September 23, 2019

SNAP Program Design Branch

Program Development Division

Food and Nutrition Service

3101 Park Center Drive

U.S. Department of Agriculture

Alexandria, VA 22302

Re: Notice of Proposed Rule Making -- Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP) RIN 0584-AE62

Dear SNAP Program Design Branch:

On behalf of the New York Legal Assistance Group (NYLAG), I appreciate the opportunity to comment on USDA’s Notice of Proposed Rule Making on a Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP). The proposed changes would cause serious harm to low-income households, and would specifically affect working families, children and the elderly and disabled populations. Furthermore, the proposed rule is arbitrary and capricious because reasoning provided for the rule is contracted by USDA’s own Regulatory Impact Analysis, and fails to consider reliance interests engendered by previous policies.

Based on the negative consequences the proposed rule would have on this country’s most vulnerable populations, NYLAG opposes this rule and recommends that it be withdrawn.

NYLAG is a not-for-profit legal services organization located in New York City. NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG serves those in need of government assistance, seniors, people with disabilities, the homebound, patients with chronic illness or disease, low-wage workers, immigrants, veterans, families facing foreclosure, renters facing eviction, low-income consumers, children in need of special education, domestic violence victims, low-income members of the LGBTQ community, Holocaust survivors, as well as others in need of free legal services.

NYLAG serves SNAP recipients in a number of capacities:

NYLAG’s Public Benefits Unit (PBU) works to ensure that low-income New Yorkers have access to the state and federal benefits to which they are entitled and that are critical to their survival, including SNAP benefits, public assistance, Medicaid, Medicare, VA benefits, Social Security Disability Insurance and Supplemental Security Income. PBU represents clients who have had their SNAP benefits reduced, incorrectly budgeted, discontinued, or who have been wrongfully denied benefits.

NYLAG’s Special Litigation Unit (SLU) brings impact litigation to protect clients’ statutory and constitutional rights, and to ensure that vulnerable New Yorkers receive the government benefits and services to which they are entitled.

SNAP plays a critical role in addressing hunger and food insecurity in our community. It is the first line of defense against hunger for low-income residents.

NYLAG sees firsthand what happens when low-income people lose their SNAP benefits and the effects it has on their lives. We urge USDA to take our recommendations into account.

The proposed rule would eliminate SNAP benefits for 3.1 million individuals nationwide, take free school meals away from the children in those families, and punish people with even meager savings. By USDA’s own estimates, the proposed rule would cut SNAP benefits over five years by $10.543 billion, while increasing SNAP administrative costs by $2.314 billion. Furthermore, USDA concedes that “[t]he proposed rule may also negatively impact food security and reduce the savings rates among those individuals who do not meet the income and resource eligibility requirements for SNAP or the substantial and ongoing requirements for expanded categorical eligibility.”

**Background**

For over two decades, New York State, along with more than 40 other states, has been utilizing an option known as “Broad-Based Categorical Eligibility” (“BBCE”), which allows them to use less restrictive asset and income tests for SNAP.[[1]](#footnote-1) In New York, BBCE confers eligibility to (1) households whose income is at or below 150% of the federal poverty level; (2) households with dependent care costs whose income is at or below 200% of the federal poverty level; and (3) seniors and people with disabilities whose income is at or below 200% of the federal poverty level, but whose resources exceed $3,250. This policy has allowed New York State to better support low-income working families, promote modest asset-building, and lower administrative costs.

**New York City residents will suffer disproportionately due to the high cost of living.**

NYLAG opposes the proposed rule because it fails to take into account the high cost of living in some states, which the current policy helps to address.Of the 1.6 million SNAP households in New York, 7% or approximately 116,646 will lose SNAP benefits if this rule is implemented.[[2]](#footnote-2) In New York City alone, over 1 million people, approximately 12.8% of the population suffer from food insecurity and are unable to afford an adequate supply of food.[[3]](#footnote-3) New York City is the second most expensive city in the United States, where the average rent for a 2-bedroom apartment is $3,110 per month.[[4]](#footnote-4) Meanwhile, 130% of the Federal Poverty Level is $2,252 for a household of three. The proposed rule would make it impossible for low-income families to make ends meet. Our low-wage working families, seniors, and clients with disabilities rely on SNAP benefits to supplement their monthly income.

**Working families will lose their SNAP benefits.**

NYLAG opposes the proposed rule because it will cause a large number of households with earned income to lose essential benefits. If the proposed rule is implemented, 10% or 41,007 SNAP households with earned income are expected to be kicked off of SNAP in New York.[[5]](#footnote-5) The current policy allows states to encourage low-income people to work by phasing benefits down gradually. This is imperative for households with fluctuating income, seasonal employment, or even those whose earnings are naturally increasing, but who still live paycheck to paycheck and struggle to meet the daily needs of their families. As a result, the proposed rule will have the unintended effect of actually discouraging individuals with low incomes from seeking paid employment.

**Households with dependent care costs will lose their SNAP benefits.**

NYLAG opposes the proposed rule because it will result in a large number of children losing benefits. If the proposed rule is implemented, it is expected that 8% or 47,726 SNAP households with children in New York will be kicked off of SNAP.[[6]](#footnote-6) BBCE reduces the effects of the “benefits cliff,”[[7]](#footnote-7) by allowing households with children to maintain their benefits, so a small increase in a family’s income doesn’t cause their benefits to decrease so much that they end up with lower overall monthly resources. By allowing states to adjust the gross income limit and take into account shelter and dependent care cost deductions, BBCE allows families whose earnings exceed 130% of the federal poverty level to keep their benefits and actually improve their economic condition. In addition, BBCE allows these families to maintain modest savings, which prevents them from experiencing a financial crisis should their employment hours decrease or their job suddenly end.

**Seniors and people with disabilities who have modest savings will lose their SNAP benefits.**

NYLAG opposes the proposed rule because it targets seniors and people with disabilities. If the proposed rule is implemented, it is expected that in New York alone, 9% or 48,878 SNAP households with seniors and 3% or 12,394 households with an individual with disabilities will lose their SNAP benefits.[[8]](#footnote-8) However, it is difficult to quantify this and could be much higher, because New York State does not currently assess the assets of this population in determining eligibility. Therefore, if the proposed rule is implemented, seniors and people with disabilities will be affected in ways that cannot yet be predicted.

Seniors and people with disabilities should be encouraged to have savings because they frequently have out-of-pocket medical expenses and medical emergencies. For example, our office is currently representing an elderly couple with work history. They receive approximately $2000 as a household in Social Security Retirement benefits. The wife recently had a stroke; after a hospital stay, followed by rehabilitation, she is back home and bed-bound. Their modest cash savings exceed the Medicaid limit, so they have monthly medical expenses of $800 for Medicare and a Medigap plan, and $2500 for the wife’s home health aide. They pay $900 per month for housing. Their monthly expenses exceed their income by $2,200. Reinstating the asset test would mean that this couple will lose their SNAP benefits and deplete their savings in a matter of months.

We should be encouraging this couple and people in similar circumstances, when possible, to maintain modest savings accounts to pay for unforeseen medical or other expenses. The ability to protect small savings increases our clients’ self-sufficiency by allowing them to plan ahead so they are not plunged into crisis, such as eviction, when unexpected expenses arise.

**Students in need will no longer qualify for free school lunch.**

NYLAG opposes the proposed rule because it would result in children losing their school meals. Currently, under the National School Lunch Program, students can qualify for free school lunch on the basis that they receive SNAP benefits. Research estimates that approximately 500,000 school-age children nationwide will lose their SNAP benefits, and thus lose automatic certification for school lunch.[[9]](#footnote-9)

Research shows that the effects of food insecurity, especially for children, are clear and numerous: Children are more likely to repeat a grade in elementary school, experience developmental impairments, and have more social and behavior problems in and out of school.[[10]](#footnote-10) They also have high risks of health conditions, such as anemia and asthma.[[11]](#footnote-11) It is manifestly clear that the limiting young children’s access to adequate food will cause many negative social and economic repercussions for the United States in the long run.

**USDA acknowledges that the proposed rule may cause civil rights violations.**

Aside from the direct impact this will have on our clients, we have concerns about the civil rights violations that are likely to result from the proposed rule. USDA itself notes that a civil rights analysis was completed to determine what impact this rule would have on program participants on the basis of age, race, color, national origin, sex or disability. The proposed rule explicitly states, “After review and analysis of the rule and available data, it has been determined that there is a potential for civil rights impacts to result if the proposed action is implemented because more elderly individuals may not otherwise meet the SNAP eligibility requirements.”[[12]](#footnote-12) No sufficient reason has been provided to justify imposition of this rule, given the potential for civil rights violations.

**The proposed rule will greatly increase administrative and household burdens.**

Implementation of the proposed rule have an unwarranted and intolerable impact on over 100,000 recipients who will have to supply additional documentation of their eligibility for benefits, and on the already overburdened local Departments of Social Services that will now have to review such documentation.

Many recipients who were previously categorically eligible on the basis of participation in another program will now have to be assessed for continued eligibility. The Department of Agriculture estimates that if categorical eligibility is eliminated, it will take households 4 minutes at initial certification and 6 minutes at certification to verify their eligibility.[[13]](#footnote-13) This estimate is completely out of touch with the reality of establishing eligibility for a public benefit. We know from the thousands of clients that we serve each year that our local Department of Social Service offices are already and overburdened and understaffed. Further, our city has been closing local SNAP centers in order to encourage use of online programs for applications and recertification.[[14]](#footnote-14) We know that, especially for seniors and people with disabilities, being able to go into a local center, is vital to accessing benefits. It can be particularly difficult to verify the lack of an asset. This can require multiple trips to the bank and to the center to present documentation proving the negative. Adding another step in the verification process will cause more clients’ benefits to be improperly discontinued or denied on the basis that they have failed to verify an aspect of eligibility. In many cases, these clients will ultimately be found eligible, but it may take the clients and the local Department of Social Services months to resolve each case.

**The proposed rule is arbitrary and capricious because the reasoning provided contradicts USDA’s own Regulatory Impact Analysis.**

In proposing this rule, USDA has failed to consider the likely outcome of undermining former SNAP-beneficiaries’ self-sufficiency. This oversight amounts to an arbitrary and capricious self-contradiction.

First, in justifying the proposed rule, USDA has articulated an intention to “help move families from welfare to self-sufficiency.”[[15]](#footnote-15) However, USDA fails to acknowledge that aspects of the proposed rule will actually serve as a disincentive for low-income individuals to seek employment in many cases. Without BBCE, low-income working families may face the “benefit cliff” described above, where increased income disqualifies them from benefits, resulting in a net loss to the household and decreased ability to feed their families. As a result, individuals may end up perversely better off if they are not employed, or employed less.

Furthermore, as noted above, USDA concedes that the proposed rule may “reduce the savings rates among those individuals who do not meet the [eligibility requirements].”[[16]](#footnote-16) The proposed rule will discourage low-income working families, seniors, people with disabilities, and others who depend on SNAP from maintaining modest savings to provide for emergencies. Without savings, these families are more likely to experience financial ruin when confronted with income fluctuations or unexpected emergencies. As a result, they are more likely to end up dependent on government services.[[17]](#footnote-17) Because these policy changes will actually undermine the self-sufficiency of SNAP recipients, the agency’s decision is arbitrary and capricious, as “the explanation for its decision…runs counter to the evidence before the agency.”[[18]](#footnote-18)

Second, the Department alleges that the revisions will ensure that "SNAP benefits reach those most in need while balancing administrative efficiency, customer service, and program integrity." Again, however, USDA's reasoning that the proposed revisions will promote administrative efficiency contradicts its own Regulatory Impact Analysis.

For instance, while the proposed revisions claim to promote administrative efficiency, the Regulatory Impact Analysis accompanying the proposal estimates an increase of $1.157 billion in Federal administrative costs, and an additional increase of "$1.157 billion in Federal reimbursement of administrative costs to State agencies (for a total of $2.314 billion in additional administrative costs)."[[19]](#footnote-19)

Similarly, the increased paperwork that will result from enactment of the proposed rule will similarly compromise USDA's supposed goal of administrative efficiency. Of the 500,000 children who previously qualified for free school lunch programs but would lose such meals under the proposed rule, 93% would qualify for reduced-priced meals, according to USDA. Anti-poverty advocates would like to add the caveat that families would need to apply individually for assistance, creating paperwork requirements that could lead some qualified children to fall through the cracks, and some families still may not be able to afford the meals, even at a significantly reduced cost, anti-poverty advocates say."[[20]](#footnote-20) Therefore since the proposed rule is reliably projected to cause declines in administrative efficiency, rather than any increases, USDA’s proposed revision of categorical eligibility is arbitrary and capricious.[[21]](#footnote-21)

### **The proposed rule is arbitrary and capricious because it fails to take into account reliance interests engendered by USDA’s prior policies.**

When an agency’s previous policy has created reliance interests, a new proposed rule that sharply changes the policy must be supported by “good reasons” and “detailed justification.” The Supreme Court in *FCC v. Fox Television Stations, Inc.* stated:

[T]he agency must show that there are good reasons for the new policy . . . the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or *when its prior policy has engendered serious reliance interests that must be taken into account* . . . *It would be arbitrary or capricious to ignore such matters.*[[22]](#footnote-22)

As reiterated in the Food and Nutrition Act of 2008, Congress and USDA have consistently strived for decades to “provide for improved levels of nutrition among low-income households through a cooperative Federal-State program of food assistance.”[[23]](#footnote-23) However, as noted above, USDA’s own Regulatory Impact Analysis concedes that the proposed rule may “negatively impact food security and reduce the savings rates among those individuals who do not meet the [revised eligibility requirements]”[[24]](#footnote-24) The Regulatory Impact Analysis explicitly notes that 3.1 million people will lose access to SNAP benefits due to the proposed rule, and that “households with one or more elderly individual(s) and/or earned income would be disproportionately affected.”[[25]](#footnote-25)

Categorical eligibility “helps working poor families move toward financial security, easing the benefits cliff as their earnings increase. Eliminating it would hit hundreds of thousands of low-income kids with a double whammy – lost meals both at home and at school – directly increasing childhood hunger.”[[26]](#footnote-26) Approximately 500,000 low-income children will lose automatic eligibility for free school lunches as a result of this proposed rule change.[[27]](#footnote-27) Moreover, as explained by Lisa Davis, senior vice president of the No Kid Hungry advocacy group, entire families also rely on free school lunches in order to avoid suffering from hunger at home. “Food is the easiest thing to cut out of a household budget. The parents start missing meals to avoid that impact on the kids. And the older kids — the ones in middle school and high school — they often will skip meals to make sure there’s food for the little ones.”[[28]](#footnote-28)

USDA knows that 500,000 schoolchildren rely on free lunches, without which their health and academic performance can be negatively and irreparably affected.[[29]](#footnote-29) USDA is also aware that 3.1 million people rely on categorical eligibility to receive SNAP benefits just so that they can eat. Furthermore, more than 40 states have created their public assistance and food assistance policies and programs based upon the categorical eligibility structure. USDA’s failure to consider the serious reliance interests of millions of people into account in their rulemaking is arbitrary and capricious, and constitutes a flagrant violation of the APA.[[30]](#footnote-30)

Additionally, USDA has failed to provide a “detailed justification” for its proposed rule change that would justify risking the reliance interests of so many. Limiting categorical eligibility to allegedly ensure that only households that receive ongoing and substantial benefits from TANF-programs can access SNAP and to increase “public confidence that benefits are being provided to eligible households”[[31]](#footnote-31) are woefully insufficient justifications for pushing millions into a state of hunger, thus making the proposed rule unsupported, arbitrary, and capricious.

Categorical eligibility policies have been in place for more than two decades. Congress rejected efforts to gut Categorical eligibility, including during its consideration of 2005 budget reconciliation and the 2014 and 2018 Farm Bills. This USDA rulemaking is an attempt to side step Congress and is outside USDA’s authority. As such, NYLAG urges the USDA to withdraw this rule.

We urge USDA to take into consideration the effects this proposed rule would have on working families, children, the elderly and people with disabilities in addition to the administrative costs. NYLAG strongly opposes the proposed rule that would cut food benefits for struggling people and harm our community.

Sincerely,

Beth Goldman

President and Attorney-in-Charge

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2. Mathematica Policy Research, “State-by-State Impact of Proposed Changes to ‘Broad-Based Categorical Eligibility’ in SNAP,” <https://www.mathematica-mpr.com/dataviz/impact-of-bbce-proposal-on-snap-caseloads> (last visited September 2019). [↑](#footnote-ref-2)
3. Hunger Free America, The Uneaten Big Apple: Hunger’s High Cost in NYC, New York City Hunger Report, 2018 6 (2018), https://www.hungerfreeamerica.org/sites/default/files/atoms/files/NYC%20and%20NYS%20Hunger%20Report%202018\_0.pdf. [↑](#footnote-ref-3)
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5. Mathematica Policy Research, “State-by-State Impact of Proposed Changes to ‘Broad-Based Categorical Eligibility’ in SNAP,” <https://www.mathematica.org/dataviz/impact-of-bbce-proposal-on-snap-caseloads> (last visited September 2019). [↑](#footnote-ref-5)
6. Mathematica Policy Research, “State-by-State Impact of Proposed Changes to ‘Broad-Based Categorical Eligibility’ in SNAP,” <https://www.mathematica-mpr.com/dataviz/impact-of-bbce-proposal-on-snap-caseloads> (last visited September 2019) [↑](#footnote-ref-6)
7. Dorothy Rosenbaum, Ctr. On Budget and Policy Priorities, SNAP’s “Broad-Based Categorical Eligibility” Supports Working Families and Those Saving for the Future 2 (2019), https://www.cbpp.org/sites/default/files/atoms/files/7-24-19fa.pdf [↑](#footnote-ref-7)
8. Mathematica Policy Research, “State-by-State Impact of Proposed Changes to ‘Broad-Based Categorical Eligibility’ in SNAP,” <https://www.mathematica-mpr.com/dataviz/impact-of-bbce-proposal-on-snap-caseloads> (last visited September 2019). [↑](#footnote-ref-8)
9. Elaine Waxman and Nathan Joo, Urban Institute, How Households with Children Are Affected by Restricting Broad-Based Categorical Eligibility for SNAP 4 (2019), <https://www.urban.org/sites/default/files/publication/101029/how_households_with_children_are_affected_by_restricting_broad-based_categorical_eligibility_for_snap_1.pdf>, *citing* Scott, letter to Purdue, https://assets.documentcloud.org/documents/6219685/Scott-Letter-to-Perdue-on-Food-Stamps.pdf. [↑](#footnote-ref-9)
10. Feeding America, <https://www.feedingamerica.org/hunger-in-america/child-hunger-facts> (last visited September 2019). [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570, 35576 (proposed Jul. 24, 2019). [↑](#footnote-ref-12)
13. *Id.* at 35578. [↑](#footnote-ref-13)
14. Kerry Burke and Michael Gartland, New York Daily News, City to close Harlem food stamp center; third SNAP office closure since fall, Jun. 12, 2019, <https://www.nydailynews.com/news/politics/ny-metro-snap-food-stamps-harlem-brooklyn-income-inequality-20190612-wpu5ch7cengehgaabvuqv43eca-story.html> (last visited September 2019). [↑](#footnote-ref-14)
15. Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570, 35573 (proposed Jul. 24, 2019). [↑](#footnote-ref-15)
16. *Id*. at 35575. [↑](#footnote-ref-16)
17. Elaine Waxman and Nathan Yoo, *How Working Families are Affected by Restricting Broad-Based Categorical Eligibility for SNAP*, Urban Institute, p. 4 (Sep. 2019) <https://www.urban.org/sites/default/files/publication/101027/how_working_families_are_affected_by_restricting_broad-based_categorical_eligibility_for_snap_1.pdf>. P.4; Elaine Waxman and Nathan Yoo, *How Households with Seniors and Adults with Disabilities Are Affected by Restricting Broad-Based Categorical Eligibility for SNAP*, Urban Institute, p. 5 (Sep. 2019) <https://www.urban.org/sites/default/files/publication/101028/how_households_with_seniors_and_adults_with_disabilities_are_affected_by_restricting_broad-based_categorical_eligibility_for_snap_1.pdf>. [↑](#footnote-ref-17)
18. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). [↑](#footnote-ref-18)
19. Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570, 35575 (proposed Jul. 24, 2019). [↑](#footnote-ref-19)
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21. *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. 29, 43 (1983). [↑](#footnote-ref-21)
22. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis added). [↑](#footnote-ref-22)
23. Food and Nutrition Act of 2008, P.L. 110-246, 110th Cong. § 1(2008), <https://legcounsel.house.gov/Comps/Food%20And%20Nutrition%20Act%20Of%202008.pdf>. [↑](#footnote-ref-23)
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25. *Id*. [↑](#footnote-ref-25)
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27. Letter From U.S. Representative Bobby Scott, Chairman of the Committee on Education and Labor, to Sonny Perdue, Secretary of the U.S. Department of Agriculture (Jul. 26, 2019) <https://www.documentcloud.org/documents/6219685-Scott-Letter-to-Perdue-on-Food-Stamps.html>. [↑](#footnote-ref-27)
28. Khimm, *supra* note 6. [↑](#footnote-ref-28)
29. Lola Fadulu, *500,000 Children Could Lose Free School Meals Under Trump Administration Proposal*, The New York Times (Jul. 30, 2019), <https://www.nytimes.com/2019/07/30/us/politics/free-school-meals-children-trump.html>. [↑](#footnote-ref-29)
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31. Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570 (proposed Jul. 24, 2019). [↑](#footnote-ref-31)