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**M E M O R A N D U M**

**TO:** Honorable Board of Supervisors  
Jeffrey V. Smith, County Executive

**FROM:** James R. Williams, County Counsel 

**RE:** Comments to U.S. Department of Agriculture regarding Proposed Rule "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program"

**DATE:** September 24, 2019

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On July 24, 2019, the Department of Agriculture issued a request for comment concerning the proposed rule "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)." The proposed rule would define "benefits" for categorical eligibility to mean ongoing and substantial benefits and limit the types of non-cash Temporary Assistance for Needy Families (TANF) benefits that confer categorical eligibility. Consequently, the proposed revisions would disenroll 3.1 million people from SNAP, eliminate state flexibility to set state-specific SNAP eligibility criteria, and instead impose more stringent income limitations and new asset limitations on SNAP households.

On September 10, 2019, at the request of Supervisors Ellenberg and Simitian, the Board approved a referral to County Counsel to submit a public comment opposing the categorical eligibility rule change and detailing the negative impact on the County of Santa Clara and residents of Santa Clara County.

Our Office submitted the attached comments on behalf of the County to the U.S. Department of Agriculture.

**Attachment:** September 23, 2019 Comments on "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program" from County of Santa Clara to U.S. Department of Agriculture

**c:** Miguel Márquez, Chief Operating Officer  
Megan Doyle, Clerk of the Board



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September 23, 2019

**SUBMITTED ELECTRONICALLY VIA [www.regulations.gov](http://www.regulations.gov)**

Program Design Branch  
Food and Nutrition Service  
United States Department of Agriculture  
3101 Park Center Drive  
Alexandria, VA 22302

**Attn: Docket No. FNS-2018-0037 (RIN 0584-0037/OMB Number: 0584-NEW)**  
**Re: Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)**

Dear Rules Docket Clerk:

The County of Santa Clara ("County") submits these comments in response to the proposed rule published by the Department of Agriculture ("Department") concerning categorical eligibility for the Supplemental Nutrition Assistance Program ("Proposed Rule").<sup>1</sup> The Proposed Rule upends longstanding state flexibility to set eligibility and verification requirements for critical food assistance programs based solely on the Department's reconsideration of a statute that has remained materially unchanged for years. The Department's current reconsideration is at odds with the statute's intent, text, and structure, and it is unsupported by its own minimal legal citations to the statute. Indeed, the Department undercounts the few costs of the Proposed Rule that it does consider and fails to assess the Proposed Rule's massive costs and consequences on local governments, communities, and our

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<sup>1</sup> Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570-01 (proposed July 24, 2019) (to be codified at 7 C.F.R. pt. 273).

most vulnerable residents. The County strongly opposes the Proposed Rule and urges the Department to withdraw it.

## **I. Background**

The Supplemental Nutrition Assistance Program (SNAP), which is known as CalFresh in California, provides critical nutrition assistance to low-income people. It is the largest nutrition assistance program in the country and an integral element of the social safety net. SNAP was enacted by Congress to raise “levels of nutrition among low-income households” and specifically to “alleviate ... hunger and malnutrition.”<sup>2</sup>

The Proposed Rule would disenroll 3.1 million people from SNAP. It eliminates state flexibility to set state-specific SNAP eligibility criteria and instead imposes more stringent income limitations and new asset limitations on SNAP households. Currently, states may rely on broad-based categorical eligibility (“BBCE”) to enroll in SNAP households with gross incomes up to 200% of the federal poverty level.<sup>3</sup> The Proposed Rule eliminates this state flexibility and imposes stricter income restrictions that deny SNAP benefits to households with gross incomes over 130% of the federal poverty level. The Proposed Rule also imposes new asset limitations that prevent households from saving as little as \$2,250 or \$3,500.

The Proposed Rule reduces access to nutrition assistance even though many people in the country and the County struggle to obtain enough to eat. Food insecurity affects more than 1 in 4 people in the County, including many working families.<sup>4</sup> Many County residents struggle to access nutritious food, contributing to costly population-wide health problems, such as a 34% rate of overweight and obese low-income children between age two and age five in the County. These very real health consequences have quality of life, life-expectancy, and economic impacts on families, and these impacts negatively affect our broader communities.

## **II. The Proposed Rule is Arbitrary and Capricious**

The Proposed Rule fails to satisfy the basic requirements of administrative rulemaking.<sup>5</sup> A rulemaking is invalid if the agency has not “give[n] adequate reasons for its decisions,”<sup>6</sup> examined the relevant data, or offered a “rational connection between the facts found and the

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<sup>2</sup> 7 U.S.C. § 2011.

<sup>3</sup> See 7 C.F.R. § 273.2(j).

<sup>4</sup> Second Harvest Food Bank, *Hunger in Silicon Valley More Widespread and Diverse than Previously Thought: Second Harvest Food Bank's Food Insecurity Study Finds 1 in 4 People Is at Risk for Hunger; Nearly a Quarter Are Families with Children 1-2* (Dec. 12, 2017), archived at <https://perma.cc/L924-AABK>.

<sup>5</sup> See 5 U.S.C. § 706(2)(A)-(B) (agency action that is “arbitrary, capricious, an abuse of discretion, ... otherwise not in accordance with law,” or “contrary to constitutional right” shall be set aside).

<sup>6</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (*Encino I*).

choice made.”<sup>7</sup> This is especially so where, as here, an agency is changing its existing policy.<sup>8</sup> In these circumstances, an agency must demonstrate that there are “good reasons” for the new policy, take into account that longstanding policies may have created significant reliance interests, and offer “a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>9</sup> The Department complies with none of these requirements.

The Department—which *only* computes the Proposed Rule’s costs in terms of reduced SNAP payments and increased administrative and verification costs—completely fails to consider the Proposed Rule’s other costs and harms, including its harms to food security, local governments, and our communities. It also fails to acknowledge the Proposed Rule’s disenrollment effects on bundled public benefit programs—effects that further deepen the Proposed Rule’s harms. As a result, the Proposed Rule is arbitrary, capricious, and an abuse of discretion.

#### **A. The Department Fails to Consider the Proposed Rule’s Harms to Food Security**

As the Proposed Rule itself acknowledges, the Department has “an obligation to expend taxpayer funds ... in alignment with the intent of the Food and Nutrition Act to alleviate hunger among low-income households.”<sup>10</sup> Despite this acknowledged obligation, the Department fails to *consider* the Proposed Rule’s effects on hunger for low-income households. The Department states in passing that the “proposed rule may also negatively impact food security,”<sup>11</sup> but does not otherwise acknowledge, analyze, or assess its impacts on hunger, food security, or adequate nutrition. The Department, which is obligated to administer SNAP in order to alleviate hunger, would disenroll 3.1 million people from SNAP without assessing their risk of hunger or their ability to secure adequate and nutritious food without SNAP. It fails to consider their food needs. The Proposed Rule is arbitrary and capricious for this reason alone.<sup>12</sup>

In the County, the Proposed Rule will increase food insecurity. If the Proposed Rule takes effect, the County Social Services Agency estimates that over 10,280 County residents will lose access to CalFresh’s critical nutrition supports. Based on County data, the Proposed Rule’s new income restrictions alone will cause over 7,000 people in the County to lose CalFresh

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<sup>7</sup> See, e.g., *id.*; *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*Motor Vehicle Mfrs. Ass’n.*); *Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 528 (9th Cir. 2010).

<sup>8</sup> *Encino I*, 136 S. Ct. at 2125.

<sup>9</sup> *Id.* at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)) (internal quotation marks omitted).

<sup>10</sup> Proposed Rule, 84 Fed. Reg. at 35572.

<sup>11</sup> *Id.* at 33575.

<sup>12</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (an agency’s rule is generally arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”).

benefits. Most of these 7,000 people are children, seniors, or people with disabilities, and a plurality are children.<sup>13</sup>

Indeed, close to twice as many people will lose benefits in the County under the Proposed Rule's income limitation as the Department predicts. Using national data (including data from states that will not be affected), the Proposed Rule estimates that 4.9% of currently participating SNAP households will lose SNAP benefits because their gross incomes exceed 130% of the federal poverty level.<sup>14</sup> However, these estimates understate the far more concentrated harms that will be imposed on states that rely on BBCE and communities with high costs of living.<sup>15</sup> Instead, in the County, 8.8% of the approximately 80,000 current CalFresh enrollees will lose food assistance due to the Proposed Rule's income restrictions.<sup>16</sup>

Thousands of people in the County will also lose CalFresh access due to the Proposed Rule's new asset restrictions. Under the Department's own conservative estimates, at least 3,280 people in the County will lose CalFresh food assistance solely due to the Proposed Rule's asset restriction. Although these estimates are likely to understate the more concentrated harms to high-cost BBCE jurisdictions such as the County, the County cannot easily estimate the magnitude of the harm because in California, like in 23 other states, asset information is not collected.

#### **B. The Department Fails to Consider the Proposed Rule's Harms to Working People**

The Proposed Rule disenrolls working families from SNAP even though Congress specifically designed SNAP to support working families. This result—which the Department fails to consider<sup>17</sup>—is contrary to Congress's clear intent.

The Proposed Rule disproportionately disenrolls working families from SNAP even though "SNAP supports work," as the Department itself acknowledges.<sup>18</sup> In the County, for

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<sup>13</sup> The County's Social Services Agency estimates that 2,800 children, 1,800 seniors, and 260 individuals with disabilities in the County will all be disenrolled from CalFresh due to the Proposed Rule's new income restriction.

<sup>14</sup> Proposed Rule, 84 Fed. Reg. at 35571-72.

<sup>15</sup> Neither the Proposed Rule nor the Regulatory Impact Analysis acknowledges these greater harms for BBCE states and communities with high costs of living. At most, the Regulatory Impact Analysis acknowledges that the Proposed Rule will "have varying impacts by State," but nowhere mentions California nor the more intense harms in high-cost communities in California. U.S. Dep't Agric., *Regulatory Impact Analysis, Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)* 20-21 (July 24, 2019), archived at <https://perma.cc/47NK-5NY2>.

<sup>16</sup> See Cnt'y Santa Clara Dep't Emp't & Benefit Servs., *2018 Annual Report 1* (2019), archived at <https://perma.cc/7E7U-X99V> (82,030 CalFresh enrollees in 2018).

<sup>17</sup> At most, the Department acknowledges that working people will "be disproportionately affected" by the Proposed Rule. See Proposed Rule, 84 Fed. Reg. at 35575.

<sup>18</sup> U.S. Dep't Agric., *Supplemental Nutrition Assistance Program (SNAP) ABAWDs*, available at <https://www.fns.usda.gov/snap/ABAWD>.

example, the Proposed Rule will disenroll most working people from SNAP benefits, including people working for minimum wage just a fraction of the time. Hourly minimum wages in the County are regularly \$15 or more due to the extremely high cost of living.<sup>19</sup> Yet even these comparatively high minimum wages do not constitute a living wage in the County,<sup>20</sup> where food insecurity affects more than 1 in 4 residents, including many working families.<sup>21</sup> Despite the massive cost differences around the country, the Proposed Rule imposes a single lower income limit for eligibility for nutrition assistance nationwide. Therefore, under the Proposed Rule, a single person will be disenrolled from SNAP if she works for just 92 hours in a month in one of these cities in the County. And a family of two in these cities will be disenrolled from SNAP if together they work for more a combined total of 123 hours. The Proposed Rule disincentivizes full-time employment and disenrolls many working families from SNAP even though “SNAP supports work,” and Congress’s “SNAP rules require all recipients meet work requirements unless they are exempt” under a specific statutory exemption.<sup>22</sup> The Proposed Rule’s disincentivization of employment and penalization of working families are contrary to Congress’s clear intent to encourage employment and to support working families.

### **C. The Department Fails to Consider the Proposed Rule’s Costs to Local Governments**

The Department fails to consider the Proposed Rule’s costs to local governments and their residents. The Department only estimates the Proposed Rule’s costs in terms of reduced SNAP payments and increased administrative and verification costs.<sup>23</sup> Its analysis entirely fails to estimate the massive costs of lost nutrition assistance on local economies, public health, and the local governments.

The Proposed Rule’s reductions in SNAP spending will hurt local economies. According to the Department itself, every dollar in SNAP payments generates an estimated \$1.79 in economic activity<sup>24</sup>—a fiscal multiplier effect that is among the most effective forms of economic stimulus.<sup>25</sup> In the County, under the Proposed Rule, an estimated 10,300 people will lose more than \$4.6 million in SNAP benefits—translating to over \$8.3 million in economic

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<sup>19</sup> The Santa Clara County cities of San José, Cupertino, Los Altos, Mountain View, Palo Alto, Santa Clara, and Sunnyvale all set minimum wages at \$15 or more per hour.

<sup>20</sup> See, e.g., Living Wage Calculator, *Living Wage Calculation for Santa Clara County, California* (2018), archived at <https://perma.cc/7FF2-6XNN> (calculating living wage rates in the County).

<sup>21</sup> Second Harvest Food Bank, *Hunger in Silicon Valley More Widespread and Diverse than Previously Thought: Second Harvest Food Bank’s Food Insecurity Study Finds 1 in 4 People Is at Risk for Hunger; Nearly a Quarter Are Families with Children 1-2* (Dec. 12, 2017), archived at <https://perma.cc/L924-AABK>.

<sup>22</sup> U.S. Dep’t Agric., *Supplemental Nutrition Assistance Program (SNAP) ABAWDs*, available at <https://www.fns.usda.gov/snap/ABAWD>.

<sup>23</sup> Proposed Rule, 84 Fed. Reg. at 35575.

<sup>24</sup> See U.S. Dep’t Ag., Kenneth Hanson, *The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP* (2013), archived at <https://perma.cc/P7GR-ZXJX>.

<sup>25</sup> Dorothy Rosenbaum, Ctr. Budget & Pol’y Priorities, *SNAP Is Effective and Efficient* 4 (Mar. 11, 2013), archived at <https://perma.cc/B4SW-78P5>.

losses to the County from SNAP disenrollment alone. These direct economic losses will harm the County's economy, its tax base and public fisc, and the financial health of its businesses and residents.<sup>26</sup>

The Proposed Rule's direct costs are not just economic. By taking food away from people who already do not have enough to eat and by making more people food insecure, the Proposed Rule also imposes major and long-term harms on our residents and communities, including our children. Access to nutrition is crucial to a child's physical and intellectual development.<sup>27</sup> Sufficient nutritious food of the type provided through SNAP is associated with improved reading and math skills in elementary school, especially for young girls, and increases the likelihood of high school graduation.<sup>28</sup> Moreover, a single year of parental SNAP eligibility is associated with fewer overnight hospitalizations and doctor's visits in children, and with significant health benefits in later childhood and adolescence.<sup>29</sup> When children do not have enough to eat, they can experience toxic stress and suffer brain development and physical and mental health problems in early childhood that extend into adulthood.<sup>30</sup> Similarly, adults who face food insecurity are at greater risk of developing chronic conditions such as diabetes and

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<sup>26</sup> See Jared Call & Tia Shimada, Cal. Food Pol'y Advocates, *Lost Dollars, Empty Plates: The Impact of CalFresh on State and Local Economies* (2016), archived at <https://perma.cc/2KSD-XTSY>.

<sup>27</sup> See Gillian Dutton, *The Effect of Welfare Reform on Immigrant Children*, 32 Clearinghouse Rev. 503 (1999), archived at <https://perma.cc/8VUR-HGAR>; Katherine M. Joyce, *Household Hardships, Public Programs, and Their Associations with the Health and Development of Very Young Children: Insights from Children's HealthWatch*, 3(1) Food Insecurity art. 4 (2012), at 12-14, archived at <https://perma.cc/L3RV-NAD7>; Steven Carlson et al., Ctr. on Budget & Pol'y Priorities, *SNAP Works for America's Children*, (Sept. 29, 2016), archived at <https://perma.cc/7TZ5-VC5P>.

<sup>28</sup> Steven Carlson et al., *supra* note 27.

<sup>29</sup> Chloe East, *The Effect of Food Stamps on Children's Health: Evidence from Immigrants' Changing Eligibility*, 3-4 (March 2016), archived at <https://perma.cc/WMQ5-UKP3>; see also Hilary Hoynes et al., *Long-Run Impacts of Childhood Access to the Safety Net*, 106(4) Am. Econ. Rev. 903, 905 (2016), archived at <https://perma.cc/MZ28-93VG> (concluding that access to SNAP benefits in utero and as young children leads to a large reduction in "metabolic syndrome," a combined measure of incidence of obesity, high blood pressure, heart disease, and diabetes, as well as an increase in reporting of good health).

<sup>30</sup> National Scientific Council on Developing Child, *Persistent Fear and Anxiety Can Affect Young Children's Learning and Development: Working Paper No. 9* (2010), archived at <https://perma.cc/VL98-6AFR>; Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 Pediatrics e232 (2013), archived at <https://perma.cc/WX6B-CG8Z>; Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 The Lancet Public Health e356 (2017), archived at <https://perma.cc/GB4S-WR98>; Natalie Slopen et al., *Cumulative Adversity in Childhood and Emergent Risk Factors for Long-Term Health*, 164 J. Pediatrics 631 (2014), archived at <https://perma.cc/6FF2-8LYH>.



hypertension, as well as mental health problems such as depression.<sup>31</sup> The Proposed Rule will impose these and the many other well-documented adverse health effects of food insecurity.<sup>32</sup>

By harming our residents' economic self-sufficiency and physical and mental health, the Proposed Rule will impose direct costs on the local governments that must provide public health, public justice, and safety net services. For example, the County operates a multi-billion dollar health and hospital system that serves as a provider of last resort, oversees most public health functions within its jurisdiction, and administers a range of safety-net programs that serve our most vulnerable residents. With sicker residents with more medical and behavioral complications, the County's costs of operating these services will balloon. At the very same time, some of the resources that the County depends upon and that are tied to community-wide SNAP eligibility levels will decrease. The Department considers none of these costs.

#### **D. The Department Fails to Consider the Proposed Rule's Effects on Bundled Public Benefit Programs**

The Department estimates that the Proposed Rule will cause 3.1 million people to lose SNAP benefits. However, it fails to consider how the Proposed Rule reduces individuals' and communities' access to the numerous critical and cost-effective benefit programs that rely on and leverage SNAP—including the National School Lunch Program, the School Breakfast Program, the At-Risk Afterschool Meals Program, the CalFresh Healthy Living Program, the Gus Schumacher Nutrition Incentive Programs, the Women, Infants and Children Program, and many more.<sup>33</sup> The Proposed Rule's disenrollment effects on programs like these that leverage or rely on SNAP magnify its already severe harms. Yet the Department never *mentions* these consequences of the Proposed Rule, even though the effects of SNAP eligibility changes on programs like school meals are regularly included in congressional and administrative analyses.<sup>34</sup>

School Meals: The Proposed Rule radically restricts children's access to school meals without ever mentioning it. The National School Lunch Program and the School Breakfast Program provide children with free and reduced-price school meals. The programs serve as a nutrition safety-net—a vital means of alleviating hunger amongst children. Under the federal

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<sup>31</sup> Hilary K. Seligman et al., *Food Insecurity Is Associated with Chronic Disease among Low-Income NHANES Participants*, 140(2) J. Nutrition 304, 308 (2010), archived at <https://perma.cc/34EL-YBQX>.

<sup>32</sup> See generally The Pew Charitable Trusts, *Health Impact Assessment of Proposed Changes to the Supplemental Nutrition Assistance Program* (2016), archived at <https://perma.cc/9JC2-37HZ> (detailing the negative health implications and increased risk of illness from losing access to SNAP).

<sup>33</sup> Many more benefits programs and funding streams (including critical funding sources such as the California Local Control Funding Formula) depend on SNAP eligibility—a fact that the Department similarly fails to acknowledge.

<sup>34</sup> See Cong. Res. Serv., *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility* 18 (2019), archived at <https://perma.cc/3Q5Y-FCJB> (explaining that “[w]hile CBO analyses of past farm bill [SNAP] proposals have often included estimates of children who would lose free meals eligibility, USDA’s RIA does not include such an estimate”); see also Cong. Budget Off., *Cost Estimate H.R. 2—Agriculture and Nutrition Act of 2018* at 13 (2018), archived at <https://perma.cc/VPE5-4BRB> (estimating how SNAP eligibility changes would affect children and school meals).

programs, school breakfasts provide children with food equivalent to 25% of their daily energy and nutrient needs, while school lunches provide children with food equivalent to 33% of those needs.<sup>35</sup> Congress designed the programs to “provide nutritious, well-balanced, and age-appropriate meals to all the children they serve to improve their diet and safeguard their health.”<sup>36</sup>

Under the federal Direct Certification for Assistance Program, children in SNAP households are directly certified to receive free school meals, without the need for an application. Direct certification is intended to improve access to free school meals through automatic enrollment. It also expands the number of children who are eligible for free school meals. For example, currently children in SNAP households in California with gross incomes between 185% and 200% of the federal poverty level—who would be ineligible for free or reduced-price school meals under the traditional school meal income eligibility guidelines—are certified for free meals because of their SNAP eligibility.<sup>37</sup> Similarly, children in SNAP households with gross incomes between 130% and 185% of the federal poverty level—who would be eligible for only reduced-price, but not for free, meals under the traditional school meal income eligibility guidelines—are directly certified for free meals because of their SNAP eligibility. The County Social Services Agency estimates that nearly 2,000 of our school-aged children will lose direct certification for free school meals due to the Proposed Rule’s more income restriction alone.

Individual children’s loss of direct certification for free school meals will decrease access to free school meals for entire schools and school districts due to the community-based school meal enrollment system. Under the Community Eligibility Provision for school meals, schools provide free breakfasts and lunches to *all* students if at least 40% of students are so-called identified students—meaning those students have been directly certified for free meals based on their participation in benefits programs such as SNAP.<sup>38</sup> But by restricting SNAP eligibility and thus restricting direct certification for free meals, the Proposed Rule also limits the number of schools that can provide all students with free meals. In the County, numerous schools and school districts with identified student percentages near the 40% Community Eligibility Provision threshold could become ineligible to provide free meals to all of their students due to the Proposed Rule.<sup>39</sup> This reduced school-wide eligibility would be especially harmful in places such as the County where enrollment in SNAP and free school meals lags far behind eligibility.

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<sup>35</sup> See Karen Weber Cullen & Tzu-An Chen, *The Contribution of the USDA School Breakfast and Lunch Program Meals to Student Daily Dietary Intake*, 5 Preventative Med. Reps. 82, 82 (2017), archived at <https://perma.cc/T4EY-YFAU>.

<sup>36</sup> 7 C.F.R. § 210.10(a)(1); see *id.* § 220.8(a).

<sup>37</sup> Child Nutrition Programs: Income Eligibility Guidelines, 84 Fed. Reg. 10295, 10296-97 (listing the 130% of federal poverty level income cutoff for free school meals and the 185% of federal poverty level income cutoff for reduced price school meals).

<sup>38</sup> See Cal. Dep’t Educ., *Community Eligibility Provision Facts*, archived at <https://perma.cc/3L8V-DP8E>.

<sup>39</sup> See Food Res. & Action Ctr., *Eligibility for Community Eligibility Provision Database*, archived at <https://perma.cc/GJZ8-FUNG> (listing schools and school districts in the County with an identified student percentage between 40% and 49%).

In 2017, only 60% of County residents eligible for SNAP were enrolled in it,<sup>40</sup> and only 74% of California children eligible for direct certification for free meals were actually directly certified.<sup>41</sup> The Proposed Rule will further limit the already too limited access to needed nutrition through free school meals in the County.

The Proposed Rule will also reduce the reimbursements received by schools and school districts under the Community Eligibility Provision. Currently, schools or school districts receive more funding for the free meals they serve under the Community Enrollment Provision when their identified student percentage increases from 40% up to the maximum of 62.5%. By causing the identified children percentage to dip within this range, the Proposed Rule reduces school funding—further straining already thinly-stretched school budgets.

At-Risk Afterschool Meals: The Proposed Rule also jeopardizes children's access to nutritious meals and snacks afterschool and during the summer. Through the At-Risk Afterschool Meals program, children in low-income areas receive free, well-balanced, and nutritious snacks and meals from their afterschool, summer, and athletic programs. Snacks are designed to supply 15% of a child's daily nutritional needs, offering each child a fruit or vegetable, a whole grain, and a protein.

At-Risk Afterschool Meals programs are only eligible to operate in areas where at least 50% of students are eligible for free or reduced price school lunches under the National School Lunch Program.<sup>42</sup> By eliminating free school meal eligibility for 2,000 children in the County due to its stricter income restrictions and untold more due to its new asset restrictions, the Proposed Rule jeopardizes the ability of At-Risk Afterschool Meals programs to feed low-income children community-wide. In the County, the Public Health Department estimates 5,200 children currently receive nutritious snacks through 104 YMCA At-Risk Afterschool Meals programs. These children receive and eat wholegrain crackers, fresh fruit, and a dairy protein at the programs—nutrition they might otherwise lack. The Proposed Rule threatens the very operation of these hunger prevention programs in our community given the program's area-wide eligibility standards.<sup>43</sup>

CalFresh Healthy Living Program: The Proposed Rule threatens community-wide access to other needed programs that depend on population-wide eligibility for SNAP or free school meals. For example, the CalFresh Healthy Living Program offers critical nutrition and activity education to children and elderly adults in low-income areas. It encourages children to increase

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<sup>40</sup> Cal. Dep't Soc. Servs., *CalFresh Data Dashboard: Program Reach Index (PRI) Santa Clara County*, archived at <https://perma.cc/D95Q-H9MW>.

<sup>41</sup> U.S. Dep't Ag., *Direct Certification in the National School Lunch Program: State Implementation Progress Report to Congress – School Year 2015-2016 & School Year 2016-2017* at 3 (2018), archived at <https://perma.cc/94AJ-JPLR>.

<sup>42</sup> U.S. Dep't Ag., *At-Risk Afterschool Meals: A Child and Adult Care Food Program Guide* 13 (2016), archived at <https://perma.cc/MB8J-AAGK>.

<sup>43</sup> See Cal. Dep't Educ., *Child and Adult Care Food Program: Funding*, archived at <https://perma.cc/4TUF-ML6J>.

their consumption of fruit and vegetables, to drink more water, and to boost their physical activity. Its interventions improve at-risk children's health and help prevent costly and common lifelong conditions such as diabetes, obesity, and high blood pressure.

The CalFresh Healthy Living Program can only be offered to children in aftercare programs and schools that qualify for the At-Risk Aftercare Meals program—meaning it can only be offered where 50% or more of students are eligible for free or reduced-price school meals. Similarly, its programming for seniors can only be offered at sites where 50% or more of the population is eligible for SNAP. The Proposed Rule, which decreases SNAP and free school meal eligibility, jeopardizes access to this program as well, harming the health and wellbeing of County residents. In the County, over 15,600 people receive CalFresh Healthy Living Program services: an estimated 10,400 children and seniors participate in the program in schools and community centers, and another 5,200 children receive the programming through YMCA afterschool programs. Many of these schools and sites stand to lose their very eligibility to offer the needed program.

Gus Schumacher Nutrition Incentive Programs: The Proposed Rule will also harm access to programs that leverage SNAP spending in order to stretch SNAP benefits further. For example, Gus Schumacher Nutrition Incentive Programs increase SNAP households' consumption of fruits and vegetables by incentivizing the use of SNAP dollars to purchase fruits and vegetables.<sup>44</sup> In the County, under the Double Up Food Bucks program, for example, SNAP households receive a coupon for up to \$10 that matches the amount of produce they purchased, which they can later use to pay for fresh produce.<sup>45</sup> Under the Market Match program, SNAP households receive similar coupons when they purchase fruits or vegetables at a farmers' market.<sup>46</sup> The programs increase SNAP households' consumption of fruits and vegetables—changes that researchers predict translate into decreased incidence of costly conditions such as type 2 diabetes.<sup>47</sup> They also expand the overall value of SNAP benefits to SNAP households and support local farmers' markets and retailers. In the County, dozens of retailers and farmers' markets participate in the Double Up Food Bucks and Market Match programs, and thousands of SNAP households use the programs to extend their SNAP benefits and increase their consumption of fruits and vegetables.

The Proposed Rule, which will reduce SNAP eligibility, will also eliminate these SNAP matching programs for disenrolled families—deepening the harm to poor families from loss of SNAP eligibility.

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<sup>44</sup> The programs, which are sometimes abbreviated as GusNIP, were formerly called Food Insecurity Nutrition Incentives (FINI).

<sup>45</sup> See SPUR, *Double Up Food Bucks California: How It Works*, archived at <https://perma.cc/5T5U-XCQN>.

<sup>46</sup> Ecology Center, *Impact Report Food Insecurity Nutrition Incentive (FINI) Grant & California's Market Match 1* (2018), archived at <https://perma.cc/2P2F-9L3T>.

<sup>47</sup> *Id.* at 4.

Women, Infants & Children Program: Due to the Proposed Rule, low-income people and communities will lose access to still other benefits that are premised on SNAP eligibility. For example, the Women, Infants and Children (WIC) program provides critical food and breastfeeding support to mothers and their young children who are at nutritional risk. Under WIC's adjunctive eligibility provision, the County Public Health Department alone provides over 4,000 women and children with these vital prenatal and postnatal supports benefits because of their enrollment in SNAP.<sup>48</sup> These women and children and the many others in the County and the country who are adjunctively eligible for WIC stand to lose these vital WIC supports due to the Proposed Rule.

The Proposed Rule deprives 3.1 million people of nutrition assistance they rely on—imposing huge costs on food security, working families, local governments, and our communities. These costs are exacerbated by the Proposed Rule's disenrollment effects on the many bundled public benefits programs that depend on individual and community-wide SNAP eligibility. Yet the Department is silent as to all these harms. As a result, the Proposed Rule is arbitrary, capricious, and an abuse of discretion.

### **III. The Proposed Rule Is Contrary to Law**

The Proposed Rule is contrary to the purpose, text, and statutory scheme for SNAP that Congress set forth in the Food and Nutrition Act of 2008, codified at 7 U.S.C. § 2011-2036. (“Act”).

#### **A. The Proposed Rule Contravenes Congress's Clear Intent**

The Proposed Rule contravenes Congress's clearly expressed intent in the Act. The intent of the Act is unambiguous: “to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households.”<sup>49</sup> Congress specifically created SNAP to “alleviate such hunger and malnutrition.”<sup>50</sup> Instead of alleviating hunger, however, the Proposed Rule creates food insecurity for low-income people, as the Department itself acknowledges.<sup>51</sup> It limits low-income people's access to needed nutrition.<sup>52</sup>

Indeed, Congress repeatedly rejected the changes to SNAP that are now being proposed by the Department in the Proposed Rule. In the Agriculture Act of 2014 and again in the Agriculture Improvement Act of 2018, proposals to limit SNAP eligibility similar to those in the

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<sup>48</sup> Cal. Dep't Pub. Health, *Women, Infants & Children Pol'y & Proc. Manual*, Certification: Eligibility Criteria—Adjunctive Eligibility Criteria (eWPPM #210-02, 2019), archived at <https://perma.cc/T9M8-MXVX>.

<sup>49</sup> 7 U.S.C. § 2011.

<sup>50</sup> *Id.*

<sup>51</sup> See Proposed Rule, 84 Fed. Reg. at 35575.

<sup>52</sup> See *supra* pt. II.

Proposed Rule were put forward and rejected by Congress.<sup>53</sup> The enacted legislation instead maintained the long-standing state flexibility on SNAP eligibility criteria that the Proposed Rule now aims to undo. The Department's contention that the Proposed Rule reflects Congress's intent for SNAP is belied by this history.<sup>54</sup>

The Department cannot use the rulemaking process to evade Congress's intent or usurp Congress's legislative power. Because the Proposed Rule would do just that, it is contrary to law and should be withdrawn.

#### **B. The Proposed Rule Conflicts with the Text and Structure of the Act**

The Proposed Rule conflicts with the Act's statutory scheme and undercuts SNAP's implementation over the past two decades. Like many federal programs, the Act sets up a federalism-inspired structure in which the federal government provides funding and broad but flexible guidance, and state and local governments are tasked with responsibility to administer and implement the program based on local needs and priorities. Thus, for example, the Act makes states responsible "for certifying applicant households" and makes states and counties responsible for administering the SNAP program on a local level.<sup>55</sup> Further, each state that participates in SNAP must submit to the Secretary of Agriculture "a plan of operation specifying the manner in which such program will be conducted within the State in every political subdivision," including procedures governing operations of the SNAP program "that the State agency determines best serve households in the State."<sup>56</sup>

The Act sets forth uniform general eligibility requirements for SNAP, but inherently allows for flexibility in implementation. This is evidenced by the Act's express provision allowing states to opt into categorical eligibility, by which households that are eligible for or receive benefits from the Temporary Assistance for Needy Families ("TANF") program—which Congress created to provide states with flexible block grants—are automatically eligible for SNAP.<sup>57</sup> The Act also gives local governments—like the County—the opportunity to develop SNAP-related "workfare" programs, through which members of households participating in SNAP may work for or on behalf of the local government in exchange for SNAP benefits.<sup>58</sup> Finally, the Act provides that "any child receiving benefits under this chapter shall be certified as eligible" for federal free school breakfast and lunch programs.<sup>59</sup>

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<sup>53</sup> See Cong. Res. Serv., *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility* 15 (2019), archived at <https://perma.cc/3Q5Y-FCJB> (discussing the rejection of legislative proposals to change categorical eligibility requirements).

<sup>54</sup> See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 45 ("agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation").

<sup>55</sup> 7 U.S.C. § 2020(a)(1).

<sup>56</sup> *Id.* § 2020(d), (e).

<sup>57</sup> *Id.* § 2014(a).

<sup>58</sup> *Id.* § 2029.

<sup>59</sup> *Id.* § 2020(u)(2).

For the past two decades, California and the County have relied upon the Act's statutory scheme to alleviate hunger and support nutrition for eligible low-income families, while at the same time supporting workfare programs. Thus, like 42 other states, California and the County have relied on categorical eligibility requirements to administer the SNAP program in California and to enter into agreements and programs for direct certification of students and school districts to receive free and reduced-price school meals. And, the County has invested substantial time and resources in its CalFresh Employment & Training program to help CalFresh recipients gain skills, tools, and training to obtain and maintain living wage jobs.<sup>60</sup>

The Proposed Rule—which will enact more restrictive eligibility requirements that Congress has repeatedly rejected and which removes a state's ability to rely on the categorical eligibility in place for decades to help expand access to basic and necessary nutrition—exceeds the Department's authority under the Act. The Proposed Rule contravenes the statutory scheme of the SNAP program and the goals of alleviating hunger and providing nutrition for the neediest members of our community.

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The Proposed Rule provides no tenable reasons for its income and asset requirements, both of which are contrary to law.

We urge the Department to withdraw the Proposed Rule in its entirety.

Very truly yours,

JAMES R. WILLIAMS  
County Counsel



LORRAINE VAN KIRK  
Deputy County Counsel



JAVIER SERRANO  
Deputy County Counsel

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<sup>60</sup> See Cnt'y Santa Clara Soc. Servs. Agency, *CalFresh Employment & Training*, archived at <https://perma.cc/5SLJ-RWW5>.