide by its own departmental regulation—4300-04 (“Departmental Regulation”)—that directed USDA to adequately evaluate the impact that the Final Rule would have on ABAWDs of color.²⁴ Indeed, “[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.” *Nat’l Conservative Political Action Comm. v. Fed. Election Comm’n*, 626 F.2d 953, 959 (D.C. Cir. 1980). As such, USDA was required to “analyze the civil rights impact(s) of policies, actions, or

²³ Bauer et al., *supra*, at 7; Danielle Kwon et al., Using Labor Market Areas to Determine ABAWD Waiver Eligibility Limits SNAP’s Local Flexibility, Urban Inst. 3 (Apr. 2020), <https://tinyurl.com/Kwon2020>.

²⁴ “Normally, an agency rule would be considered arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

decisions that will affect the USDA workforce or its federally conducted or federally assisted programs and activities” in its CRIA. USDA DR 4300-004 *Civil Rights Impact Analysis* at 2. The Departmental Regulation further directed USDA to collect “current race, ethnicity, gender (REG) . . . data collection of program participants from various sources (i.e., U.S. Census, Census of Agriculture, agency internal databases, etc.) to determine if implementation will result in underrepresentation or will disproportionately impact protected groups.” *Id.* at 12. And, importantly, the CRIA must include, *inter alia*, analysis of “(1) [w]hether or not the impacts will be disproportionate; and (2) [h]ow the disproportionate impacts will be manifested.” *Id.*

The CRIA did not even minimally satisfy these requirements. The CRIA claimed that “[s]pecific race, ethnicity, and gender data regarding the ABAWDs that will be impacted *are not available.*” ECF No. 26-2 (CRIA) at 76 (emphasis added). The only data included in the CRIA broadly describes the ethnic makeup of current ABAWDs. *See id.* at 75 (“43.8% are White, 27% are African-American, 1.8% are Asian, 11.4% are Hispanic, under 1% are Native Hawaiian or other Pacific Islander, 1.8% are Native American, 12% have an unknown race, and 2.1% are identified as being of multiple races.”). As discussed in detail below, several experts submitted extensive race, ethnicity, and gender data detailing the harm to communities of color, which USDA clearly ignored when conducting its CRIA. Rather than assess “[h]ow the disproportionate impacts will be manifested,” the CRIA observed only that:

[T]he implementation of the final rule may impact African Americans and Hispanic groups at a higher rate due to factors more strongly associated with potential program users in these minority groups. Rates of unemployment for members of minority protected groups tend to be higher than rates of unemployment for non-minorities, vary widely from State to State, and as a result any such impacts vary based on factors specific to individual states

Id. at 76.

Contrary to USDA’s contention that the CRIA is not subject to judicial review, courts may consider the sufficiency of a departmental CRIA when relevant to a party’s challenge of a final agency action.²⁵ Here, the CRIA included neither “[s]pecific race, ethnicity, and gender data regarding the ABAWDs that will be impacted,” nor a description of “[h]ow the disproportionate impacts will be manifested.” *Id.*; Dept. Reg. at 12. In view of these shortcomings, USDA failed to comply with its own Departmental Regulations, and the Final Rule was therefore “unlawfully issued.” *See Nat’l Conservative Political Action Comm.*, 626 F.2d at 959.

2. *The Department Failed to Implement the CRIA’s Recommendations and Mitigation Strategies.*

USDA also egregiously ignored the CRIA’s remedial recommendations and mitigation strategies. In view of its own deficiencies, the CRIA recommended that USDA gather data and information necessary to fully evaluate the racial impact. To remediate this issue, the CRIA directed USDA to (1) “complete a detailed review of the impact of this final rule on each State Agency and their SNAP participants who are members of protected groups before its implementation to determine whether any specific groups might be disproportionately impacted;” (2) “encourage States to develop State-specific plans to address any impacts that are identified as a result of the detailed reviews of the final rule;” (3) “identify the race, sex, and national origin of SNAP beneficiaries impacted by the final rule to evaluate civil rights impacts on protected classes;” (4) “develop a Factsheet detailing scenarios that would be designated as exceptional circumstances under the final rule;” and (5) “extend the implementation of the final rule from

²⁵ *See McFalls v. Purdue*, No. 3:16-cv-2116-SI, 2018 WL 785866, at *10 (D. Or. Feb. 8, 2018) (noting that an agency’s practice of “conducting CRIAs using an improper standard” could be considered “wrongful behavior”); *Ctr. for Sci. in the Pub. Interest v. Purdue*, No. GJH-19-1004, 2020 WL 1849695, at *15 (D. Md. Apr. 13, 2020) (“Although Plaintiffs may disagree with the results of the Civil Rights Impact Analysis, the Court is satisfied that the Analysis identifies the relevant issues of concern and USDA’s reaction to them . . .”).

April 1, 2020, to May 1, 2020, to allow additional time to complete the mitigation as outlined above.” ECF No. 26-2 (CRIA) at 77. USDA completed none of these actions, yet did not delay implementation of the Final Rule.

Next, the CRIA indicated that USDA should “[e]ncourage State agencies to develop SNAP Employment and Training (E&T) programs and to make strategic partnerships with private sector entities to facilitate the training and employment of SNAP beneficiaries affected by the final rule.” *Id.* But USDA conceded it did not fulfill this recommendation because there is not “additional federal funding to help support the E&T programs.” Mar. 5, 2020 Prelim. Inj. Hr’g Tr. at 90:19-91:7 (ECF No. 52). Remarkably, USDA suggested it was not necessary to implement *any* mitigation strategies identified in the CRIA as long as it “consider[ed] the possibility of a disparate impact.” *Id.* at 91:8-12.

The Final Rule is therefore arbitrary and capricious because, as set forth above, it did not seriously attempt to consider “an important aspect of the problem” (the racial impact), as required by Departmental Regulations. USDA also abused its discretion by issuing the Final Rule without conducting additional studies, delaying implementation, or implementing the mitigation strategy, as directed by the CRIA.

C. USDA Abused Its Discretion By Failing to Consider or Respond to Comments on the Disparate Impact on Communities of Color Caused By the Requirement That States Only Request Waivers for LMAs.

The Final Rule’s LMA requirement fails to account for inherent barriers to unemployment, as well as transportation limitations faced by Black and Latinx ABAWDs in urban areas. The Department of Labor defines an LMA as “an *economically integrated* area within which individuals can reside and find employment within a *reasonable* distance or can readily change

jobs without changing their place of residence.”²⁶ However, LMA designations oftentimes group low-income urban communities with wealthier suburban units—even if those communities are in separate counties or states. The combination of low-income urban areas with well-to-do white suburbia is far from “economically integrated.” Indeed, “[t]he mismatch between available employment for ABAWDs and available employment across an LMA is starkest in large urban areas.” *District of Columbia*, 2020 WL 1236657 at *20. Similarly disconnected to reality is the fact that a “reasonable distance” is purely based on the “commuting patterns of the *general* workforce”—the idea that every resident can drive to work. However, the Rule fails to recognize that Black and Latinx ABAWDs in low-income areas generally rely on public transportation to get to work and their commute can be between 5-6 hours each way, comprising 3-4 modes of transportation.²⁷

Rather than rely on states’ expertise to group similarly situated counties, the use of LMAs drastically distorts both the commuting capabilities and the unemployment and poverty percentages of Black and Latinx residents in urban areas. Reliance on LMAs will result in potentially 301,000 low-income Americans losing their SNAP benefits. *See District of Columbia*, 2020 WL 1236657, at *1. As shown below, this grouping of counties is not only entirely arbitrary in the context of time limit waivers, but directly harmful to communities of color.

²⁶ Local Area Unemployment Statistics: Geographic Concepts, U.S. Bureau of Labor Statistics (Mar. 20, 2020) (explaining that counties are grouped into an LMA if at least 25% of one county’s employed residents commute to another county within the LMA or at least 25% of one county’s workers commuted in from another county), <https://www.bls.gov/lau/laugeo.htm>

²⁷ *See supra* Section C.2.

1. ***LMAs Fail to Account for Unemployment Differences Between White Workers and Black and Latinx Workers.***

LMAs simply do not reflect higher unemployment and poverty rates in urban areas. Bronx County in New York is a noteworthy example. The Bronx is part of the “New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area,” and is one unit out of 25 units across New York, New Jersey and Pennsylvania. The Bronx itself is comprised of approximately 34.1% Black, 55.9% Latinx, and 21.3% white residents. The LMA’s overall population is comprised of only 16% Black, 25% Latinx, and 46% white residents.²⁸ As the total percentage of Black and Latinx residents decreases, the unemployment rate drops (5.8% to 3.8%), the median household-income rises (\$38,085 to \$78,478), and the poverty rate decreases (27.4% to 12.3%).^{29,30} The disparity in unemployment, poverty, and median household-income relative to racial composition in Baltimore City, Maryland³¹ and Washington D.C.,³² is also striking.

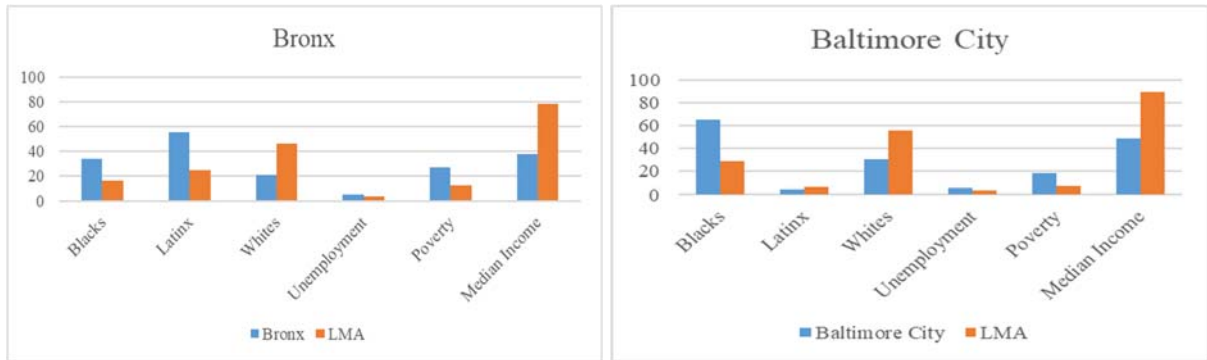
²⁸ Bronx County, N.Y., U.S. Census Bureau, <https://data.census.gov/cedsci/profile?q=Bronx%20County,%20New%20York&g=0500000US36005&tid=ACSDP1Y2018.DP05> (last visited July 7, 2020); New York-Newark-Jersey City, NY-NJ-PA Metro Area, Census Reporter, <https://censusreporter.org/profiles/31000US35620-new-york-newark-jersey-city-ny-nj-pa-metro-area/> (last visited July 7, 2020); Bronx County, N.Y. Census Reporter, <https://censusreporter.org/profiles/05000US36005-bronx-county-ny/> (last visited July 7, 2020).

²⁹ *Id.*

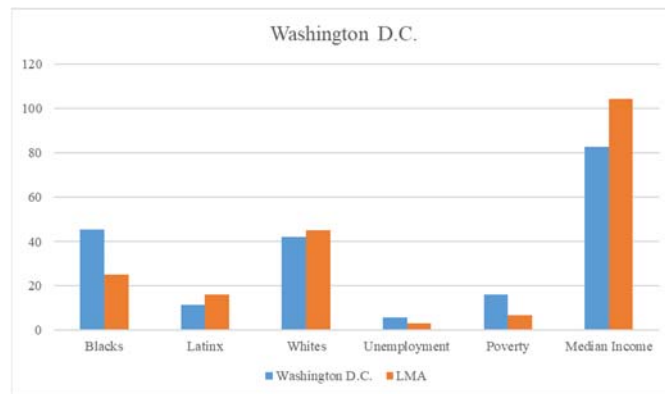
³⁰ Note that the numbers in the chart correlate to percentages for all categories, outside of the Median Income category, which correlates to dollars.

³¹ Baltimore City, Maryland is one of six counties across Maryland, and the LMA is titled, “Baltimore-Columbia-Towson, MD Metropolitan Statistical Area.”

³² Washington D.C. is one of 23 counties across Maryland, Virginia, and West Virginia, and the LMA is titled, “Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Area.”



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Thus, urban areas tend to have more diverse populations and higher unemployment.³⁵ By forcing states to combine these areas with units that have less diverse populations and lower unemployment, the government is ignoring the unemployment crisis facing Black and Latinx ABAWDs in urban areas across the country.

³³ <https://data.census.gov/cedsci/profile?q=Baltimore%20city&g=0500000US24510#>; Baltimore-Columbia-Towson, MD Metro Area, Census Reporter, <https://censusreporter.org/profiles/31000US12580-baltimore-columbia-towson-md-metro-area/> (last visited July 7, 2020); Baltimore City, MD, census Reporter, <https://censusreporter.org/profiles/05000US24510-baltimore-city-md/> (last visited July 7, 2020).

³⁴ District of Columbia, U.S. Census Bureau, <https://data.census.gov/cedsci/profile?g=0400000US11&q=District%20of%20Columbia> (last visited July 7, 2020); Washington-Arlington-Alexandria, DC-VA-MD-WV Metro Area, Census Reporter, <https://censusreporter.org/profiles/31000US47900-washington-arlington-alexandria-dc-va-md-wv-metro-area/> (last visited July 7, 2020); Washington, DC, Census Reporter, <https://censusreporter.org/profiles/16000US1150000-washington-dc/> (last visited July 7, 2020).

³⁵ Letter of Nat’l Women’s Law Center to Certification Policy Branch, SNAP at 16 (Apr. 2, 2019), <https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2019/04/NWLC-Comment-on-Proposed-SNAP-Time-Limit-Rule-RIN-0584-AE57.pdf>

Moreover, LMAs do not consider how women of color face structural barriers to employment. Due to the intersecting nature of systemic racism and sex discrimination, Black and Latinx women face higher unemployment rates than white men. For example, in February 2019, the national unemployment rate for Black women (5.3%) was almost twice the unemployment rate for white men (3%), with 4% of Latinx women unemployed.³⁶ Overall, and across all races and ethnicities, women are overrepresented in the low-wage workforce.³⁷ Although Latinx women only account for 7.4% of the workforce, 16% of them are low-wage workers. *Id.* at 13. Indeed, Black women only account for 6.5% of the workforce, while 12% of them are low-wage workers.³⁸

The Final Rule also fails to consider the barriers to unemployment for Black and Latinx women. For instance, these women are more likely to be involuntary part-time workers, and women of color in the low-wage workforce face unstable and unpredictable schedules that prevent them from working on average 20 hours per week. *Id.* at 13, 16. Black and Latinx women face unemployment periods longer than three months, and, in February 2019, approximately 270,000 Black women and 207,000 Latinx women were unemployed for 15 weeks or longer. *Id.* at 16. Black women are unemployed for an average of 28 weeks and Latina women are unemployed for an average of 16 weeks. *Id.* In these ways, the LMAs—and thus the USDA—failed to consider the specific employment realities of women of color and the ways in which the Rule would further harm these communities.

³⁶ *Id.* at 16.

³⁷ *Id.* at 12.

³⁸ *Id.*; see also Jasmine Tucker, Julie Vogtman, *When Hard Work Is Not Enough: Women in Low-Paid Jobs*, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf (April 2020).

2. *USDA Failed to Consider How the Size of Each LMA Creates Unrealistic Commuting Expectations for Black and Latinx ABAWDs.*

The LMA provision also ignores that low-income residents heavily rely on public transportation, despite USDA's claims that ABAWDs can "reasonabl[y]" commute to any other part of the LMA for work. *Id.* Such a contention is unreasonable. Indeed, the percentage of residents who rely on public transportation in urban areas is generally *three times* that of residents who rely on public transportation in each of the aforementioned LMAs.³⁹ For example, in the Bronx, 67.3% of the *unit* population relies on public transportation or walking to work.⁴⁰ By contrast, only 37% of the *LMA* population relies on such modes of transportation.⁴¹ Similarly, in Baltimore City, 24.4% of the *unit* population relies on public transportation or walking to work, whereas only 8% of the *LMA* population relies on such commutes.⁴² And, in Washington D.C, 47.7% of the *unit* population uses only public transportation or walking, while 16% of the *LMA* population makes use of such transportation.⁴³

Moreover, public transportation is simply not a viable option to commute to certain counties within the LMA. Although the unemployment percentages in the counties within the LMA are lower than the urban areas, and thus, in theory, have more jobs readily available, public transportation is not a viable option to commute to certain counties within the LMA. For instance, although the other counties in Baltimore City's LMA have a lower unemployment percentage (ranging between 2.9%–3.9%) compared to Baltimore City's unemployment percentage (5.2%), it

³⁹ See *supra* n. 40-43.

⁴⁰ See *infra* n. 28.

⁴¹ *Id.*

⁴² See *supra* n. 33.

⁴³ See *supra* n. 34.

is nearly impossible to travel the duration of Baltimore City's LMA without taking no less than 4 transfers with a commute over 6 hours.⁴⁴ The Bronx is another noteworthy example. Although the Bronx has an unemployment percentage of 5.8%, many of the other units in the LMA are under 4%, and it thus appears that a Bronx resident could retain a job in one of these areas. However, traveling the entire distance of that LMA is over 5 hours, requiring 4 transfers between rail and bus.⁴⁵ The commute from the Bronx to one end of the LMA fares no better, as it is over 5 hours comprising over 3 separate modes of transportation, in addition to significant walking time.⁴⁶ Finally, the commute in Washington D.C.'s LMA is over 6 hours from end to end, comprising 2 separate modes of transportation.⁴⁷ Thus, although the other counties in the LMA have a significantly lower unemployment rate (all well under 4%), compared to D.C.'s 5.6% rate, it is not feasible for these residents to travel within the LMA.

A commute of these lengths will necessarily entail an overly burdensome commuting expense. For instance, in Washington D.C.'s LMA, the fare for the D.C. Metro ranges \$2.25-\$6.00 *per ride*.⁴⁸ Additionally, ABAWDs with children will be required to pay for much longer periods of childcare if they are traveling 7+ hours a day to and from work. Even if such residents could

⁴⁴Driving Directions, Rosebank, Baltimore, MD to North Beach, MD, <https://goo.gl/maps/nZh784AN6FPQnakw7> (last visited July 8, 2020).

⁴⁵ Driving Directions, Stafford Township, N.J. to Poughkeepsie, N.Y., Google Maps, <https://goo.gl/maps/Ef8WJdi2LtJiZ5Ga8> (last visited July 8, 2020)

⁴⁶ Driving Directions, Bronx, N.Y. to Stafford Township, N.J., Google Maps, <https://goo.gl/maps/mDMW NX689KPxWBDU8> (last visited July 8, 2020)

⁴⁷ Driving Directions, Frederick, MD to Fredericksburg, VA, Google Maps, <https://goo.gl/maps/Q2HnDKBkTC2Kr2jCA> (last visited July 8, 2020)

⁴⁸Washington DC, *Navigating With Metro: Find out everything you need to know to ride DC's world-class Metrorail system, get a Metro map, check operating hours, ride fares and more*, <https://washington.org/navigating-dc-metro#Metro-Fares> (last visited July 7, 2020).

make the impossible possible, it is hard to imagine an employer who would hire an individual whose commute is so lengthy and complicated.

These examples demonstrate that LMAs misrepresent the commuting patterns of Black and Latinx ABAWDs, as their reliance on public transportation is not similar to that of the “general workforce.” USDA must factor in these considerations in deciding what commuting patterns are “reasonable” for residents. USDA did not refute these contentions, responding only that, “LMAs remain the best available and most appropriate delineation to address the issue of grouping, as there are no Federally-designated areas that specifically assess commuting patterns and other related economic factors for ABAWDs.” 84 Fed. Reg. at 66793. USDA then noted that, “if in the future a more robust delineation becomes available from a Federal source, the Department may consider its appropriateness in the context of future rulemaking.” *Id.* But Black and Latinx ABAWDs in urban areas cannot simply wait until such a “robust” model becomes available. They are entitled to have their interests accounted for now, to ensure that they and their families can survive. If the government cannot account for the basic needs of these communities, then it must lift the prohibitions on states’ ability to help those that the federal government refuses to consider.

D. USDA Abused Its Discretion By Failing to Consider or Respond to Significant Comments About the Disparate Impact on Communities of Color Caused By Requiring the Use of BLS Data and Implementing a 6% Floor.

Requiring the use of BLS data and implementing a 6% floor will disproportionately harm ABAWDs of color. By considering only BLS unemployment data, the Final Rule would severely restrict the more holistic ways in which states may demonstrate weak job markets. Specifically, BLS data fails to adequately account for the stark differences between the overall unemployment rate of a state and the unemployment rate of Black and Latinx people within the state. Thus, limiting waivers to areas that have an unemployment of at least 6% will harm ABAWDs of color to a far greater degree than white ABAWDs because overall employment rates obscure the reality

that ABAWDs of color face significantly higher unemployment rates. For example, as of May 2020, the national unemployment rate of Black and Latinx people is approximately 45% higher than that of whites.⁴⁹ For Black and Latinx women, these unemployment rates have remained steadily high. In May 2020, 16.5% of Black women and 19% of Latinx women were unemployed.⁵⁰

National unemployment rates and BLS statistics do not adequately reflect the unique circumstances that ABAWDs of color experience on a daily basis. Analyzing unemployment statistics at the state level and by race, then, is critical to truly understanding the disparities in unemployment between these two groups. For example, as of the fourth quarter of 2019, Washington, D.C. had an overall unemployment rate of 5.3%.⁵¹ Because this falls under the 6% floor, D.C. would not be eligible for a waiver under the Final Rule. However, this 5.3% figure woefully misrepresents the unemployment rate for Black ABAWDs who currently rely on SNAP benefits to prevent starvation in Washington D.C. The estimated population of D.C. as of the fourth quarter 2019 was 705,749; 46% Black, 46% white, and 8% Other.⁵² However, the unemployment rate during this time period for white people in D.C. was 1.7%, *see Valerie Wilson, supra*, whereas

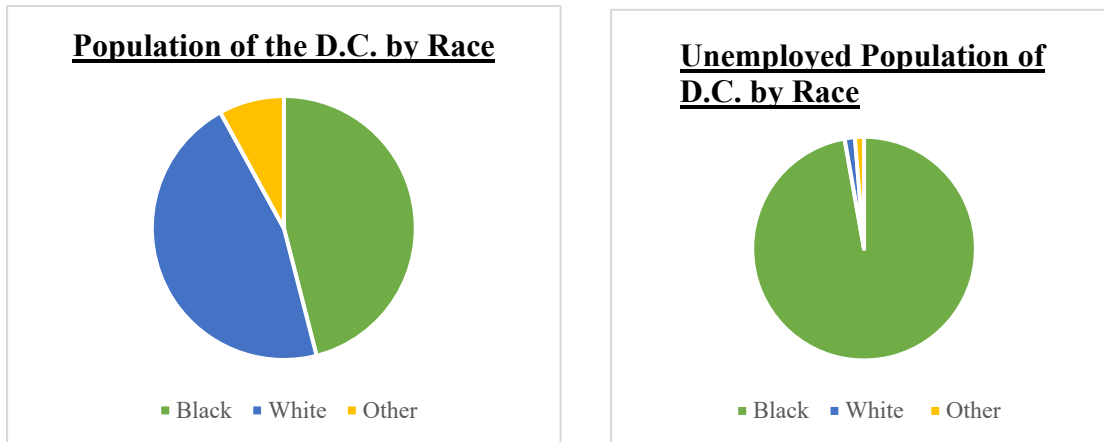
⁴⁹ Rakesh Kochhar, *Unemployment rate is higher than officially recorded, more so for women and certain other groups*, Fact Tank (June 30, 2020), <https://www.pewresearch.org/fact-tank/2020/06/30/unemployment-rate-is-higher-than-officially-recorded-more-so-for-women-and-certain-other-groups/>

⁵⁰ Claire Ewing-Nelson, *Despite Slight Gains in May, Women Have Still Been Hit Hardest by Pandemic-Related Job Losses*, Nat'l Women's Law Center at 2 (June 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/06/May-Jobs-FS.pdf>

⁵¹ *See Valerie Wilson, Latest data: Black, white, and Hispanic unemployment rates defy national lows in some Southern and Rust Belt states*, State unemployment by race and ethnicity, Econ. Pol'y Inst., Q4 2019, <https://www.epi.org/indicators/state-unemployment-race-ethnicity/> (last updated Mar. 2020)

⁵² *See Quick Facts*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/LA,DC/PST045219> (last visited July 7, 2020)

the unemployment rate of Black people was 11.2%—almost 560% higher. *See id.* There were approximately 37,400 unemployed residents in D.C. during this time, and Black people accounted for approximately 36,300 of them, compared to just approximately 550 whites.



D.C. is not an outlier. This disparity between the overall state unemployment rate and the unemployment rate of Black people in that same state exists in numerous states, such as Arkansas, Delaware, Illinois, Louisiana, Michigan, Mississippi, Ohio, and Pennsylvania.⁵³

<i>*Based on Q4 2019 data</i>	Overall State Unemployment	Unemployment Rate of African Americans	Percentage Difference
Arkansas	3.6%	6.0%	67%
Delaware	3.8%	7.3%	92%
Illinois	3.8%	7.9%	108%
Louisiana	4.7%	7.9%	68%
Michigan	4.0%	6.8%	70%
Mississippi	5.6%	9.1%	63%
Ohio	4.2%	8.0%	90%
Pennsylvania	4.3%	8.1%	88%

Studies have found that ABAWDs face significantly more barriers to obtaining stable employment than the general population.⁵⁴ A 2015 study found that one-third of ABAWDs have

⁵³ *See id.* Note that these metrics are as of the fourth quarter of 2019.

⁵⁴ *See generally* Steven Carlson et al., *Who Are the Low-Income Childless Adults Facing the Loss of SNAP in 2016?*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 8, 2016), <https://tinyurl.com/CarlsonFeb2016>; Ed Bolen et al., *More Than 500,000 Adults Will Lose SNAP*

a mental or physical limitation, nearly half lack access to any transportation, and more than half lack a driver's license.⁵⁵ Additionally, many ABAWDs do not have post-secondary education and face additional barriers to employment, including homelessness, not being native English speakers, unstable employment histories, and criminal records.⁵⁶ Because of their disproportionate limitations, the average gross income for ABAWDs is 33% of the federal poverty level.⁵⁷

This high unemployment rate amongst ABAWDs is not for a lack of effort at obtaining work. Studies have consistently found that ABAWDs who can work do so.⁵⁸ However, because of ABAWDs' disproportionately low levels of education and high levels of housing and transportation instability, the jobs that ABAWDs obtain tend to be unstable, low-wage jobs. *Id.* at 14. Thus, most ABAWDs who are working remain below the poverty line. *Id.* And when they are not working, ABAWDs tend to qualify for limited or no assistance from public safety net programs beyond SNAP. *Id.* at 10-12.

USDA received comments—supported by research and analysis—indicating, among other things, that the standard unemployment rate does not accurately reflect the “labor markets prospects for ABAWD’s [] and . . . does not fully account for the ability of ABAWDs to find and keep jobs due to lack of skills, training or other barriers.” *See District of Columbia v. 2020 WL*

Benefits in 2016 as Waivers Expire, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 18, 2016), <https://tinyurl.com/Bolen2016>

⁵⁵ Carlson et al., *Who Are the Low-Income Childless Adults*, *supra*, at 5.

⁵⁶ *Id.* at 2, 5.

⁵⁷ Elaine Waxman & Nathan Joo, *Reinstating SNAP Work-Related Time Limits*, Urban Inst. 6 (Mar. 2019), https://www.urban.org/sites/default/files/publication/100027/reinstating_snap_time_limits_0.pdf

⁵⁸ *See, e.g.*, Carlson et al., *Who Are the Low-Income Childless Adults*, *supra*, at 10, 15; Bartfeld et al., *supra*, at 2; Elaine Waxman & Nathan Joo, *Reinstating SNAP Work-Related Time Limits*, URBAN INST. 6 (Mar. 2019), <https://tinyurl.com/Waxman2019>; Joel Cuffey et al., *Food Assistance and Labor Force Outcomes of Childless Adults: Evidence from the CPS*, at 17 (Econ. Res. Serv., USDA 2015), <https://tinyurl.com/Cuffey2015>

1236657 at *6. USDA responded that it “recognizes that ABAWDs may face barriers to employment and have more limited employment prospects [N]otwithstanding the issues . . . [USDA] is resolute that establishing an unemployment rate floor . . . is necessary . . . to accurately reflect a lack of sufficient jobs in a given area.” 84 Fed. Reg. at 66787. USDA asserts that its “position is based on its operational experience [indicating that] without an unemployment rate floor, areas that do not clearly lack sufficient jobs will continue to qualify for waivers solely because they are 20 percent above the national unemployment rate.” *Id.* This response is a clear abuse of discretion by USDA.

IV. CONCLUSION

Despite Secretary Perdue’s bold assertion that “we will feed everyone by ensuring the health and stability of SNAP for those who truly need it,”⁵⁹ the overwhelming evidence demonstrates that the Final Rule would do just the opposite. As Representative Jim McGovern stated regarding the Final Rule, “The Trump administration ought to know more about this population before they literally take food off their table.”⁶⁰ The Administration’s failure to meaningfully consider this population and the disparate impact of the Final Rule is a dereliction of its duties under the APA and USDA’s mission to support those most in need. This Court should therefore vacate the Final Rule.

⁵⁹ Phil McCausland, Food stamp changes would mainly hurt those living in extreme poverty, study finds (March 14, 2019), <https://www.nbcnews.com/news/us-news/food-stamp-changes-would-mainly-hurt-those-living-extreme-poverty-n983031>

⁶⁰ Ryan McCrimmon, *They literally take food off their table*, Politico (Feb. 3, 2020), <https://www.politico.com/news/2020/02/03/trump-agriculture-department-cut-programs-109205>

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Respectfully submitted,

On Brief:

Gwyn Williams
David W. Rowe
Latham & Watkins LLP
200 Clarendon Street
Boston, MA 02116
(617) 880-4500
Gwyn.williams@lw.com
David.rowe@lw.com

Amella Viso
Jaclyn D. Newman
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
(212) 906-1200
Amella.viso@lw.com
Jaclyn.newman@lw.com

Counsel for Amicus Curiae

/s/ Abid R. Quershi
Abid R. Qureshi (Bar ID: 459227)
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004-1304
(202) 637-2240
Abid.qureshi@lw.com

Jon Greenbaum
Dariely Rodriguez
Dorian Spence
Pilar Whitaker
Maryum Jordan
Lawyers' Committee for Civil
Rights Under Law
1500 K Street N.W., Suite 900
Washington, D.C. 20005
(202) 662-8600
jgreenbaum@lawyerscommittee.org
drodriguez@lawyerscommittee.org
dspence@lawyerscommittee.org
pwhitaker@lawyerscommittee.org
mjordan@lawyerscommittee.org