UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and CITY OF NEW YORK,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; GEORGE ERVIN PERDUE III, in his official capacity as Secretary of the U.S. Department of Agriculture, and UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 1:20-cv-00119-BAH

STATE PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN FURTHER SUPPORT OF STATE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

SNAP was designed by Congress to "alleviate hunger and malnutrition among low-income Americans" and is the "cornerstone" of this country's effort to reduce not only hunger, but "hunger's adverse effects on health, educational achievement, and housing security." P.I. Op. at 1.[1] The Rule overrides that longstanding purpose (as well as the statutory text) with USDA's preference to reduce the overall number of SNAP recipients. "Congress alone has the . . . constitutional authority to revise statutes in light of new social problems and preferences." Br. for House of Representatives as Amicus Supporting Pls. (ECF No. 81, "House Br.") at 21 (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). Defendants offer no factual or legal basis to sustain the Rule, merely recycling arguments this Court has already rejected or criticized. The Rule must be vacated.

The Rule is procedurally improper because the Proposed Rule failed to notify the public that USDA was eliminating a state's qualification for extended unemployment benefits as a waiver basis (and indeed explicitly assured just the opposite) and that Labor Market Areas (LMAs) would be the only allowable waiver areas. Defendants suggested at the preliminary injunction stage that the Court postpone ruling on these procedural challenges until it had the benefit of the full administrative record, P.I. Op. at 28 n. 11, but the agency has pointed to no additional facts or arguments to justify its procedural failures. The Rule falls on this basis alone.

The Rule also is substantively deficient. Defendants' arguments to the contrary are

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[1] The Court's March 13, 2020 Memorandum Opinion (ECF No. 51) granting preliminary injunction is referred to herein as "P.I. Op." Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 93) is referred to herein as "Defs.' Mot." State Plaintiffs' Motion for Summary Judgment (ECF No. 65) is referred to herein as "Pls.' Mot." Unless otherwise noted, other terms and phrases are defined in this brief as they were previously defined in State Plaintiffs' Motion for Summary Judgment.

unsupportable in fact or law. First, USDA claims that its statutory construction is supported by "longstanding practice" of using general unemployment data to grant waiver requests. Defs.' Mot. at 26. But a longstanding practice of *approving* waivers based on certain general unemployment markers does not support *denying* waivers based solely on the failure to meet general unemployment thresholds. Such a sleight of hand should be summarily rejected.

Second, USDA claims that its definition of area survives under *Chevron* because the Statute's references to "jobs" and "employment" indicate that waiver areas should have "a real and substantial relationship … [to] a job market," and LMAs designate a job market. Defs.' Mot. at 33. But USDA's argument consciously ignores the key part of Congress's inquiry, that there must be sufficient jobs *for ABAWDs*. The fact that LMAs might designate *a* labor market cannot save USDA's construction when LMAs are far removed from the ABAWD experience. *See, e.g.*, Br. for Lawyers' Committee for Civil Rights under Law and National Woman's Law Center et al. as Amici Supporting Plaintiffs (ECF No. 84, "Lawyers' Comm. Br.") at 18-20. Indeed, the Court already found that relying on LMAs as the only possible waiver area is an unreasonable construction of the statute. P.I. Op. at 36-45. Defendants' summary judgment brief offers nothing to cause the Court to alter its ruling.

Next, Defendants claim that general unemployment rates (coupled with an unemployment floor) and LMAs provide a "good enough" answer to the inquiry Congress demanded, because *Chevron* does not require "scientific exactitude," and there are no objective and reliable means for determining jobs or labor markets specific to ABAWDs. Defs.' Mot. at 20. In other words, an admittedly off-base construction is rendered reasonable where the question is nuanced or there is no one obvious data set that answers the statutory question precisely. This argument ignores (and contradicts) a plethora of evidence provided by commenters and previously acknowledged by the agency, which is probative on the ABAWD question, including state- and locality-specific data and expertise. Moreover, USDA cannot just throw up its hands because the question Congress directed the agency to answer is nuanced. Rather, it must roll up its sleeves and reasonably answer the question. The Rule is unlawful because it fails to implement Congress's mandate.

Finally, Defendants incorrectly claim that, "[t]he statute does not stipulate how USDA must treat a State's failure to use its allotted exemptions for more than one year," and that Plaintiffs "point to no text in the statute that entitles States to indefinitely stockpile unused exemptions." Defs.' Mot. at 35-36. In truth, as Defendants obliquely admit on the next page of their brief, Plaintiffs (and amici) thoroughly explain through specific textual analysis how the statute mandates indefinite carryover of exemptions. Pls.' Mot. at 18-23; *see generally* Br. for Impact Fund et al. as Amici Curiae Supporting Plaintiffs (ECF No. 71, "Impact Fund Br."); *see also* House Br. at 18-19. "[T]ellingly," Defendants fail to confront this textual analysis, limiting their argument to a continued emphasis on the words "preceding fiscal year," without any attempt to contextualize and reconcile their interpretation of this phrase with the rest of the statute. Defs.' Mot. at 36. Moreover, when confronted with an effort to curtail exemption carryover, as well as a proposal to reduce the annual percentage of exemptions accorded to each state, Congress specifically rejected the former in favor of the latter. House Br. at 19. USDA's elimination of exemption carryover is contrary to law, contravenes clear congressional intent, and is unreasonable.

The unreasonableness (and cruelty) of the Rule are placed in stark relief by the public health and economic crises our country is experiencing as a result of the COVID-19 pandemic. If this Rule were in effect, most jurisdictions would be left unprotected from the swift termination of vital food assistance despite extremely high current unemployment. Bolen Supp. Decl. (ECF No. 65-1) ¶¶ 13-17. Defendants' dismiss this vivid demonstration of the Rule's ramifications as no more than "extra-record" evidence that Plaintiffs apparently should have provided during the comment period (before the pandemic began) and that the Court should disregard. Defs.' Mot. at 42 n. 20. But, a Rule predicated on the presumption that the current economic conditions will persist forever cannot be reasonable. Commenters warned USDA that the Rule relied shortsightedly (and unreasonably) on a time of economic prosperity and would wreak havoc on the most vulnerable upon the next downturn. Defendants cannot escape evidence of the current economic reality. The Rule fails procedurally and substantively and should be vacated.

ARGUMENT

I. USDA's Proposed Rule Failed to Provide Sufficient Notice of the Changes That the Rule Imposes.

USDA's rulemaking is procedurally deficient because the Proposed Rule failed to inform the public that the Rule would (1) eliminate extended unemployment benefits as a waiver basis and (2) define "area" in the statute as only an LMA. Additionally, the Proposed Rule's failure to adequately explain how the agency's "operational experience" supported state abuse of the waiver procedures and the need for new sweeping restrictions illegally deprived the public of a meaningful opportunity to test the agency's rationale. Although Defendants urged this Court to postpone ruling on these deficiencies at preliminary injunction, they have offered no new arguments or support to rehabilitate these obvious failings.

USDA again incorrectly asserts that its elimination of qualification for extended unemployment benefits as a waiver criterion is a "logical outgrowth" of the agency's directly contrary statement in the Proposed Rule that it would maintain this criterion. Defs.' Mot. at 67-68. As Plaintiffs have previously explained, Defendants' argument hinges on a flagrant mischaracterization of the "logical outgrowth" principle. *See* State Pls.' P.I. Mot. (ECF No. 3) at 13-17; Pls.' P.I. Reply Br. (ECF No. 31) at 2-6; Pls. S.J. Mot. (ECF No. 65) at 11-12. Defendants assert that "the D.C. Circuit has repeatedly held that an agency's refusal to adopt its proposal is *always* a logical outgrowth of the proposal." Defs.' Mot. at 67. Not so. In fact, Defendants' and Plaintiffs' cases are in accord and hold only that, where an agency proposes a *change* to the status quo, declining to adopt *that change* and maintaining the status quo is a "logical outgrowth" of the proposed rule. *New York v. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (proposed change gave notice of "two readily foreseeable outcomes," the change being implemented and the change not being implemented); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

USDA did not propose a change from the status quo and then decide not to implement it. Rather, the agency affirmatively told commenters that it would maintain the status quo and then enacted a change that it never even hinted at. Such a "surprise switcheroo" is unlawful. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996-97 (D.C. Cir. 2005); *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107-08 (D.C. Cir. 2014); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005). Tellingly, USDA only received six comments (out of more than 100,000) that even addressed receipt of unemployment benefits as a waiver basis. ABAWD00008237.

USDA also attempts—and fails—to distinguish the clear law on this issue by claiming that because USDA proposed making a "wholesale revision" to the waiver criteria, commenters should have been on notice of changes that were not included or were explicitly disavowed in the Proposed Rule. Defs.' Mot. at 68. Defendants' argument turns the notice requirements on their head and finds no support in the law. The only case that USDA provides is inapposite. *Abington Mem'l Hosp. v. Burwell*, 216 F. Supp. 3d 110, 131-32 (D.D.C. 2016) (cited in Defs.' Mot. at 68) held only that an agency's notice of proposed changes was not made defective merely because the proposed rule defined its action as a "clarification," rather than a "change." *Abington* does not support USDA's action here of changing longstanding regulations the agency never indicated it would change or that it explicitly avowed it would not change.[2]

Defendants further contend that commenters had adequate notice of its newly minted definition of "area" as only an LMA because the Proposed Rule stated that the agency would "require that all waiver areas correspond to an economically tied region." Defs.' Mot. at 69. But there is no conflict between this requirement and waivers of areas other than LMAs, such as cities or counties. Moreover, the Proposed Rule stated that USDA "believes that a more targeted approach" than statewide waivers is needed, which affirmatively suggests that waivers for individual substate jurisdictions would be retained in the final Rule. *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, Notice of Proposed Rulemaking, 84 Fed. Reg. 980, 985 (Feb. 1, 2019). Commenters had no reason to guess that USDA would take precisely the opposite approach, *foreclosing* jurisdiction-specific waivers.[3]

Finally, as Plaintiffs pointed out in their preliminary injunction briefing (State Pls.' P.I. Mot. at 16-17), USDA fails to explain how its "operational experience" demonstrates that waivers

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[2] USDA also argues that that extended unemployment benefits criterion is inimical to USDA's apparent goal of eliminating statewide waivers. Defs.' Mot. at 68. But the Proposed Rule specifically excepted the extended unemployment benefits criterion from the proposal to eliminate statewide waivers. 84 Fed. Reg. at 985.

[3] Defendants also argue that comments in support of a strict definition of "area" show that USDA satisfied its notice-and-comment requirement. Defs.' Mot. at 69. However, none of the comments identified by USDA actually argues that the definition of "area" should be restricted to solely LMAs. *See* ABAWD00078212; ABAWD00034773-74; ABAWD00008241 Moreover, the dispositive question is "whether the policy change was clear on the face of the proposed rule," not the number of comments. *Abington*, 216 F. Supp. 3d at 134; *see Ass'n. of Private Sector Colleges and Univs v. Duncan.*, 681 F.3d 427, 462 (D.D.C. 2012) ("[T]he fact that some commenters actually submitted comments addressing the final rule is of little significance. The agency must itself provide notice of a regulatory proposal.") (internal punctuation and brackets omitted).

were improperly obtained for areas where ABAWDs had sufficient job opportunities or even that areas included and excluded in a waiver request were "logically [] considered part of the [same] economic region" (Defs.' Mot. at 70) for purposes of evaluating job opportunities for ABAWDs. Vague, conclusory references to "experience" deprived the public of a meaningful ability to test the agency's justifications for the Rule. *See California by & through Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1173-74 (N.D. Cal. 2019) (finding inadequate notice where agency provided only conclusory rationale for rule). As this Court previously pointed out, Defendants' reliance on *Pharm. Research & Mftrs. of Am. v. FTC*, 44 F. Supp. 3d 95, 129 (D.D.C. 2014), is (and continues to be) misplaced. P.I. Op. at 38 n. 15. The Rule is procedurally deficient and should be vacated on this ground alone.

II. THE RULE VIOLATES THE APA BECAUSE IT IS CONTRARY TO LAW.

Defendants' constructions of the Statute fail at both *Chevron* steps. At the outset, Defendants virtually ignore *Chevron* step one. Defs.' Mot. at 19-20. In conducting a *Chevron* step one analysis, *all* traditional tools of statutory construction must be employed: text, structure, purpose, and history. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004); *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014). The Court asks whether those tools demonstrate that Congress's intent is clear on the question at issue. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Even if a statute's express language does not reveal Congress's intent, those tools may supply a clear answer for *Chevron* step one purposes. If a statute "clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996); *see also New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 557 (D.C. Cir. 2020) (noting rejection of "suggestion 'that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power'") (citation omitted); *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 271 (D.C. Cir. 2001) (finding clear intent under *Chevron* one based on legislative history).

Defendants' approach on *Chevron* step two (seeking near-total deference) likewise ignores that "*Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring);[4] *see also Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) ("The reasonableness of an agency's construction depends, in part, on the construction's 'fit' with the statutory language, as well as its conformity to statutory purposes.") (internal quotation marks omitted) (quoting *Abbott Labs. v. Young*, 920 F.2d 984, 988 (D.C. Cir. 1990)).

A. <u>USDA's Near-Total Reliance on General Unemployment Data to Evaluate Lack of Sufficient Jobs for ABAWDs Is Contrary to Law.</u>

Defendants admit that the Rule "functionally replaces" the flexible "lack of sufficient jobs" inquiry and all the "various criteria" previously permitted to answer this question with near-total reliance on general unemployment rates, including an unemployment rate floor. Defs.' Mot. at 11, 20. But as the Court already has recognized, "[b]y making both prongs of § 2015(o)(4)(A) dependent on unemployment rate, USDA has arbitrarily written this distinction out of the [statute]." P.I. Op. at 33. USDA's rewrite fails under *Chevron* one.

Indeed, the Statute's use of the present tense suggests that denial of a waiver based on an unemployment floor with a twenty-four-month window is unlawful. The Statute asks whether an area "*has*" a 10-percent unemployment rate or "*does not have* a sufficient number of jobs to

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4 The panel majority also adopted Judge Silberman's concurring position in a clarification and amendment of the majority opinion. *Glob. Tel*Link*, 866 F.3d at 417.

provide employment for [the ABAWDs subject to a waiver request]." 7 U.S.C. § 2015(o)(4) (emphasis added). Those phrases are inconsistent with requiring such a large window of backward-looking unemployment figures. "The present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010) (citing the Dictionary Act, 1 U.S.C. § 1). The inference is even stronger where, as here, "Congress could have phrased its requirement in language that looked to the past but did not choose this readily available option."[5] *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 25 (D.C. Cir. 2010) (Garland, J., concurring in the judgment) (internal punctuation omitted) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987)).

Ignoring the axiom that USDA has no authority to rewrite a statute, *see Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)), USDA brushes past *Chevron* step one to *Chevron* step two, claiming that its near-total reliance on unemployment rates to *deny* waivers is reasonable because it is consistent with "longstanding agency practice," and because "the general unemployment rate is a reasonable proxy for the ABAWD population's job prospects in light of USDA's authority to select an administrable standard based on reasonable approximations, not scientific exactitude." Defs.' Mot. at 20. Both these arguments are wrong on the facts and the law.

Longstanding regulations did not provide for denial of a waiver based solely on general unemployment rates, but rather contained a "non-exhaustive list of criteria for establishing lack of sufficient jobs," with "six examples of data sources and types that may be used," before the Rule

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[5] 7 U.S.C. § 2015(o)(2) looks to "the preceding 36-month period" in determining when the work requirement, if it applies, must result in a denial of benefits. This paragraph uses the past tense ("individual *received* benefits"). 7 U.S.C. § 2015(o)(2). The same is true elsewhere in the statute. *See, e.g.*, *id.* § 2015(b)(1) (various "period[s]" of ineligibility based, inter alia, on a finding that an individual "made a false statement" or "committed any act in violation of this chapter").

eliminated five of those six examples and instituted an unemployment rate floor. P.I. Op. at 10. The fact that USDA previously considered a general unemployment rate in a particular area *sufficient* to make a waiver "readily" approvable does not mean such data *alone* (particularly in an LMA) supports the summary denial of waivers to the exclusion of all other relevant material. The Rule is not consistent with "longstanding agency practice."

Nor is USDA's use of general unemployment rates to the *exclusion* of available data that is admittedly relevant to the ABAWD experience reasonable. *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (unreasonable not to consider statutorily mandated factor); *id.* at 1222 (agency decision unreasonable when characterized by "lack of knowledge" that was "willful"); *id.* at 1220-21 (agency explanation for decision "probably flawed" when Congress directed it to issue a rule "dealing with" a matter, agency "said that the costs and benefits . . . are unknown," "[b]ut nothing prevented the agency from itself estimated the costs"); *see also Cigar Ass'n. of Am. v. FDA*, 964 F.3d 56, 63 (D.C. Cir. 2020) ("[T]he relatedness of the concept discussed to the statutorily mandated factor that the agency does not discuss does not relieve the agency of the duty of compliance with the congressional instruction.") (citation omitted). Plaintiffs' position is not that an unemployment rate is irrelevant to whether there are sufficient jobs for ABAWDs in the area where they reside, but instead that Defendants' near-total reliance on general unemployment rates, to the exclusion of all other relevant factors, is inconsistent with the statutory text and structure, congressional intent, and longstanding agency practice. *See* Pls.' Mot. at 13-14. This Court's prior opinion correctly rejected Defendants' point: although "[t]he statute undoubtedly makes unemployment rate a factor relevant to evaluating waivers, [] that point sidesteps the flaw in the Final Rule's core standards. The real issue is whether the Final Rule, in making general unemployment rates the only factor for evaluating waivers, permissibly interprets § 2015(o)(4)(A)." P.I. Op. at 34. The answer is no. *See also* House Br. at 17 (stating that "the second criterion set forth by Congress is effectively erased" by the Rule).

Defendants' additional assertion that USDA's authority to "consider unemployment rates" is supported by the fact that "Congress has never even attempted to modify," the agency's past practice (Defs.' Mot. at 28) misses the point for the same reason. Plaintiffs agree Congress can convey its intent through statutory reauthorizations. *See* Pls.' Mot. at 17; *see also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 143-57 (2000). But here that maxim supports Plaintiffs' position. Against a backdrop of decades of a consistent regulatory approach by USDA, Congress decided over the course of several statutory reauthorizations to retain the existing sufficient jobs language. And in enacting the 2018 Farm Bill, Congress expressly "[struck] modifications to the criteria that States may use to request a geographic waiver of the work requirement," Conference Report at 615, referring to provisions in the House-passed bill that included a seven-percent unemployment floor.[6] Congress's actions speak volumes, just not in USDA's favor.

Defendants accuse the States of cherry-picking language from the 2018 Conference Report, Defs.' Mot. at 39, n. 17, but the cited language accurately reflects Congress's targeted approach to revising Section 2015. Congress adopted the House's reduction of annual percentages for exemptions but affirmatively "str[uck] modifications to the criteria that States may use to request a geographic waiver of the work requirement." Conference Report at 614-15. The supposedly cherry-picked sentence illustrates that Congress understood the waiver and exemption provisions to be interrelated, and that in adopting only a targeted percentage reduction to the latter, Congress

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[6] The Farm Bill as passed by the House included, on page 272 lines 6-21, a seven-percent unemployment floor. *See* House Bill, § 4015.

acted with a "scalpel, not a cudgel" to address any perception that too many ABAWDs were escaping § 2015(o)'s requirements. *See Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 505 (D.C. Cir. 2013).

Defendants next erect a strawman, claiming that *Chevron* step two does not require "scientific exactitude" to justify their reliance (in conflict with the intent of Congress) solely on a general unemployment rate "as a proxy for ABAWD unemployment." Defs.' Mot. at 25.[7] But whatever the outer bounds of *Chevron* reasonableness may be, the law clearly does not allow an agency to do what USDA did here: USDA cannot throw up its hands, discard the statute's command to answer the sufficient-jobs inquiry for ABAWDs, and willfully blind themselves to relevant information about ABAWDs' job prospects. *See Pub. Citizen*, 374 F.3d at 1220-22; *Cigar Association*, 964 F.3d at 63. The cases cited by Defendants do not hold otherwise. In *Baystate Franklin Medical Center v. Azar*, 950 F.3d 84, 86-93 (D.C. Cir. 2020), the Circuit upheld agency action refusing to use one hospital's late-filed amended data where the agency had gone through an exhaustive process of reviewing, and using data to calculate an average hourly wage rate for each geographic area. Here, the purported absence of information is not based on a regulated party's failure to timely supply it but is a result of Defendants' willful blindness to a plethora of

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[7] Defendants' contention that they adopted an unemployment floor as a "proxy for ABAWD unemployment," Defs.' Mot. at 25, appears nowhere in the proposed or final Rule *See Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, 84 Fed. Reg. 66782, 66784-89 (Dec. 5, 2019) (to be codified at 7 C.F.R. Part 273). *SEC v. Chenery Corp*., 318 U.S. 80, 94-95 (1943); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). The Rule states that the Department's adoption of a 6-percent floor "is primarily driven by the fact that it aligns with DOL's LSA standard and that it represents the most justified option relative to the Proposed Rule's 7 percent floor or other potential unemployment rate floors." 84 Fed. Reg. at 66785. None of this suggests USDA concluded that a general unemployment rate, alone, is a "proxy for ABAWD unemployment."

record evidence and the agency's own prior findings.[8]

Mayo Foundation for Medical Educ. and Research v. United States, 562 U.S. 44 (2011), also is of no help to Defendants. There, the Court upheld an agency's use of a full-time work schedule of 40 hours per week to assess whether a student employee's service to a school was predominantly employment or education for tax purposes, because "[f]ocusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of" determining whether employment predominated over education. *Id.* at 59. Nothing about that rationale, which was specific to each employee's number of hours worked, supports Defendants' contention that a general unemployment rate, to the exclusion of all other factors, is an appropriate way to determine whether there are sufficient jobs for ABAWDs.

Finally, Defendants' suggest that the use of a general employment rate "as a proxy for ABAWD unemployment is reasonable" because "there is no measure available for determining the number of available jobs specifically for ABAWDs participating in SNAP in any given area." Defs.' Mot. at 25 (quoting 84 Fed. Reg. at 66787). But the fact that a single data set may not always answer the question demanded by the Statute is exactly why the prior procedures were implemented and repeatedly endorsed by Congress. *See* House Br. at 12-19 (discussing Congress's design for and endorsement of a flexible approach). Moreover, in administering a statute calling

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[8] *Barnhart v. Thomas*, 540 U.S. 20 (2003), involved applying the "rule of the last antecedent" to a statute's definition of "disability," under which an individual was not disabled if she was able to perform her prior job. *Id.* at 23-25 (discussing statute), 26-27 (discussing rule of last antecedent). Explaining why applying this grammatical rule did not produce absurd results, *Barnhart* stated, "Congress could have determined that an analysis of a claimant's capacity to do his previous work would in most cases be an effective and efficient administrative proxy for the claimant's ability to do some work that exists in the national economy," given that "the Social Security hearing system is probably the largest adjudicative agency in the western world." *Id.* at 26-29. Here, the statutory text favors Plaintiffs' position, and USDA's consideration of states' SNAP waiver requests is many orders of magnitude different from individualized Social Security adjudication.

for an answer to a nuanced question, Defendants may not throw up their hands or willfully blind themselves to a whole host of relevant information. *See, e.g.*, *Pub. Citizen*, 374 F.3d at 1220-22.[9]

The Rule itself acknowledges the relevance of "economic metrics other than unemployment rates, such as a county's poverty rates, education levels, and other demographics associated with poverty," to determining "a meaningful threshold for economic distress." 84 Fed. Reg. at 66785. In addition, as one commenter noted, "[m]any labor economists consider the prime-age employment rate to be a proxy for labor demand." ABAWD00110188. This commenter provided a county-level regression analysis indicating much higher prime-age (25-54 years old) non-employment than general unemployment rates would suggest, with results varying widely among counties with the same unemployment levels.[10] That analysis indicated "significant labor market slack" in areas with the unemployment rates used by Defendants. *Id.*[11] Defendants also

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[9] *Champion v. Shalala*, 33 F.3d 963 (8th Cir. 1994), does not support Defendants' position. There, the statute directed an agency to identify an amount of automobile equity a family seeking AFDC benefits could exclude from an asset calculation. *Id.* at 965. To determine what amount to use, the agency looked to a survey of assets among food stamp recipients, a population that "extensively overlap[ped] with that of AFDC recipients." *Id.* at 966. Here, the statute does not direct Defendants to choose one metric, implicitly bars them from relying on the metric they chose, and record evidence supports that the metric is insufficiently tethered on its own to the relevant population.

[10] This comment shows a non-employment rate predicted at 27% or 33% when the unemployment rate is five percent or seven percent. ABAWD00110189. The prediction is a result of a scatterplot of county-level results showing significant disparities between non-employment and unemployment rates; some county-level results, for example, showed prime-age non-employment rates of forty and sixty percent even at a seven percent unemployment rate. *Id.*

[11] This comment also referenced a "Distressed Community Index" generated using Census Bureau data and indicating economic distress at the local level. ABAWD00110188. The "Distressed Communities Index" is "draw[n] from the U.S. Census Bureau's American Community Survey's 5-Year Estimates and Business Patterns data," and employs seven metrics to assess a zip code's level of distress. "[T]he DCI captures 99 percent of the U.S. population and all 25,800-plus zip codes with at least 500 residents." *See* Economic Innovation Group, from Great Recession to Great Reshuffling: Charting a Decade of Change Across American Communities, at 2-3 (2018), https://eig.org/wp-content/uploads/2018/10/2018-DCI.pdf.

irrationally rejected arguments that other measures (such as U-6 unemployment or a low and declining employment-to-population ratio) would better capture ABAWDs' job prospects or at least be relevant to them.[12] *See* ABAWD00110183-85 (noting that "Researchers Routinely Use Employment-to-Population Ratio to Measure Local Labor Market Conditions"); *see also* ABAWD00079165-66 (arguing for use of U-6 unemployment rate and the "BLS employment-population ratio"); ABAWD00079166-67 (noting that employment-population ratio "includes individuals employable but have not looked for a job in more than a year," and so will "paint a clearer picture of the strength of the labor market than other measures" in "periods of severe and long-term economic recessions"). Commenters also suggested using American Community Survey data from the Census Bureau. ABAWD0071967 (stating that "BLS has concluded that data users often are better served by substate area data from the Census Bureau's American Community Survey (ACS)").[13]

B. USDA Acted Contrary to Law by Imposing a Strict Definition of Area.

USDA claims that its interpretation of the statutory reference to the "area" where the ABAWDs reside is reasonable because the Secretary determines whether to approve a waiver.

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[12] Although U-6 unemployment data is generally not published at the sub-state level, it has been published for some localities, including New York City. *See* Bureau of Labor Statistics (BLS), Alternative Measures of Labor Underutilization for States, Third Quarter of 2019 through Second Quarter of 2020 Averages, https://www.bls.gov/lau/stalt.htm. Defendants offer no rationale for not considering such data in conjunction with other available evidence.

[13] From data.census.gov, if a user clicks "advanced search," and on the ensuing page clicks "employment," and then "employment and labor force status," the user is directed to a series of options for ACS data. Among them is a table entitled "Employment Status," which provides a table of total population, labor force participation rate, and employment-to-population ratio for that locality. This information is cross-tabbed by age, race, sex, poverty status in the past twelve months, disability, and educational attainment. A related set of data is entitled "Work Status in the Past 12 Months," which contains information about the number of weeks worked in the past twelve months, usual hours worked, and the number of workers 16-64 who worked full-time for the whole year.

Defs.' Mot. at 31-32. This argument fails because it ignores significant guardrails the statutory text and context place around agency discretion.

"If Congress employs a term susceptible of several meanings, as many terms are, it scarcely follows that Congress has authorized an agency to choose any one of those meanings." *Goldstein*, 451 F.3d at 878. "[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Brown & Williamson*, 529 U.S. at 133) (internal quotation marks omitted). Here, that context confirms Congress's focus on economic conditions *within* states and localities. Under § 2015(o)(4), a state makes a request. The request may be for "*any* group of individuals," a term suggesting a broad delegation to states to decide the group of individuals for whom waiver should be sought. This "group of individuals" must be "*in the State*," so the "area" in which those individuals "reside" necessarily is a state or a substate area. 7 U.S.C. § 2015(o)(4); *see also* Pls.' Mot. at 15-17.

Moreover, the Statute generally operates through states and localities. The program operates "at the request of the State agency, a term that includes local offices and agencies, to provide food assistance to "eligible households within the State." 7 U.S.C. §§ 2013(a), 2012(s). The program may be operated by states or by local jurisdictions (including counties). *Id.* §§ 2020(a)(2), 2012(s)(1). It is required to include employment and training programs designed by the state to "meet State or local workforce needs," *id.* § 2015(d)(4)(A)(i), through a "statewide workforce development system, unless the component is not available locally," *Id.* § 2015(d)(4)(A)(ii). Confirming this statutory focus, where Congress has intended relevant definitions to apply outside of a state's boundaries, it has said so expressly. *Id.* § 2015(d)(4)(B)(ii)(II) ("The term 'workforce partnership' includes a multistate program."). The statute as a whole is thus directed toward and indicates an appreciation of states' and localities' roles in administering SNAP on behalf of their own residents based on the unique job market and economic conditions existing within those states and localities.[14]

Indeed, in 2018, Congress rejected a provision limiting the joining of substate areas for waivers unless the areas constituted LMAs. *See* House Bill, § 4015. In rejecting that restriction (which the Rule exceeds), Congress provided that "[t]he Managers intend to maintain the practice that bestows authority on the State agency responsible for administering SNAP to determine when and how waiver requests for ABAWDs are submitted." Conference Report at 616.

Defendants' additional claim that their use of a metric "not perfectly aligned with job markets solely for ABAWD," Defs.' Mot. at 33, *to the exclusion of all other possible metrics* is "reasonable" despite the disconnect because "there is no indication from the record that anything closer to an administrable definition of an ABAWD-labor market area exists" misconstrues the facts and the law. On the facts, states can and have for more than two decades defined the geographic scope of waiver requests that were better suited to the economic and labor conditions affecting ABAWDs than LMAs. For example, it is indisputable that the District of Columbia is a more reasonable and aligned area within which to evaluate the job prospects of D.C. SNAP recipients than a far-flung area that reaches to areas of Virginia, Maryland, and even West Virginia that are admittedly inaccessible by public transit. *See also* P.I. Op. at 40 n.17 (noting tailored

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[14] Defendants apparently take the position that jurisdictional boundaries are an improper way to define a waiver area. Defs.' Mot. at 33 ("The relationship between a civil jurisdiction, which is based on a political boundary, and a job market is so attenuated to perhaps be nonexistent."). This position is incorrect in light of the Statute's plain focus on state and local governments, and "State or local workforce needs." 7 U.S.C. § 2015(d)(4)(A)(i). That position likewise conflicts with decades of regulatory practice to the contrary—practice that has remained consistent while Congress reauthorized the statute multiple times. *See* P.I. Op. at 7-8 (describing prior regulation); Pls.' Mot. at 20-21 (describing reauthorizations).

waiver application in New York City). By making an LMA the *only available option*, USDA's interpretation of "area" fails under *Chevron*. [15]

USDA's reliance on *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (Howell, J.), illustrates its flawed reasoning. In that merger case, defendants challenged the plaintiff's expert's use of switching data as one piece of evidence supportive of diversion among products (which could have indicated the relevant market). The Court agreed that the switching data's ability to support diversion was limited but considered it among a wealth of other documentary and expert evidence supporting the plaintiff's market definition. *See id.* at 52-54, 62-65. In other words, this Court found that imperfect and inconclusive data could be used to support a proposition *if* other evidence sufficiently corroborated that data. Here, Defendants promulgated a Rule projected to eliminate nutrition benefits for 700,000 people, relying solely on flawed information untethered to the relevant population and closing their eyes to information more tethered to it. The Court's comprehensive evaluation of the evidence in *H&R Block* further underscores the logical flaws in Defendants' approach. [16]

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15 "*Chevron* itself involved a phrase 'stationary source' that was not at all defined and clearly could equally refer to (a) a factory complex, or (b) a specific emitter of pollution. But it would have been unreasonable to refer to (c) a whole city. Yet too many times agencies have taken advantage of an ambiguity to [illegally] pursue a (c), (d), or (f) interpretation that accorded with policy objectives." *Glob. Tel*Link*, 866 F.3d at 418 (Silberman, J., concurring) (internal citation omitted).

16 Defendants' continued reliance on *Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155 (D.C. Cir. 2015), is misplaced. In that case, "the Providers [did] not challenge the Secretary's adoption of the Core-Based Statistical Areas" used to compare a hospital region's wages to the national average. *Id.* at 1164. Moreover, the mere fact that the word "area" may be ambiguous in a vacuum ignores that the statutory context and history here foreclose USDA's strict definition of area to mean only LMAs, areas that traverse multiple states and hundreds of miles and fail to respect unique conditions that affect economic and labor conditions, particularly for ABAWDs. *See* Pls.' P.I. Reply Br. at 13-15. More generally, the highly technical calculation process explained in this

C. **<u>USDA's Elimination of Unused Discretionary Exemptions Is Contrary to Law.</u>**

The Rule's prohibition on carryover of exemptions initially accrued before the previous fiscal year conflicts with the Balanced Budget Act's plain language. The statute contains a simple directive that the agency must subtract two figures and carry forward the difference into the next year. One figure (call it "X") is how many "average monthly exemptions [were] estimated for the State agency for such preceding fiscal year under this paragraph." 7 U.S.C. § 2015(o)(6)(G). The other figure (call it "Y") is how many "average monthly exemptions [were] in effect in the State for the preceding fiscal year." *Id.* What must be carried forward is X minus Y. Nobody disputes that Y is the number of exemptions the state actually used last year—so the only question is what X includes.

X includes exemptions carried into the preceding fiscal year from the prior year. The reason is that X equals the number "estimated for the State agency for such preceding fiscal year *under this paragraph*," *Id.* (emphasis added). From the perspective of 2020, in other words, the statute requires looking to the number estimated "under this paragraph" for 2019. And the number "under this paragraph" from 2019 includes those retained from 2018 under subparagraph (G), which is part of "this paragraph." This reading follows from the established premise that Congress understands statutory drafting hierarchy,[17] which Defendants do not and cannot dispute. *See Koons*

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case for generating the Medicare wage index by gathering data from virtually all hospitals, and basing a "reasonable approximation" of relative wage levels on that data, *Anna Jacques*, 797 F.3d at 1157-59, further underscores the irrationality of Defendants' abandonment of any focus and all relevant data on ABAWD-specific circumstances, both with regard to LMAs and the unemployment.

[17] Other provisions within paragraph (6) confirm Congress's reference in subparagraph (G) to "this paragraph," as opposed to a particular subparagraph, was intentional. *See, e.g.*, 7 U.S.C. § 2015(o)(6)(A) (definitions "[i]n this paragraph"); *id.* § 2015(o)(6)(A)(ii) (individuals denied

Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004); *see also* Impact Fund Br. at 13-16. That makes sense in light of paragraph (6)'s structure. The paragraph is organized, through a series of subparagraphs, to calculate a state's number of exemptions and then apply a series of adjustments, including the carryover adjustment, to that number. "In other words, when subparagraph (G) is read in context of the whole paragraph (consistent with subparagraph (B)), it can only refer to the total number of exemptions available to a State in the prior year." Impact Fund Br. at 15.

Defendants have no textual answer to this construction. Instead, their principal argument is a mere repetition of, and emphasis on, the statutory phrase "preceding fiscal year" without grappling with the math problem the statute directs them to solve. Defs.' Mot. at 35-37. Defendants additionally argue that Congress's imposition of a percentage limit on annually accrued exemptions shows the "design" of the statute favors their position. Not so. There is nothing about the one limitation that militates toward imposing the other. The "primary purpose" of the work requirement to "ensur[e] that ABAWDs engage in meaningful work activity" (Defs.' Mot. at 37), is equally fulfilled by a design, like the one Congress adopted, that incentivizes states to use fewer than the available number of exemptions in a given year in better economic times and preserve them for use in later, more difficult times. Defendants use a monetary figure that sounds large ($960 million) to quantify the number of unused exemptions and thereby to suggest that the statute's plain language must not mean what it says, but that figure is less than two percent annual SNAP spend since 2011.[18]

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benefits "solely due to paragraph (2)"); *id.* § 2015(o)(6)(B) (exemptions "from the requirements of paragraph (2)" provided "[s]ubject to subparagraphs (C) through (H)"). *See also* Impact Fund Br. at 14-16.

[18] *See* Supplemental Nutrition Assistance Program Participation and Costs (Data as of July 10, 2020), https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-7.pdf.

Defendants' dismissal of the 2018 Farm Bill and its enactment history as mere "subsequent legislative history" fails. Defendants offer no basis to distinguish the D.C. Circuit's decision in *Hearth, Patio & Barbecue Association*, where the Court concluded that Congress's adoption of measured changes in a statutory scheme "revisit[ed] . . . with purpose" showed Congress acted with a "scalpel, not a cudgel," and thus foreclosed the agency itself from using the cudgel. 706 F.3d at 505. Congress is required to reauthorize SNAP in the Farm Bill every few years, and, because SNAP accounts for a large portion of the Farm Bill spending, "it is the subject of much attention and debate by Members of Congress." House Br. at 3; *see* Pls.' Mot. at 21 & n.7. In the 2018 Farm Bill, Congress amended SNAP in a series of targeted ways, including "consider[ing] and reject[ing] the very restrictions to be imposed by this Rule." House Br. at 4. *See* Pls.' Mot. at 21 & n.8. USDA cannot dispute that limits on exemption carryover, among other "cudgels" passed by the House, were expressly discarded by the Conference Report before the Farm Bill's more scalpel-like measures were enacted. The Conference Report's language on this score makes Congress's intent to maintain then-current law on exemption carryover crystal clear. Conference Report at 616. *See Pub. Citizen, Inc. v. U.S. Dept. of Health and Human Services*, 332 F.3d 654, 668 (D.C. Cir. 2003) (a conference report can "much advance" a Court's understanding of Congress's "ultimate resolution of the matter"); *see also* House Br. at 18-19 (noting that Congress maintained exemption accrual in 2018).

Finally, Defendants unsuccessfully attempt to distinguish the D.C. Circuit's finding of illegal retroactivity in *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010). Defs.' Mot. at 36 n.15. Defendants cannot escape that in *Arkema*, as here, prior regulation and agency pronouncement provided for accumulation and retention of an item of value (there pollution allowances and here continued SNAP benefit allowances) and that the Circuit held that an EPA rule that reduced an accumulated allowance of that item "t[ook] away or impair[ed] vested rights." Defs.' Mot. at 36 n.15 (citing *Arkema,* 618 F.3d at 7, 10). Defendants offer no legitimate reason why the retention of pollution allowances is any different from a state's past retention of exemptions. USDA repeatedly recognized that, if a state did not use an exemption in one year, the exemption would become part of the state's running balance, and USDA published lists of those balances. *See* Pls.' Mot. at 23 & n.9. The Rule's elimination of these balances does not merely "unsettle states' expectations;" but impairs their vested rights and cannot be maintained. *Arkema*, 618 F.3d at 7.

III. THE FINAL RULE DOES NOT REFLECT REASONED DECISION-MAKING.

This Court has already decided that Plaintiffs are likely to succeed in showing that the Rule's radical changes to waiver criteria and restrictive "area" definition are arbitrary and capricious under the APA. P.I. Op. at 29. Defendants do not point to any evidence that supports, let alone requires, a different result. Defendants also fail to offer a reasoned explanation for the elimination of carryover exemptions or for ignoring the Rule's costs and disproportionate impacts on minorities. Thus, in additional to failing the *Chevron* analysis, the Rule must be vacated as arbitrary and capricious.

A. USDA's Narrowing of the Sufficient Jobs Inquiry to General Unemployment Rates Is Arbitrary and Capricious.

Defendants offer only two explanations for USDA's decision to abandon its decades-long practice of considering waiver applications based on "whatever data [a state] deems appropriate to support" its request. ABAWD00000131. First, USDA claims that certain data sources explicitly credited under earlier agency guidance are reasonably excludable because they "conflict with the revised definition of a waiver area." Defs.' Mot. at 41, 43. Second, USDA asserts that data sources other than federal unemployment rate figures "are subjective, non-standard, of ambiguous value, and/or rarely used." *Id.* at 41, 44. USDA's first reason is circular and only further underscores that the choice of an LMA as the exclusive "area" under the statute is unreasonable. The second is contrary to previous factual findings by the agency that ABAWDs face significant barriers to employment not experienced by the general population, that general unemployment rates fail to fully capture the availability of jobs for ABAWDs, and that states are best positioned to evaluate job prospects for ABAWDs in their jurisdictions. The administrative record demonstrates that these prior findings by the agency remain fully in force. The Rule fails to confront the nuanced inquiry Congress mandated and material aspects of the problem and must be vacated.

USDA rejected at least four different criteria (LSA-designation, qualification for extended unemployment benefits, U-6 unemployment data, employment-to-population ratios) based solely on the fact that data for these criteria is not available at the LMA level. *See* 84 Fed. Reg. at 66789-90, 66800; Defs.' Mot. at 43-45. USDA does not, however, contradict commenters' abundant evidence that these metrics can help answer the statutory question of whether an area has sufficient jobs for ABAWDs. *See* Pls.' Mot. at 24-28. Indeed, USDA expressly concedes that these criteria "can enhance the understanding of the job market," 84 Fed. Reg. at 66791, and in fact, permits use of these criteria in circumstances where U-3 BLS unemployment data is not available, *id.* at 66799. In other words, USDA's newly concocted restrictions rule out admittedly probative data and serve to make the waiver process less effective in tailoring waivers to areas where ABAWDs cannot find work.

USDA's argument that it can refuse to consider concededly relevant criteria because they conflict with the agency's new, self-imposed definition of waiver "area" is the definition of using one irrational decision to justify another. That USDA selected a definition of "area" which it claims renders numerous pertinent data sources unusable does not justify jettisoning those sources; to the contrary, it calls into question the appropriateness of USDA's extremely limited definition. One might hope an agency determining whether to deny food assistance to 700,000 people would look where the data is richest and not pursue a course where in its own judgment it would be precluded from examining relevant information. USDA's citation to *Mississippi Commission on Envtl. Quality v. EPA*, 790 F.3d 138, 160 (D.C. Cir. 2015) is inapposite. There, the D.C. Circuit merely found that it was reasonable for the EPA to decide that "comparing data from the same time period would be more appropriate than analyzing data from different time periods" in a "highly technical evaluation." *Id.* The case does not support USDA's action here of compounding one irrationality with another.

Defendants' claim that eliminated waiver criteria are "less reliable and consistent than standard unemployment data" also does not stand up to scrutiny. 84 Fed. Reg. at 66791. This Court already found that USDA's sudden change of position on the appropriateness of well-established waiver criteria "cannot be justified by 'merely recit[ing] the terms' reliable and consistent." P.I. Op. at 31 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).[19] This is especially so where commenters presented USDA with "considerable evidence" that the two-year unemployment rate is a poor measure of jobs for ABAWDs and that other metrics can provide a more accurate picture. *Id.* USDA has failed to provide a meaningful response to this evidence or articulate a "rational connection between the facts found and the choice" to abandon existing waiver criteria. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also* P.I. Op. at 31 (collecting cases).

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[19] The cases that USDA cites do not hold that conclusory assertions regarding the reliability of data are entitled to deference. In *Nat. Res. Def. Council, Inc.* v. *EPA*, 529 F.3d 1077, 1086 (D.C. Cir. 2008), the agency provided a detailed explanation of how it assessed industry-supplied data used for a risk analysis and why it considered that data to be reliable. Similarly, in *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 161 (D.D.C. 2005), the court deferred to agency expertise in analyzing "scientific matters concerning sea turtle viability in the fishery."

There is simply no support in the record for USDA's claim that once-credited data have suddenly become unreliable or inconsistent, or even that U-3 unemployment data is a more reliable indicator of job opportunities for ABAWDs than other data. This Court has already stated that prior limited used of a data source "does not change the record before the agency indicating problems with its approach or the inadequacy of the agency's response to those problems." P.I. Op. at 32.

Defendants substitute bare conclusions for reasoned decision-making in defending their decision to impose a six percent unemployment floor. Defendants offer only that an "objective threshold" of six percent average unemployment is self-evidently justified, otherwise areas with unemployment rates between 4.7 percent and 5.5 percent would qualify for a waiver. Defs.' Mot. at 47-48. As at the preliminary injunction stage, USDA's logic is "circular." P.I. Op. at 30. Defendants cite no reason for USDA's conclusion that areas with unemployment lower than six percent provide enough jobs for ABAWDs and the weight of the evidence before the agency proves the opposite.

Defendants attempt to obfuscate the agency's failure to reconcile the Rule with the factual record by arguing that the States are seeking to substitute their own judgment "for the agency's view as to what the best proxy is." Defs.' Mot. at 43 Not so. USDA's analysis is deficient because Congress has mandated that the inquiry be specific to ABAWDs, and the agency and Congress have recognized that the two-year unemployment rate is an "imperfect" measure of the reality of job prospect for ABAWDs. ABAWD00000168. Defendants' claim that, "it has never been understood that USDA is limited to considering waivers based on measures of available jobs specific to ABAWDs" (Defs.' Mot. at 42) misses the point. As this Court already explained, a proper reading of the Statute "would bar USDA from relying solely on measures so general that the ABAWD unemployment rate is essentially not counted, without requiring USDA to rely solely on ABAWD specific measures." P.I. Op. at 34 n. 14. The agency must implement the waiver process in a way reasonably geared to satisfy that mandate. This Rule falls demonstrably short of this requirement.

Defendants further argue that USDA is free to change its view on whether general unemployment rates adequately measure ABAWDs' employment opportunities without a "detailed justification" because they are providing a policy judgment, not a factual finding. Defs.' Mot. at 46. (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). To the contrary, *Fox* makes clear that a detailed justification is in fact required where, as here, the agency's new "policy" disregards facts and circumstances that underlay or were engendered by the prior policy. *Id*. at 515-16. The fact is that ABAWDs' employment experience is distinct from the general populace, that states are best equipped to evaluate ABAWD job prospects in their jurisdictions, and what metrics may be suited to the waiver inquiry are factual findings that USDA departed from without an adequate explanation. Courts in this Circuit have repeatedly held that such an "unexplained inconsistency" with prior agency findings "is the hallmark of arbitrary and capricious decision-making." *Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018) (collecting cases). Defendants cite cases in which an agency identified new data to support a new rule. *New England Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1201 (D.C. Cir. 2018); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 727-28 (D.C. Cir. 2016). This is precisely what USDA failed to do here.[20]

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[20] The other cases Defendants cite are not on point. *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Serv.'s*, 545 U.S. 967 (holding that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037-38 (D.C. Cir. 2012) (an agency may change its view as to whether a rule is in the public interest).

Finally, Defendants devote several pages to arguing that sole use of the two-year average unemployment rate is a "reasonable proxy" for sufficient jobs for ABAWDs because "'there is no measure available for determining the number of available jobs specifically for ABAWDs participating in SNAP in any given area.'" Defs.' Mot. at 25 (quoting 84 Fed. Reg. at 66788). To the contrary, the record is replete with probative data sources that speak to the inquiry mandated by Congress, and, far from the "best rule conceivable," (Defs.' Mot. at 26), this Court has already found that the Rule fails to meet a much lower bar: "the Final Rule adopts unreasonably narrow criteria for implementing the statutory requirements for evaluating waivers." P.I. Op. at 32-36.

Indeed, the States have never taken the position that USDA may not consider general unemployment rates or that the strength of the job market for ABAWDs can only be assessed using ABAWD-specific statistics. Rather, Plaintiffs have argued (and this Court has agreed) that the Rule's "tunnel-vision embrace" of the two-year unemployment average coupled with an unemployment floor as the sole basis for rejecting a waiver is incompatible with the statutory scheme. P.I. Op. at 29 & 34 n. 14. The fact that past waivers were *granted* based on general unemployment rates does not demonstrate that it is reasonable to *deny* waivers on the basis of general unemployment rates alone.

USDA's argument that it has authority to rely on "'reasonable approximations'" and balance "accuracy against . . . 'administrative efficiency'" similarly misses the point. Defs.' Mot. at 22. Plaintiffs never argued that USDA is not permitted to use general employment markers as readily approvable bases for ABAWD waivers, as it has done for two decades. Rather, Plaintiffs take issue with the Rule's shortcut denial of waivers by refusing to consider information demonstrably relevant to the statutory question without a sufficient justification.[21] *See* P.I. Op. at 29-32; Pls.' Mot. at 24-28; *see also Pub. Citizen v. Fed. Motor Carrier Safety Admin*., 374 F3d 1209, 1221 (D.C. Cir 2004) (holding that the absence of data addressing the precise statutory question is not a legitimate reason to ignore the statue's command). Furthermore, USDA never cited "administrability" as a basis for eliminating other waiver criteria, and agency actions cannot be upheld based on post hoc justifications. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

Defendants' "kitchen sink" arguments are designed to evade the simple fact; supported by numerous comments, past agency guidance, and amici; that USDA's exclusive reliance on the two-year average unemployment rate and unemployment floor will result in waiver denials for areas where there are not, in fact, sufficient jobs for ABAWDs in contravention of the statutory mandate. *See* Pls.' Mot. at 25-27 (citing comments). The most obvious example is the Rule's elimination of qualification for extended unemployment benefits as a waiver criterion. A sharp economic downturn sufficient to trigger qualification for extended unemployment benefits may have a drastic effect on job availability for ABAWDs—but in many cases a sharp recession would not be immediately captured by the general unemployment rate averaged across the two-year

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[21] USDA not need rely on "speculative projections about future technology," *United Steelworks of Am. AFL-CIO-CLC v. Marshall,* 647 F.2d 1189, 1266 (D.C. Cir. 1980), nor does the data that states have used to support waiver requests involve "standards…on the frontiers of scientific knowledge." *Indus. Union Dept. AFL-CIO v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). Nor do Plaintiffs argue that USDA needs to apply new data retroactively. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1230 (D.C. Cir. 1994). Rather, USDA should allow states to use the "most reliable data available," *id.,* and not restrict the data sources to U-3 unemployment data when there is ample evidence in the record that the eliminated criteria provide states with other, more accurate measures of job availability. States have relied on these data sources for decades. Given the ample evidence of the utility of this data, and the agency's longstanding practice of allowing states to submit such data in support of their ABAWD waiver requests, USDA "must provide some explanation for ignoring it in favor of blanket, highly conservative assumptions," *Leather Indus. of Am. v. EPA*, 40 F.3d 392, 403 (D.C. Cir. 1994), which, as Plaintiffs have argued in more detail, USDA has failed to do.

reference period, as has been the case for numerous States during the COVID-19 pandemic. *See* Pls.' Mot. at 26 n. 13, 29; *see also* ABAWD00110165-66 ("When unemployment rates rise rapidly when the economy is entering into a recession and jobs are quickly declining, individuals likely face many challenges finding or keeping work. By requiring a very high two-year average unemployment rate, the proposed rule, however, would keep many areas from qualifying for a waiver during this time."); *see* Bolen Supp. Decl. ⁋ 13 (estimating only 9-10 percent of counties would qualify for waiver under final Rule during current pandemic, but 97 percent of counties would qualify under current regulations).[22]

B. <u>The Rule's Restrictions on Waiver Area Are Arbitrary and Capricious.</u>

USDA also fails to offer new arguments in support of its radical decision to replace flexible, state-defined waiver areas with solely areas federally designated as LMAs. The absence of any valid reasons for the Rule's departure from USDA's decades-long policy demonstrates that the Rule "is a solution in search of a problem." P.I. Op. at 43.

First, USDA cannot escape the *Fox* mandate that a "detailed justification" is required here because the agency's adoption of broad LMAs as the single, monolithic area for a waiver request is in direct opposition to the agency's prior factual finding that due to "variety in local employment conditions…statewide averages may mask slack job markets in some counties, cities, or towns," and that states are in the best position to define the scope of the request based on local economic conditions. ABAWD00000166; *see* ABAWD00000089. The Rule fails to provide any reasonable

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[22] Similarly, employment-to-population ratios provide an indicator of whether working aged persons have dropped out of the labor force, which can demonstrate a depressed job market for ABAWDs even where unemployment rates are relatively high, and which U-6 unemployment data can be used to more accurately captures the condition of the labor market faced by ABAWDs because it includes the unemployed, the marginally attached to the labor force, and those who are working part-time but want to be working more hours. *See* ABAWD00110183-84.

basis for disregarding these prior findings. *See Fox*, 556 U.S. at 515; *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 89 (D.D.C. 2019).

Defendants trade prior claims of state abuse for attacks on the "weakness" of the 2001 Regulation, claiming that "broad flexibility to self-define waiver areas led to waivers that 'maximize waived areas rather than demonstrate high unemployment' in a particular job market." Defs.' Mot. at 50 (citing 84 Fed. Reg. at 66794). However, the agency's recast, coupled with a new indictment that states failed to explain why their requests met the statutory provision (despite that USDA apparently failed to ask any state to do so), does not better provide the link that the agency was unable to give at the preliminary injunction stage: why such waiver requests are improper or support a stricter definition of "area." As this Court already held, "[g]rouping contiguous counties with relatively high unemployment while omitting contiguous counties with relatively low unemployment is entirely consistent with good faith efforts by states to target waiver requests to areas that lack sufficient jobs and to apply the work requirements in areas with enough jobs." P.I. Op. at 39. *See* House Br. at 14 (USDA mischaracterizes the flexibility written into the law as "'weaknesses'" that states "'have taken advantage of'") (citation omitted).

The Court recognized many "readily apparent" reasons for a state's decision to exclude low unemployment areas from a waiver request. P.I. Op. at 39-40. USDA's assertion that the cited waiver groupings cannot be explained "as anything other than an effort to ensure the broadest possible application of the waiver," Defs.' Mot. at 51-52, ignores these alternative explanations, as well as the obvious fact that states can and should seek the broadest allowable application of a waiver in an effort to ensure the food security of its low-income residents. That is not gamesmanship; it is good government. P.I. Op. at 42 (noting that maximization of waivers is not *ipso facto* problematic because it enables states to let "funds appropriated for SNAP go directly to feed the needy rather than to bloat state agencies that enforce work requirements in unwaived areas"). Defendants' assertions fall short of the rational decision making the law requires. *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (holding that agency speculation is "not adequate grounds upon which to sustain an agency's action"). Moreover, to the extent that "USDA did indeed think that states were manipulating the waiver process, then asking states why they were grouping as they were, requesting that states resubmit waiver applications that USDA viewed as inappropriate, or outright denying such waiver applications, would have been a sensible course." P.I. Op. at 42-43. [23]

USDA claims that it "simply could not reject waivers that" USDA had reason to believe reflected strategic grouping, Defs.' Mot. at 54-55, but it does not identify any bar to making further inquiries of states or seeking additional documentation supporting substate groupings, and it offers no explanation or support for why the "2001 Regulation *requires* USDA to approve waiver areas consisting of jurisdictions grouped into overly broad areas," *id.* at 56 (emphasis added). Indeed, USDA's position that it has no discretion to demand further substantiation of waiver areas or reject these waivers is directly contrary to other positions it takes in this case and prior guidance. Defs.' Mot. at 30 ("if the State's group of individuals does not align with the areas the Secretary determines to have insufficient jobs, USDA could always 'advise [a state] that it would not approve [a request] unless one or more of its provisions was deleted or modified' to conform to the type of

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[23] In addition to the identified issue of State waiver applicants omitting low unemployment counties from waiver requests, Defendants complain that States failed to explain how large areas covered by waiver requests constitute a single cohesive job market, noting the "obvious inability of … ABAWDs to commute across hundreds of miles." Defs.' Mot. at 53. This problem is nowhere identified in the Rule. Furthermore, USDA's skepticism that large areas can constitute a single job market for ABAWDs—including because ABAWDs cannot realistically commute to far flung counties—is directly at odds with its embrace of LMAs, which sometimes span not just counties but also states, as the only definition of "area."

request that USDA would consider granting") (internal citations omitted); *see also* McConnell Decl. (ECF No. 26-1) Ex. 3, at 10 (under the earlier rules, "[i]f the State defines its own group, the rationale for the boundaries of the group must be thoroughly documented"); *see also* ABAWD00000212 ("Once the areas are identified, the justification and documentation must be thoroughly explained in order to expedite review of the data.").

USDA's rationale for adopting LMAs as the sole definition of a waiver area is equally convoluted. USDA argues that LMAs are the only measure that "incorporate the economic reality of commuting in an attempt to define job markets." Defs.' Mot. at 56. But it also contends that it was reasonable for USDA to ignore evidence that LMAs do not capture the commuting patterns or job opportunities specific to ABAWDs—the population at issue under the statute. *Id.* As both commenters and now amici have amply explained, LMAs are not designed to reflect the job markets for ABAWDs and have little relation to where ABAWDs can realistically travel for work. *See* Pls.' Mot. at 31-35; Lawyers' Comm. Br. at 18-20; Br. for Shriver Center on Poverty Law et al. as Amici Supporting Plaintiffs (ECF No. 86, "Shriver Center Br.") at 5-20; Br. for Greater Hartford Legal Aid et al. as Amici Supporting Plaintiffs (ECF No. 85) at 9-16.

Defendants' claim that the "absence of viable alternative[s]" justifies using a single miscalibrated definition of "area" is meritless. Defs.' Mot. at 56-57. USDA rejected its prior flexible approach as "not lead[ing] to waiver areas that matched realistic commuting patterns for ABAWDs"—in favor of LMAs, which admittedly do not match realistic commuting patterns for ABAWDs. *Id.* at 56. These inconsistencies in USDA's logic render its decision arbitrary and capricious. *See Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 52 (D.D.C. 2019).

In a last-ditch effort to salvage the Rule, Defendants maintain that because both LMAs and the prior framework could lead to "undesirable results in some instances," USDA's decision to adopt LMAs was reasonable. Defs.' Mot. at 58. But the Rule and the status quo ante are *not* both equally imperfect. Plaintiffs have established that the Rule will irrationally condition District of Columbia ABAWDs' ability to eat in part on general employment numbers in far-flung counties in West Virginia that they cannot reasonably reach on a regular basis. In contrast, USDA has not established that any waiver was granted under the prior framework in an area where ABAWDs in fact had sufficient jobs. Under the 2001 Regulations, states had flexibility to obtain waivers targeted to jurisdictions that lack sufficient jobs for ABAWDs. Under the Rule, states cannot obtain waivers for local areas that meet the waiver criteria unless the broader LMA *also* meets the waive criteria, regardless of whether ABAWDs in regions with high unemployment have access to transportation or the skills necessary to find jobs in that may exist in areas hundreds of miles away, as illustrated by the examples of New York City and Washington D.C. *See* Lawyers' Comm. Br. at 15-20; Shriver Center Br. at 5-21; *Sinclair Broad. Grp., Inc. v. F.C.C.*, 284 F.3d 148, 162 (D.C. Cir. 2002) (agency exercise in line-drawing "cannot escape the requirements that its action not 'run[ ] counter to the evidence before it' and that it provide a reasoned explanation for its action) (quoting *State Farm,* 463 U.S. at 43). Such an arbitrary denial of vital food assistance cannot stand.

C. <u>USDA's Decision to Limit Carryover of Unused Exemptions Is Arbitrary and Capricious.</u>

Defendants argue that the Rule's prohibition on the accumulation of carryover exemptions beyond one year is reasoned because both the agency and OIG determined that states' accumulation of exemptions was inconsistent with Congress's decision to limit the number of exemptions allocated on a yearly basis. Defs.' Mot. at 64-65. But USDA does not even attempt to explain—in the Rule, or in its briefing—why Congress's decision to impose an annual limit on accumulation of exemptions is incompatible with allowing states to store exemptions for when they need them most. Indeed, Congress has expressly ratified USDA's original policy through repeated reauthorizations of the operative statute, noting that it did so because "neither the [USDA] nor Congress can enumerate every [able-bodied adult]'s situation as it relates to possible exemption from the time limit, and subsequently, the work requirement." House Br. at 12-19 (citation and internal quotation marks omitted); *see also* Impact Fund Br. at 6-8, 16-18. Reference to one set of limitations in no way supports the reasonableness of the other, particularly when Congress has specifically provided otherwise.

Moreover, even if the Rule's elimination of exemption balances might otherwise be permissible, it must fall when balanced against the considerable reliance interests generated by the prior policy. The APA requires that USDA "must identify some problem that it is solving or benefit that it is achieving, meaning it must give a reasoned explanation" for the change. *California v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-00682-LB, 2020 WL 4051705, at *7 (N.D. Cal. July 20, 2020). The only "problem" USDA has identified is a purported failure to meet the intent of the statute, a claim utterly unsupported by the agency and disavowed by Congress. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006); s*ee* Impact Fund Br. at 3-18. [24]

On the other hand, commenters presented significant evidence that eliminating state exemption balances beyond one year will significantly hinder states' ability to nimbly respond to

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[24] By contrast, in *Rust v. Sullivan,* 500 U.S. 173, 187 (1991), the agency relied on "critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide 'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." (citation omitted).

unexpected economic crises or serve the needs of ABAWDs in unwaived areas. *See, e.g.*, ABAWD00008249-50; *see also* Impact Fund Br. at 19-25. Additionally, commenters noted that the new restrictions provide the perverse incentive for states to use their exemptions in times of economic prosperity given that they will otherwise forfeit them altogether. ABAWD00008249-50. Defendants only response to these serious concerns is that USDA "balanced" states' reliance interests by permitting states to use their accumulated exemptions over this next year and to carryover exemptions for one year going forward. Defs.' Mot. at 65-66. But USDA offers no explanation of how it arrived at its conclusion that allowing carry over for one year was sufficient to accommodate states' concerns. Moreover, USDA failed to grapple with the perverse incentive that this Rule creates whereby states are required to use all of their accumulated exemptions within two years, rather than distributing them strategically as emergencies arise.

The current COVID-19 crisis highlights the dire consequences of USDA's unwillingness to meaningfully engage with the consequences of the Rule. While the Rule would deny waivers based on the 24-month average unemployment rate, which dramatically understates the impact of sudden declines in employment caused by the crisis (*see* Rivera Supp. Decl. (ECF No. 65-4) ⁋⁋ 5-8; Bolen Supp. Decl. ⁋⁋ 13-17, Fernández Supp. Decl. (ECF No. 65-3) ⁋⁋ 10-12; Buhrig Supp. Decl. (ECF No. 65-2) ⁋⁋ 7, 11, 13-14; Zeilinger Supp. Decl. (ECF No. 65-5) ⁋⁋ 4-7), states that did not qualify for a waiver would be limited to at most two years' worth of exemptions to continue vital food assistance to their residents. USDA did not seriously grapple with the question of whether this limited carryover permits states the flexibility needed to ensure that residents who lose their jobs as a result of unexpected crises can still have access to basic nutrition. [25]

D. <u>The Rule Fails to Consider the Cost and Disparate Impact of the Rule.</u>

USDA attempts to shirk its obligations to consider the costs and disparate impact of the Rule by pointing to irrelevant authority and mischaracterizing the States' arguments. First, USDA argues that its obligation to conduct a cost-benefit analysis arises only under an executive order, and executive orders cannot give rise to a cause of action under the APA. Defs.' Mot. at 59. But it is well-settled law that reasonable regulation requires an agency to consider costs to impacted parties when formulating a rule. *Michigan v. EPA*, 135 S. Ct. 2699, 2707-08 (2015). And "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also Council of Parent Attorneys & Advocates, Inc.,* 365 F. Supp. 3d at 53-55; *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 239-42 (D.D.C. 2016); Br. for New York University Inst. for Policy Integrity as Amicus Supporting Plaintiffs (ECF No. 70, "NYU Br.") at 4.

Plaintiffs pointed to numerous examples in the administrative record of both immediate and downstream costs to states which USDA ignored, including the need for state agencies to

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[25] Plaintiffs are aware that the Families First Coronavirus Response Act has *temporarily* suspended the ABAWD time limit, but this provision is set to expire with the expiration of the federal public health emergency. Pub. L. 116-127, 134 Stat. 187-88. As such, it is merely temporary salve that may not heal the much deeper economic wounds caused by the pandemic that could far outlast the public health emergency. Congress intended for states to have flexibility to address economic downturns within their jurisdictions, not to have their hands tied so that they are forced to rely on Congressional relief that may not be forthcoming. House Br. at 11 (noting that the Rule would "hamstring SNAP in times, like now, of economic stress."). And states should not have to rely on the "exceptional circumstances" provision in the Rule when the examples provided in the Rule indicate that waivers would be granted on that ground only in very limited, short-term circumstances.

modify IT systems and train or hire additional staff in order to implement the Rule. Pls.' Mot. at 39. *See* ABAWD00000420-21. It is arbitrary for an agency to fail to "adequately analyze" the consequences of its decision, as USDA has done here. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017); *Michigan,* 135 S. Ct. at 2706.

USDA justifies its failure to consider the downstream costs on state Medicaid agencies and state economies because the "record 'do[es] not permit estimation of potential costs specific to the dispersed ABAWD population that might result from this Rule.'" Defs.' Mot. at 60 (citation omitted). But the law does not permit an agency to throw up its hands and disregard the fact of well-substantiated costs just because they cannot be precisely quantified. *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005) (finding that difficulty in assessing costs "does not excuse the [agency] from its statutory obligation to determine as best it can the economic implications of the rule it has proposed"); *see also* NYU Br. at 9-14.

USDA had more than enough information at its disposal with which to determine the economic implications of the Rule: over a thousand commenters submitted information to USDA regarding the specific economic impacts—in times of economic downturn and prosperity—of implementing the Rule. ABAWD00008256-60; *see also* Br. for 16 Counties and Cities et al. as Amici Supporting Plaintiffs (ECF No. 83, "Counties and Cities Br.") at 6-10; NYU Br. at 9-11. USDA dismissed this information, claiming that "[t]he magnitude and direction of these impacts…cannot be accurately estimated," Defs.' Mot. at 61 (citing ABAWD00000422). But "[t]he mere fact that the magnitude of [a regulatory cost] is uncertain is no justification for disregarding the effect entirely." *Pub. Citizen,* 374 F.3d at 1219 (emphasis omitted); *see Metlife, Inc.*, 177 F. Supp. 3d at 230 (agency decision was arbitrary and capricious where is "assumed the upside benefits…but not the downside costs of its decision").

Finally, USDA justifies its failure to consider relevant costs by claiming that its motivation for the Rule was not cost savings, but to more closely conform to statutory intent. Defs.' Mot. at 62. Plaintiffs have already established, the House of Representatives has already averred, and this Court has already found that large swaths of the Rule affirmatively *fail* to conform to statutory goals. Regardless, USDA cannot simply enact rules without considering their negative impacts, regardless of their stated motivation. *See Michigan*, 135 S. Ct. at 2707 ("No regulation is 'appropriate' if it does significantly more harm than good."); *Chamber of Commerce,* 412 F.3d at 143. At bottom, USDA failed to adequately consider the costs that the Rule would impose on affected parties rendering the Rule arbitrary and capricious.

USDA similarly tries to cabin its obligations to consider the Rule's disproportionate impact on protected groups to the Civil Rights Impact Analysis ("CRIA") and then claims that the CRIA is unreviewable. Defs.' Mot. at 62. But Plaintiffs do not seek judicial review of the Rule's CRIA. Rather, the States contend that USDA failed to consider an important aspect of the problem when it gave short shrift to the Rule's impact on minorities. *See Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 97 (D.D.C. 2017) (looking to agency policy to define "important aspects" of the problem). USDA once again threw up its hands at the problem, claiming it lacked "[s]pecific [demographic] . . . data" about the individual ABAWDs who may be newly subject to the time limit. Defs.' Mot. at 63. But, as with the economic costs of the Rule, USDA cannot abdicate its obligations to consider disparate impact by simply claiming a lack of perfect data.[26] *Conoco-*

[26] The CRIA recommended that the agency gather additional data from state agencies about the impact of the Rule on the agency and on SNAP participants in each state who are members of protected groups in order to more accurately assess the disproportionate impact of the Rule before its implementation. ABAWD00000359. The fact that USDA ignored this recommendation and proceeded to finalize the Rule further underscores that USDA simply brushed aside concerns about disparate impact.

Phillips Co. v. EPA, 612 F.3d 822, 840 (5th Cir. 2010) ("[The agency] cannot refuse to carry out its mandate, waiting for the day when it might possess the perfect information.") (citation and internal quotation marks omitted). Rather, USDA must meaningfully engage with the evidence submitted during the comment period regarding the Rule's harm to protected groups, which, as Plaintiffs have noted, is substantial. Pls.' Mot. at 40 n. 20; *see* Lawyers' Comm. Br. at 11 (noting that several experts submitted extensive data about how the Rule would impact protected groups which USDA ignored); NYU Br. at 16-19.

Even the limited analysis USDA did perform, of "a reasonably similar category of individuals," Defs.' Mot. at 63, fails to uphold USDA's obligation to address the Rule's likely harm to protected groups. As the Court noted in considering the preliminary injunction, the CRIA's plan for "mitigation strategies" fails to adequately assess how the agency will address the Rule's disproportionate impact on minorities. *See* ABAWD00000351-52; *see also* Counties and Cities Br. at 14-15. USDA's failure to adequately address the Rule's impact on minorities renders the Rule arbitrary and capricious.

E. <u>The Court Should Consider Plaintiffs' Evidence Regarding the Current Public Health Crisis.</u>

Defendants take issue with Plaintiffs' submission of declarations concerning the current public health crisis to highlight deficiencies in the Rule that commenters already noted, including that the 24-month unemployment rate is not responsive to sudden economic downturns and states' need for carryover exemptions beyond one year to address unexpected and prolonged downturns. Pls.' Mot. at 26 n. 13, 36. Defendants' argument that the Court should "disregard" the current economic climate and the stark relief in which it has placed the Rule's deficiencies is meritless.

Defendants' claim that there is a categorical ban on extra-record evidence overlooks case law from this Circuit allowing plaintiffs to "include extra-judicial evidence that was not initially before the agency but that the plaintiff believes should nonetheless be included in the administrative record." *Oceana, Inc. v. Ross,* No. 17-cv-829, 2020 WL 1905148, at *3 (D.D.C. Apr. 17, 2020) (internal citations omitted) (allowing a plaintiff to submit a supplemental expert declaration in support of their APA claims).[27] One circumstance where this evidence is particularly permitted is "if the background information is needed to determine whether the agency considered all the relevant factors." *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010).

The States' supplemental declarations directly address USDA's failure to consider important factors when finalizing the Rule, which the COVID-19 crisis has brought into stark light. Obviously, the States could not have submitted this background evidence regarding the grave economic and employment impacts of this crisis during the comment period.

Moreover, numerous commenters flagged for USDA that the Rule's restrictions would make the waiver and exemption processes unable to respond to swift economic downturns. The declarations discussing the impacts of COVID-19 illustrate the agency's failure to consider these comments and critical factors relating to States' need for flexibility in addressing rapid economic downturns—including how the Rule's elimination of the extended unemployment benefits qualification standard and limitations on carryover exemptions severely undercut this flexibility—and USDA's failure to assess the costs and disparate impact of the Rule, which the COVID-19 pandemic has only exacerbated. *See also* NYU Br. at 5-11. The Court clearly can (and should) consider this important evidence.

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[27] As discussed above, USDA argues that the agency can provide an "amplified explanation" of USDA's reasoning in the Rule. Defs.' Mot. at 51 n. 23. It follows then that Plaintiffs should similarly be permitted to rely on evidence that amplifies the reasoning provided by commenters in the record.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment.

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Respectfully submitted,

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