

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
APPELLANTS.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**APPELLEES' RESPONSE TO THE COURT'S SHOW-CAUSE
ORDER REGARDING THE BRIEFING FORMAT**

In response to the Court's August 8, 2020 show-cause order, the appellees submit this proposal regarding the briefing format. In short, the appellees propose that the appellants be allotted 16,000 words for their opening brief; that the appellees—comprising two sets of plaintiffs who filed separate actions in the district court and raised different arguments in some respects—be allotted a total of 16,000 words divided between two response briefs; and that the appellants be allotted 7500 words for their reply brief. These word limits are only a modest increase beyond

those that would be allowed in a standard “one appellant, one appellee” appeal. We explain below the reasons justifying the increase.

The appellants take no position on the appellees’ proposal and do not intend to file a separate response.

BACKGROUND

This appeal arises from two actions that were consolidated in the district court. The first action, No. 20-CV-119, was filed by a coalition comprising the District of Columbia, 19 States, and the City of New York (“State Plaintiffs”). The second action, No. 20-CV-127, was filed by Bread for the City—a non-profit organization that provides food and other services to District of Columbia residents experiencing poverty—and two individuals, Damon Smith and Geneva Tann, who are beneficiaries of the federal program at issue in this case (“Private Plaintiffs”). The defendants were the United States Department of Agriculture and related federal entities (collectively, “USDA”).

Both actions challenged a final rule, issued by USDA, that affects the availability of benefits under the federal Supplemental Nutrition Assistance Program (“SNAP”). *See* Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66,782 (Dec. 5, 2019) (“Final Rule”). The SNAP statute generally limits the amount of time that an able-bodied adult without dependents (“ABAWD”) can receive SNAP benefits, but it also

allows USDA to waive the time limit at the request of the state agencies that help administer SNAP. *Id.* at 66,782. Waivers are statutorily authorized if USDA determines that an “area” designated by a State either “(i) has an unemployment rate of over 10 percent; or (ii) does not have a sufficient number of jobs to provide employment for [ABAWDs]” residing in the “area.” 7 U.S.C. § 2015(o)(4)(A).

The Final Rule altered the criteria USDA will use in deciding whether to grant such waivers, making them more stringent in two respects relevant here. First, whereas USDA had previously considered a wide range of evidence in deciding whether an area lacked “a sufficient number of jobs” for ABAWDs residing there, the Final Rule states that USDA will only grant waivers for areas that have either (1) “a recent 12-month average unemployment rate over 10 percent;” or (2) a recent 24-month “average unemployment rate 20 percent or more above the national rate” *and* 6% or higher. 84 Fed. Reg. at 66,811. Second, whereas USDA had previously authorized waivers for State-designated “area[s]” comprising single counties or towns, or groups of substate jurisdictions, the Final Rule requires an “area” to be a Labor Market Area (“LMA”) recognized by the Department of Labor. *Id.* USDA’s proposal to change the waiver criteria spurred “more than 100,000 [rulemaking] comments,” which “came from a broad range of stakeholders, including Members of Congress, State agencies, State elected officials, local governments, advocacy

groups, religious organizations, food banks, legal services organizations, private citizens, and others.” *Id.* at 66,782.

After filing their respective complaints in the district court, the State and Private Plaintiffs both separately moved for preliminary injunctions of the Final Rule. The district court then consolidated the two cases. 1/23/20 Minute Order.¹ Because the State and Private Plaintiffs had different interests and, in some respects, different legal arguments, they asked for permission to continue filing separate briefs and to present separate oral arguments. ECF No. 10. USDA did not object, and the district court granted their request. *See* 1/23/20 Minute Order; ECF No. 52 (hearing transcript).

On March 13, 2020, the district court granted in part the plaintiffs’ requests for a preliminary injunction and issued an 84-page memorandum opinion explaining its decision. ECF Nos. 50 & 51. USDA filed a timely notice of appeal on May 12, 2020. ECF No. 61. Since then, the parties have moved forward with summary judgment briefing in the district court, with the State and Private Plaintiffs again filing separate briefs. *See* ECF Nos. 65 & 66.

DISCUSSION

The State and Private Plaintiffs respectfully request, for the reasons discussed below, that they be allowed to file two response briefs that together contain no more

¹ Citations to district court filings refer to No. 20-CV-119.

than 16,000 words. For the sake of fairness, USDA's opening brief should also be allowed to contain 16,000 words and its reply brief 7500 words.

I. The Appellees' Briefs.

This Court's Rules recognize that governmental entities generally are differently situated than other parties and have unique sovereign and governmental interests. For that reason, when participating as amici or intervenors, governmental entities are permitted to file their own briefs and need not join with other parties in a single brief, as other intervenors and amici must do to the extent practicable. *See* D.C. Cir. R. 28(d)(4), 29(b). The same considerations that underlie these exceptions apply with even greater force when, as here, the governmental entities are not merely intervenors or amici but full-fledged parties.

Although the State and Private Plaintiffs both seek to enjoin the Final Rule, they come to the case with different interests and arguments. Unlike the Private Plaintiffs, the State Plaintiffs administer SNAP and are responsible for preparing the waiver requests that are governed by the Final Rule. They therefore have a unique sovereignty interest here: an interest in retaining the full authority and flexibility that Congress gave them in this scheme of cooperative federalism. The harms that the Final Rule inflicts on them are also distinctively governmental and include significant administrative burdens and costs, such as staffing and training costs, notification costs, and costs from expanding employment and training programs.

For their part, the Private Plaintiffs embody the interests of those SNAP is ultimately intended to help: those threatened with hunger stemming from poverty. The harm they face is not administrative burden but an inability to obtain adequate food or, in the case of Bread for the City, an inability to provide food for D.C. residents who will be in need under the Final Rule, and a diversion of scarce resources away from other programs that assist people living in poverty. In light of these divergent perspectives, the State and Private Plaintiffs should be permitted to file two separate response briefs.

Mindful of the need to avoid repetitive briefing, however, the Plaintiffs do not propose two full-length briefs (which would total 26,000 words). Instead, the State Plaintiffs will file a lead brief of roughly 10,000 words. The Private Plaintiffs will file a brief of roughly 6000 words that incorporates by reference those portions of the State Plaintiffs' brief that apply equally to them. *See* Fed. R. App. P. 28(i) (“In a case involving more than one appellant or appellee, . . . any party may adopt by reference a part of another’s brief.”). The total number of words between the two briefs will not exceed 16,000. Below is a detailed estimate of the words that each set of Plaintiffs will need for the various portions of their briefs.

A. The State Plaintiffs’ Brief.

The State Plaintiffs anticipate their response brief will contain the following sections:

- *Statement of Issues* (200 words).
- *Statement of the Case* (2200 words). This section will explain the history of SNAP, the statutory scheme, and the challenged rulemaking. It will also summarize the relevant district court proceedings. The analogous portion of the State Plaintiffs' preliminary injunction motion (ECF No. 3) consisted of roughly 2300 words.
- *Summary of Argument* (500 words).
- *Argument* (7100 words). The argument section will contend that (1) the State Plaintiffs' challenges to two aspects of the Final Rule are likely to succeed on the merits; (2) the other preliminary injunction factors also weigh in the State Plaintiffs' favor; and (3) the nationwide scope of the district court's injunction was proper.
 - *Likelihood of Success* (4600 words). This section will argue that the district court correctly held that two aspects of the Final Rule are likely unlawful. First, the Final Rule's narrowing of the criteria USDA will consider in deciding whether an area has "a sufficient number of jobs" for ABAWDs both contravenes the SNAP statute and is arbitrary and capricious under the Administrative Procedure Act ("APA"). Second, the Final Rule's redefinition of "area" to encompass only LMAs likewise contravenes the SNAP statute and is arbitrary and capricious.

The analogous portions of the State Plaintiffs' preliminary injunction motion consisted of roughly 5700 words.

- *Remaining Injunction Factors* (1500 words). This section will argue that the district court correctly concluded that the State Plaintiffs would suffer irreparable injury without a preliminary injunction, and that the balance of harms and the public interest also support that relief. The analogous portions of the State Plaintiffs' preliminary injunction motion consisted of roughly 1900 words.
- *Nationwide Relief* (1000 words). This section will argue that the district court properly granted a nationwide injunction. Although the State Plaintiffs devoted fewer than 300 words to this topic in their preliminary injunction motion, the district court's analysis of the issue spans more than 15 pages.

B. The Private Plaintiffs' Brief.

The Private Plaintiffs anticipate that they will incorporate by reference substantially all of the State Plaintiffs' Statement of the Issues; Statement of the Case; Likelihood of Success arguments regarding arbitrary and capricious agency action; and Remaining Injunction Factors arguments other than those addressing irreparable harm. The Private Plaintiffs anticipate addressing the following matters, which they alone addressed in the district court, in the number of words described:

- *Statement of Issues* (75 words). The Private Plaintiffs will identify the issues arising from their unique arguments described below.
- *Statement of the Case* (425 words). The Private Plaintiffs will address their specific background as two individuals who receive, and an organization assisting individuals who receive, SNAP benefits.
- *Summary of Argument and Argument*
 - *Likelihood of Success* (4000 words). The Private Plaintiffs will argue that they are likely to succeed on the merits of their argument that USDA exceeded its statutory authority in issuing the Final Rule. The Private Plaintiffs will argue that the statute required USDA to determine waivers through case-by-case adjudications of specific facts concerning the particular “area” at issue in a waiver application, and that the agency unlawfully displaced that adjudication process with a prospective categorical rule (the polar opposite of adjudication). The district court did not reach this argument but said that postponing its consideration did not mean the argument was less likely to succeed than the arguments that the court did reach. ECF No. 51 at 28 n.11. In the district court, the Private Plaintiffs addressed this argument in 5770 words.

- *Irreparable Harm* (1500 words). The Private Plaintiffs will address irreparable harm unique to them. The individual Private Plaintiffs will address the harm to them from not having enough to eat. Bread for the City will address how the Final Rule will impair its programs and directly conflict with its organizational mission. The district court's discussion of these issues covered nine pages. In the district court, the Private Plaintiffs addressed these issues in 2403 words.

II. The Appellants' Briefs.

For the sake of fairness, USDA should in turn be allotted 16,000 words for its opening brief (to match the combined 16,000 words allotted to the Plaintiffs) and 7500 words for its reply brief.

Respectfully submitted,

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