IN THE SUPREME COURT OF THE STATE OF DELAWARE

CINDY GONZALEZ Defendant Below – Appellant, vs. THE STATE OF DELAWARE, Plaintiff Below – Appellee.	No. 416, 2018 Court Below: Superior Court C.A. No. N18C-01-144 RRC

CORRECTED APPELLANT CINDY GONZALEZ'S REPLY BRIEF

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ARGUMENT

I. Introduction.

The State's contention that the Federal SNAP Act does not preempt the use of the DFCRA to penalize Ms. Gonzalez (Appellee Br. Part II) is wrong. The State, while advancing a number of supposed policy arguments to support its interest in pursuing a DFRCA claim after having used the SNAP Act's Intentional Program Violation provisions, fails to address the statutory and regulatory preemption identified by Ms. Gonzalez in her Brief to this Court. Instead, the State points to other sections of the SNAP Act, which, rather than support its claims, actually confirm that the State's actions are preempted by the SNAP Act and regulations.

II. The SNAP Act and Implementing Regulations Set Out Detailed, Comprehensive, and Exclusive Procedures for When a Program Participant is Believed to Have Obtained SNAP Wrongfully.

The SNAP Act and its implementing regulations define explicitly how participating states may investigate and remediate potential violations by program participants. The SNAP Act requires participating states to "proceed against" individuals alleged to have engaged in certain disqualifying activities described in the SNAP Act "**either** by way of administrative hearings, after notice and an opportunity for a hearing at the State level, **or** by referring such matters to

appropriate authorities for civil or criminal action in a court of law." 7 U.S.C. § 2015(b)(2) (emphasis added). The use of the disjunctive is not accidental here.

Congress has spoken clearly and with intent regarding the requirement that states must choose between pursuing penalties against alleged Intentional Program Violation-committing SNAP participants through either administrative **or** judicial avenues, but not both. The Food Stamp Act of 1977 previously provided that State agencies taking action against individuals alleged to have committed fraud could proceed either by way of administrative hearings or by referring such matters to appropriate legal authorities, **or both** (Section 6(b)). *See* Pub. L. No. 95-113, Sec. 1301, § 6(b), 91 Stat. 913, 964-65. However, that language was amended by the Omnibus Budget Reconciliation Act of 1981 (Section 112 of Pub. L. 97-35) to limit states' actions by requiring that they choose to proceed by way of **either** an administrative hearing **or** by referral to appropriate state legal authorities. Thus, in 1981, Congress determined that States would no longer be permitted to use all means of pursuing alleged wrongdoing by recipients but instead, had to pick one of two mutually exclusive paths.

Here, the statute's express, unambiguous, terms should be enough to settle the question on appeal since, "absent a clearly expressed legislative intention to the contrary, [a statute's] language must ordinarily be regarded as conclusive." *Evans v. State*, 516 A.2d 477, 478 (Del. 1986) (citing *Giuricich v. Emtrol Corp.*, 449

A.2d 232, 238 (Del. 1982)). Additionally, the clear contrast between the SNAP Act provisions prescribing penalties for program violations by recipients and provisions prescribing disqualification penalties of retail food stores and wholesale food concerns provides further evidence of Congress's preemptive intent. 7 U.S.C. § 2021. Section 2021, which applies to retail stores, provides for a detailed recovery and disqualification mechanism against merchants and also provides "[i]n addition to a disqualification under this section, the Secretary may assess a civil penalty in an amount not to exceed $100,000 for each violation." *Id.* at 2021(c)(1). Thus, whereas Congress mandated that States choose one remedy against SNAP recipients by speaking in the disjunctive, it explicitly provided for additional remedies against retail stores.

Implementing regulations further support the straightforward reading of the purely disjunctive nature of the relevant Food Stamp Act provision. *See* 7 C.F.R. § 273.16(a)(1) (requiring SNAP administering agency to "investigat[e] any case of alleged [Intentional Program Violation], and ensur[e] that appropriate cases are acted upon **either** through administrative disqualification hearings **or** referral to a court of appropriate jurisdiction in accordance with the procedures outlined in this section.") (emphasis added). The regulations provide that state SNAP agencies should conduct administrative disqualification hearings where "the State agency

believes the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system." 7 C.F.R. § 273.16(a)(2)

In promulgating this implementing rule, the United States Department of Agriculture explained:

> We continue to believe that Congress intended to prevent the State agency from pursuing the same case of alleged Program abuse by way of both an administrative hearing and referral for prosecution when the language of the statute was changed.

48 Fed. Reg. 6836, 6840 (Feb. 15, 1983).

In other words, the SNAP statute and implementing regulations reflect the clear purpose of providing a state with a choice of the path to travel in addressing an alleged Intentional Program Violation. The State can use its civil and/or criminal machinery to pursuer alleged wrongdoing by SNAP applicants and recipients. Alternatively, the State may use the Administrative Disqualification Hearing process, which includes both lengthy suspension from the program as well as a mechanism to recover improperly obtained SNAP benefits. What the State cannot do is take both paths. It must choose one option. The State may prefer a different set of choices, but that is not what Congress determined in structuring the SNAP Act.

The State's arguments to the contrary do not permit the State to both pursue an Administrative Disqualification Hearing and then subsequently use the DFCRA remedy. First, the State's citation to the provisions of the Medicaid Act (Appellee

Br. 7-8) highlight the weakness of this argument. The Medicaid Act specifically anticipates that a State may pursue an overpayment through the use of a state enacted False Claims Act statute and provides for a formula for recovery. 42 U.S.C. § 1396h. The Food Stamp Act authorizes no such action. This material difference between the two statutes clearly demonstrates that Congress could have built such a provision into the SNAP Act, but chose not to.

Second, the State makes the claim that the use of DFCRA in this matter prevents Ms. Gonzalez from defrauding the state and deters others. Appellee Br. 15-16. However, this argument overlooks the simple fact that the SNAP Act already defines and builds in deterrence as Congress intended. Under the SNAP Act, a person found to have committed an Intentional Program Violation faces an escalating series of disqualifications as defined by the Secretary of the United States Department of Agriculture ("Secretary") in implementing regulations.

Those penalties are explained in language clearly setting forth that the State must chose its path when it believes a recipient has committed an Intentional Program Violation:

> (b) Disqualification penalties.
>
> > (1) Individuals found to have committed an Intentional Program Violation either through an administrative disqualification hearing **or** by a Federal, State or local court, **or** who have signed either a waiver of right to an administrative disqualification hearing or a disqualification consent agreement

> in cases referred for prosecution, shall be ineligible to participate in the Program:
>
> (i) For a period of twelve months for the first intentional Program violation, except as provided under paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section;
>
> (ii) For a period of twenty-four months upon the second occasion of any intentional Program violation, except as provided in paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section; and
>
> (iii) Permanently for the third occasion of any intentional Program violation.

7 C.F.R. § 273.16(b)(1)(emphasis added). Thus, the United States Department of Agriculture, which the State acknowledges funds the SNAP program (Appellee Br. 16), has determined the appropriate levels of sanction necessary to deter intentional misconduct.

Rather than provide for a "consequence free" enforcement regime suggested by the State (Appellee Br. at 16-17), this structure establishes clear mechanisms to root out and deter misconduct by program participants. While the State may think the SNAP Act's penalties are not sufficient (Appellee Br. 16-17), its remedy is to petition Congress to amend the statute, or to ask the Secretary to amend the regulations, and not to ask this Court to rewrite the statute's long-established enforcement regime to add new penalties not authorized by federal statute or implementing regulation. The extent to which the State overreaches to support its argument is demonstrated by its bank robbery analogy. Appellee Br. 17. The State

suggests that the only remedy imposed by an Administrative Disqualification Hearing is that a recipient found to have committed an Intentional Program Violation must return the SNAP benefits wrongfully obtained. *Id.* However, that argument blithely ignores the escalating periods of disqualification, including the minimum of a one-year disqualification period. More concretely, the State's argument fails to acknowledge that Ms. Gonzalez has indeed received this penalty—having been disqualified from SNAP for 12 months.

The State's argument that it needs to act under DFRCA to deter unlawful conduct also ignores that Delaware had a choice. It could opt (as it did) for the relatively inexpensive and efficient path of an Administrative Disqualification Hearing with a lower standard of proof and more relaxed evidentiary rules. Or, the State could have opted but chose not to pursue the more burdensome and expensive process of a criminal and/or civil prosecution.[1] The criminal prosecution option is, of course, subject to a higher standard of proof and stricter

[1] The State contends that Ms. Gonzalez committed 32 criminal offenses. Appellee Br. 17. This is, of course, not true. There was no criminal prosecution and no verdict by a jury. The administrative hearing officer did not apply a beyond a reasonable doubt standard, but instead the less stringent clear and convincing standard. *See* Appendix A20-A32. Indeed, the State's claim that each month that Ms. Gonzalez received SNAP benefits constitutes a separate offense has no basis in law. While the State could have initiated a criminal prosecution and sought to persuade a jury that there were "at least 32 separate criminal offenses" (Appellee Br. 17), it chose not to do so. It is purely inflammatory speculation to baldly assert that the facts found at an Administrative Disqualification Hearing would have necessarily led to criminal convictions.

evidentiary rules. Here, the State opted for an Administrative Disqualification Hearing and secured not only restitution, but also a one-year disqualification—exactly the penalties prescribed by the SNAP Act.

Third, contrary to the State's argument (Appellee Br. Pt. II), the SNAP Act does preempt the use of DFRCA in this context. The State is the recipient of funds under the Federal SNAP Program. As such, it must comply with the rules and requirements of that Program. As the Supreme Court has stated in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981): "Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."

States choosing to participate in SNAP "do so under an agreement to operate the Program within their state in accordance with applicable federal laws and regulations and in accordance with their own state's Food Stamp Plan." *Robertson v. Jackson*, 766 F. Supp. 470, 471 (E.D. Va. 1991). The State's duty to comply with federal SNAP mandates is unequivocal. The State "is free not to participate in the scheme of cooperative federalism established under the [SNAP] . . . Act[], but if it decides to join, it must comply with federal requirements" of the Act as a condition of the continued receipt of federal funding. *Reynolds v. Giuliani*, 506 F.3d 183, 201–02 (2d Cir. 2007) (internal quotation marks omitted).

Delaware also confirms and acknowledges the primacy and preemptive effect of the SNAP Act on the operation of the program in Delaware, requiring the Delaware Department of Health and Social Services ("DHSS") to "bear the responsibility of administering the food stamp program for the State in compliance with the provisions of the Federal [SNAP Act]." 31 Del. C. § 601(a).

In promulgating regulations, DHSS adopted the language of the federal SNAP Act and implementing regulations. For example, the Department's regulations concerning what the agency must do when fraud is suspected provide that the Delaware Department of Social Services ("DSS"), an agency within DHSS:

> is responsible for investigating any case of alleged intentional Program violation, and ensuring that appropriate cases are acted upon through administrative disqualification hearings **or** referral to a court of appropriate jurisdiction.
>
> Administrative disqualification procedures **or** referral for prosecution actions should be initiated by DSS in cases where DSS has sufficient documentary evidence to substantiate that an individual has intentionally made one or more acts of intentional Program violation.

16 Del. Admin Code § 2023.1 (emphasis added). The implementing regulation, clearly acknowledging the Department's full understanding of the preemptive effect of the SNAP Act and its implementing regulations, explains further that:

> DSS should conduct administrative disqualification hearings in cases in which [DSS] believes the facts of the individual case do not warrant civil or criminal prosecution through the

> appropriate court system, in cases previously referred for prosecution that were declined by the appropriate legal authority, and in previously referred cases where no action was taken within a reasonable period of time and the referral was formally withdrawn by DSS. Do not initiate an administrative disqualification hearing against an accused individual whose case is currently being referred for prosecution or subsequent to any action taken against the accused individual by the prosecutor or court of appropriate jurisdiction, if the factual issues of the case arise out of the same, or related, circumstances.

Id.

Fourth, the State attempts to obfuscate the preclusive effect of this language by suggesting that even though DSS is directed by the SNAP Act to pursue only certain remedies, other state agencies are not similarly precluded. Appellee Br. 20. This argument overlooks the fact that the State of Delaware and not DSS is the recipient of funds under the SNAP Act, and, as such the provisions of the SNAP Act control throughout the State.

Two additional provisions of the SNAP Act further undercut the State's specious argument. 7 U.S.C. § 2015(b)(1) makes clear that the disqualification provisions apply to "any person who has been found by **any** State or Federal court or administrative agency" to have engaged in an Intentional Program Violation. (Emphasis added.) Thus the SNAP Act does not limit the application of Intentional Program Violation disqualifications simply to the state agency—DSS in this case—but rather the State itself.

Moreover, 7 U.S.C. § 2022(a)(1) vests the Secretary with the authority to determine and collect overpayments and provides that, "such powers with respect to claims against recipients may be delegated by the Secretary to State agencies." Pursuant to this statutory authorization, the Secretary promulgated regulations providing that:

> Claims delegation. FNS delegates to the State agency, subject to the standards in § 273.18, the authority to determine the amount of, and settle, adjust, compromise or deny all or part of any claim which results from fraudulent or nonfraudulent overissuances to participating households.

7 C.F.R. § 271.4(b). *See also Bliek v Palmer,* 102 F.3d 1472, 1474 (8th Cir. 1997).

Thus, contrary to the State's contentions, the SNAP Act proscribes the manner in which intentional overpayments are recovered—by the state agency—and by which penalties are imposed—either through Administrative Disqualification Hearings conducted by the State agency or by referrals by that same state agency for criminal or civil prosecution. The DFRCA procedure initiated here falls totally outside the mandated process and is therefore beyond the authority granted to the State by the Secretary of USDA under the SNAP Act.

Fifth, the State's description of the disqualification requirements in the SNAP regulations (Appellee Br. 22) is simply wrong and misleading. Contrary to the State's claim, the regulations do not simply authorize a state agency to create a system of administrative disqualification hearings. Rather the regulations mandate

that the state agency do so. Indeed, the regulation explicitly provides that, "the State agency **shall** be responsible for investigating any case of alleged Intentional Program Violation, and ensuring that appropriate cases are acted upon either through administrative disqualification hearings or referral to a court of appropriate jurisdiction." 7 C.F.R. § 273.18(a) (emphasis added). Thus, contrary to the State's argument (Appellee Br., 22), the language of 7 C.F.R. § 273.18(a) can hardly be described as "mostly permissive." Rather, the regulation specifically and explicitly uses "shall" and not words such as "may" or "should."

Moreover, the State opportunistically rummages through the regulation[2] to find the single instance that uses words of encouragement—§ 273.16(g)(1)(ii) — and then relies upon this language completely out of its context. Appellee Br. 22-23. This misleading citation simply proves Ms. Gonzalez's point. The State fails to acknowledge that the state agency is permitted to rely on 273.16(g)(1)(ii) only if the Secretary has previously exempted the State from the provisions of § 273.16(a).[3] The State makes no such factual assertion here and, therefore, §

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[2] Notwithstanding the State's creative use of language (Appellee Br., 22), 7 C.F.R. § 273.18 is a regulation and not guidance.

[3] 7 C.F.R. § 273.16(a)(2) provides:

> The State agency shall be responsible for investigating any case of alleged intentional Program violation, and ensuring that appropriate cases are acted upon either

273.16(g)(1)(ii) is entirely irrelevant. Rather, the State's actions to address Intentional Program Violations are governed by the mandatory language of the statutes and regulations previously discussed.

Finally, the State's citations to cases in which SNAP providers were sued by the United States under the Federal False Claims Act (Appellee Br. 26-27) are simply irrelevant. First, those case all address program violations by providers (merchants) and not by recipients. As explained *supra*, 2-3, Congress chose to provide very different and entirely separate statutory provisions for the collection of overpayments to and punishment of providers and explicitly authorized false claim act suits against merchants. *See* 7 U.S.C. §§ 2018, 2021, 2023. Second, in the cases of the merchants, the false claims are being presented by the merchants directly to the federal government.

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through administrative disqualification hearings or referral to a court of appropriate jurisdiction.

CONCLUSION

Appellant Cindy Gonzalez respectfully asks this Court to reverse the Superior Court's grant of the State's Motion for Judgment on the Pleadings, vacate its judgment, and order dismissal of the State's Complaint based on federal preemption of the State's claims.

Respectfully submitted,

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