

 New Civil Liberties Alliance

April 8, 2020

Sonny Perdue
Secretary of Agriculture
United States Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20550

Brandon Lipps, Deputy Under Secretary
Food, Nutrition and Consumer Services
Braddock Metro Center II
1320 Braddock Place
Alexandria, VA 22314

Pam Miller, Administrator
Food and Nutrition Service
Braddock Metro Center II
1320 Braddock Place
Alexandria, VA 22314

Re: *Easing Dangerous Regulatory Burdens for the Emergency Food Assistance Program*

Dear Secretary Perdue:

The New Civil Liberties Alliance (NCLA) submits the following letter urging the United States Department of Agriculture (USDA) and the Food and Nutrition Service (FNS) to ease certain regulatory burdens associated with your implementation of the Emergency Food Assistance Program (TEFAP) in light of serious health and safety concerns associated with the COVID-19 pandemic.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws

made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.¹ This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of regulatory power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. NCLA believes that agencies must ensure that they are not contradicting their congressional mandate when administering programs within their jurisdiction. Courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution. Sometimes this means that agencies should waive or alter their existing regulatory requirements.

II. THE EMERGENCY FOOD ASSISTANCE PROGRAM

USDA, through FNS, administers the Emergency Food Assistance Program, which is a federal food distribution program that supports food banks, food pantries, and other local feeding organizations serving needy Americans.² TEFAP relies on state and local action to actually distribute food resources to the community. FNS's role is limited to administering the program. Indeed, while USDA, of course, provides significant resources to participating distributors through the program, many also distribute resources provided by state and local authorities and individuals. TEFAP is therefore a much-needed supplement to local support networks.

¹ See generally Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

² Kara Clifford Billings, Congressional Research Service, *The Emergency Food Assistance Program (TEFAP): Background and Funding*, CRS Report 45408, at 1 (Jan. 8, 2020).

TEFAP was enacted under the Emergency Food Assistance Act.³ The statute requires USDA to enter into agreements with states for the distribution of food to “needy persons.”⁴ Each state decides who that includes but is required to seek “approval of the Secretary” to “determine those persons in the State that shall qualify as needy persons eligible for such commodities.”⁵ The state must formally submit an administration plan to the Secretary.⁶ The plan must “set forth the standards of eligibility for individual or household recipients of commodities, which shall require-- (A) individuals or households to be comprised of needy persons; and (B) individual or household members to be residing in the geographic location served by the distributing agency at the time of applying for assistance.”⁷ The Secretary of Agriculture is required to issue regulations “to implement” the statute.⁸

The *regulations* issued by USDA, codified at 7 C.F.R. § 251.1, however, take the plan requirements much further. USDA’s criteria that a state may use for determining eligibility are in fact more stringent than the statute. Under the regulations, “Each State agency must ... (1) Enable the State agency to ensure that only households which are in need of food assistance because of inadequate household income receive TEFAP commodities; (2) Include income-based standards and the methods by which households may demonstrate eligibility under such standards; and (3) Include a requirement that the household reside in the geographic location served by the State agency at the time of applying for assistance, but length of residency shall not be used as an eligibility criterion.”⁹ The regulations also require that the local distribution site collect “the name of the household member receiving commodities, the address of the household (to the extent practicable), the number of persons in the household, and the basis for determining that the household is eligible.”¹⁰ The regulations further provide that once an agreement is entered into, it “will be considered permanent with amendments initiated by State agencies, or submitted by them at the Department’s request, all of which will be subject to approval by the Department.”¹¹

III. THE COVID-19 PANDEMIC’S IMPACT ON FOOD DISTRIBUTION

As we are all aware, the country currently faces a crisis related to the worldwide outbreak of

³ 7 U.S.C. § 612c *note*; 7 U.S.C. § 7501 *et seq.*

⁴ 7 U.S.C. § 7505(c).

⁵ *Id.*

⁶ 7 U.S.C. § 7503.

⁷ *Id.* at (b)(4).

⁸ 7 U.S.C. § 7512.

⁹ 7 C.F.R. § 251.5(b)

¹⁰ 7 C.F.R. § 251.10(a)(3).

¹¹ 7 C.F.R. § 251.2(c)(1).

the novel coronavirus, which causes COVID-19. Recently, the President of the United States released government estimates that the pandemic could kill as many as 240,000 Americans, even with drastic social distancing measures in place.¹² No part of our nation has been spared from this virus. To slow the spread of infection, the Centers for Disease Control and Prevention (CDC) has recommended, at a minimum, that workers at even essential businesses maintain six feet of separation from others unless absolutely necessary.¹³

The economic fallout from this pandemic has already been devastating and continues to worsen every day. On April 2, 2020, the U.S. Department of Labor announced that a record 6.6 million American applied for unemployment benefits the preceding week, which was an increase from the previous week's record of 3.2 million Americans.¹⁴ These numbers were "10 times the previous weekly record set in 1982."¹⁵ As a result "[a]n unprecedented number of Americans have resorted to food banks for emergency supplies[.]"¹⁶ Despite this "unprecedented demand" "plummeting donations from retailers, and a fall in personnel due to the coronavirus crisis" have stretched food pantry resources to the breaking point.¹⁷ Now, more than ever, needy Americans must rely on TEFAP for resources.

IV. FNS's RESPONSE TO THIS CRISIS HAS BEEN INADEQUATE

Instead of focusing on critical assistance to the needy, FNS oddly has insisted on enforcing regulatory requirements that present a danger to the public. Worse, some of these requirements do not appear to be valid exercises of agency authority in the first place. Now is not the time to let bureaucracy and administrative intransigence cause harm to the needy.

Facing unprecedented need and the rapidly changing nature of the crisis, food banks across the country have struggled to follow existing agreements concerning income guidelines. Several states have requested amendments to their service agreements under TEFAP, but FNS has

¹² Philip Ewing, *Coronavirus Task Force Details 'Sobering' Data Behind Its Extended Guidelines*, NPR (Mar. 31, 2020), <https://www.npr.org/2020/03/31/823916343/coronavirus-task-force-set-to-detail-the-data-that-led-to-extension-of-guideline>.

¹³ *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, CDC (Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

¹⁴ News Release, *Unemployment Insurance Weekly Claims*, U.S. Department of Labor (Apr. 2, 2020) available at <https://www.dol.gov/ui/data.pdf>.

¹⁵ Irina Ivanova, *Number of Americans Filing for Unemployment Doubled to Record 6 Million Last Week*, CBS News, MoneyWatch (Apr. 2, 2020), <https://www.cbsnews.com/news/unemployment-jobless-claims-6-million-united-states-economy/>.

¹⁶ Nina Lakhani, *'A Perfect Storm': US Facing Hunger Crisis as Demand for Food Banks Soars*, The Guardian, (Apr. 2, 2020), <https://www.theguardian.com/environment/2020/apr/02/us-food-banks-coronavirus-demand-unemployment>.

¹⁷ *Id.*

reportedly delayed responding to these requests, all while need has been rising dramatically.¹⁸ As expressed by Pennsylvania Governor Tom Wolf in a letter to USDA, existing eligibility requirements implemented under the state's agreement no longer reflect current reality and need.¹⁹ Moreover, in asking for a complete waiver of income eligibility requirements, Governor Wolf wrote, "Those who are seeking assistance from our food banks are the newly unemployed and those critically in need of food, and it is unconscionable to delay their access because of the need to complete cumbersome paperwork requirements to prove that they are eligible for the food that they so desperately need."²⁰

Furthermore, local distribution sites have been unable to collect record-keeping information required under 7 C.F.R. § 251.10(a)(3) while also observing CDC guidelines concerning social distancing. This has caused a bottleneck for those needing assistance, which lengthens the time that staff and members of the public must interact.²¹ While staff members rarely have personal protective equipment, they now risk exposing themselves to the virus, and potentially spreading it, simply to gather the required information.

FNS's response to these problems has been unsatisfactory. In a document entitled, *The Emergency Food Assistance Program (TEFAP) Flexibilities for State Agencies*, FNS doubled down.²² With respect to existing income eligibility requirements, FNS said that it would continue to enforce existing agreements unless it approved new agreements pursuant to 7 C.F.R. § 251.6(b) and (c).²³ FNS further insisted that the record-keeping requirements in 7 C.F.R. § 251.10(a)(3) required "TEFAP eligible recipient agencies (ERAs), such as foodbanks and food pantries, [to] collect the address of each household *at the time of application*." (emphasis added).²⁴

V. FNS HAS THE ABILITY TO RELAX THESE REQUIREMENTS

FNS's response refuses to acknowledge the agency's discretion to not enforce existing agreements and, more seriously, reflects an unwarranted, unlawful and potentially dangerous, interpretation of legal record-keeping requirements.

¹⁸ Jenna Johnson, *Food Banks Sought Relaxed Federal Rules to Minimize Contact. The USDA Has Stalled Those Requests, Officials Say*, Washington Post (Apr. 1, 2020), https://www.washingtonpost.com/politics/food-banks-sought-relaxed-federal-rules-to-minimize-contact-the-usda-has-stalled-those-requests-officials-say/2020/03/31/0239a26e-733b-11ea-a9bd-9f8b593300d0_story.html.

¹⁹ Gov. Tom Wolf, Letter to USDA Sec. Sonny Perdue (Mar. 25, 2020).

²⁰ *Id.*

²¹ Johnson, *supra*, note 18.

²² FNS/Supplemental Nutrition and Safety Programs, *The Emergency Food Assistance Program (TEFAP) Flexibilities for State Agencies* (Mar. 30, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/TEFAP%20Flexibilities%20and%20DHD%20One-Pager.pdf>.

²³ *Id.*

²⁴ *Id.*

First, the Secretary has significant discretion not to enforce its counterproductive restrictions. Under the statute, the Secretary has an obligation to “provide the commodities made available” under the program “as expeditiously as possible.”²⁵ Further, rather than providing for an enforcement mechanism, the statute grants the Secretary wide discretion to “settle” or “adjust” or “waive” “any claim” under the program.²⁶ This provision suggests that the Secretary has, at least, wide enforcement discretion to suspend specific requirements in extant agreements during this crisis.

Furthermore, the agency may always rescind or modify its own regulations. Indeed, the Administrative Procedure Act allows an agency to suspend procedural rulemaking requirements “for good cause” when they would be “impracticable, unnecessary, or contrary to the public interest.”²⁷ USDA could therefore modify its own regulations to provide emergency relief to states under existing agreements.

Using this ability to modify is particularly called for when considering that the income requirements built into many extant agreements are not statutorily mandated. Congress did not define “needy persons” and the Secretary has elected to impose the income requirements through regulation. The Secretary therefore has the authority to rescind those requirements.

Next, FNS’s current insistence that “TEFAP eligible recipient agencies (ERAs), such as foodbanks and food pantries, must collect the address of each household *at the time of application*” is not based on *any* legal requirement. The Emergency Food Assistance Act contains no record-keeping requirement.²⁸ Instead, this requirement was purportedly adopted under the Secretary’s authority to “implement” the statute. But as a substantive requirement binding on the regulated parties, it appears to exceed the delegation of authority bestowed by Congress. In any event, the regulation itself provides simply that each distribution site “must collect and maintain on record” the relevant information.²⁹ It does not say that the information must be collected “at the time of application” as FNS now insists.

Simply put, USDA and FNS have the ability to respond to the crisis by allowing safer and speedier distribution of food to the needy. The agencies must not insist on counterproductive and dangerous formalities in this emergency. Indeed, NCLA respectfully submits that FNS’s

²⁵ 7 U.S.C. § 7505(a).

²⁶ 7 U.S.C. § 7516(a).

²⁷ 5 U.S.C. § 553(b)(3)B).

²⁸ See 7 U.S.C. § 7501, *et. seq.*

²⁹ 7 C.F.R. § 251.10(a)(3).

interpretations of the recordkeeping requirements are themselves unlawful and ERAs could bring meritorious court challenges to the agency's determinations. NCLA therefore urges USDA and FNS to alter their response to the pandemic immediately so as to ensure that the intended beneficiaries of TEFAP may quickly and safely access the food resources they desperately need.

Sincerely,



Caleb Kruckenberg

Litigation Counsel

Mark Chenoweth

General Counsel

New Civil Liberties Alliance