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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

BRIEF OF AMICUS CURIAE DAVID A. SUPER IN SUPPORT OF APPELLANT URGING REVERSAL OF THE SUPERIOR COURT JUDGMENT GRANTING THE STATE OF DELAWARE'S MOTION FOR JUDGMENT ON THE PLEADINGS

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STATEMENT OF INTEREST OF AMICUS

Amicus is David A. Super, Professor of Law at Georgetown University. Amicus has specialized in the law of the Supplemental Nutrition Assistance Program (SNAP) and its predecessor, the Food Stamp Program, for his entire professional career. Initially upon graduating from law school, he practiced public welfare law with Community Legal Services of Philadelphia, Pennsylvania, arguing three food stamp cases before the U.S. Court of Appeals for the Third Circuit. He subsequently served as Legal Director for the Food Research and Action Center, where he authored the completely revised Eighth Edition of *FRAC's Guide to the Food Stamp Program*. He also served for eleven years as General Counsel at the Center on Budget and Policy Priorities, where again he specialized in food stamps.

In addition to litigating food stamp issues, he also has worked as a registered lobbyist on food stamp issues, has worked extensively with federal, state, and local food stamp and SNAP administrators, authored numerous papers on food stamp and SNAP issues, trained food stamp and SNAP advocates in over forty states, published over a dozen scholarly or practitioner-oriented articles on food stamp law, served as an expert witness in SNAP cases in several states, and frequently been quoted in the popular media on food stamp and SNAP issues. He is the author of one of the leading casebooks on public benefit law, published by

Foundation Press. Within the area of SNAP law, he has specialized in issues relating to program integrity, including fraud, overissuances, and quality control.

David A. Super submits this amicus brief because of his longstanding involvement in the SNAP/Food Stamp program and his role in preserving its integrity and federal character. The Superior Court decision in this matter threatens to undermine the federal nature of the SNAP program and cause significant harm to vulnerable low-income recipients.

Authority to file this brief has been granted through the *Order Granting David A. Super Leave to File Brief as Amicus Curiae*, entered by the Court on September 28, 2018.

SUMMARY OF ARGUMENT

Benefits under SNAP are funded entirely by the federal government. As such, Delaware suffers no injury when an ineligible person such as Ms. Gonzalez participates. Congress and the U.S. Department of Agriculture (USDA) have extensively regulated SNAP, with detailed provisions covering both the punishment of fraud and the collection of overissuances from recipients. These regulations do not authorize the invocation of Delaware's False Claims Act and, indeed, reflect deliberate policy choices inconsistent with the application of that statute.

ARGUMENT

I. Applying the Delaware False Claims Act to SNAP Benefits is Inconsistent with the Wholly Federal Character of Those Benefits.

SNAP and its predecessor, the Food Stamp Program, have always been notable for their distinctly federal character. Unlike the former Aid to Families with Dependent Children (AFDC), Aid to the Aged (AA), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD) programs, and the current Temporary Assistance for Needy Families (TANF), Medicaid, and Children's Health Insurance Program (CHIP), food stamps and SNAP have never required states to contribute to program benefit costs. *See* H.R. Rep. No. 464, 95th Cong., 1st Sess., at 292-301 (June 24, 1977) (surveying history of the program's administration); *Commonwealth of Massachusetts, Dep't of Public Welfare v. Sec'y of Agriculture*, 984 F.2d 514, 518 (1st Cir. 1990) (discussing divergent interests of federal and state governments in program administration).

This anomaly results in part from food stamps' history as a replacement for a program that distributed federal commodities to low-income people. *Id.* The lack of a state contribution to benefit costs also reflects the judgment of many successive Administrations and Congresses that a state role in funding benefits would undermine the program's goal of providing a minimally adequate nutritional safety net for low-income people. Benefits in AFDC, AA, AB, and APTD all lost substantial purchasing power over time as states froze or reduced their contributions or

failed to adjust those contributions to offset the effects of inflation. SNAP benefit levels, by contrast, are adjusted for inflation at the federal government's expense.

Congress has taken the federal character of food stamp and SNAP benefits very seriously over the years in numerous ways. The eligibility and benefit computation rules in the Food and Nutrition Act of 2008, the Food Stamp Act of 1977, and the Food Stamp Act of 1964 have all contained an uncommon level of specificity for major public benefit programs. This reflects judgments by successive Congresses and Administrations of both parties that, because none of states' own funds were included in SNAP benefits, many states likely would be excessively generous in distributing benefits if given broad discretion. Successive administrations also have written exceptionally detailed, prescriptive regulations further specifying both substantive eligibility and benefit computation rules and the procedures by which eligibility and benefit levels are to be determined. The 2018 edition of the Code of Federal Regulations contains 446 pages devoted to SNAP. 7 C.F.R. Parts 271-285.

The Food and Nutrition Act and its predecessors have among the most comprehensive prohibitions on state and local governments counting SNAP benefits as income in determining eligibility for other public programs or tax liability. 7 U.S.C. § 2017(b); *see, e.g.*, *Dupler v. City of Portland*, 421 F. Supp. 1314 (D. Maine 1976). Members of Congress of both parties have seen this as a

fundamental issue of federalism because SNAP benefits are entirely federally funded and the power to tax those benefits is the power to damage or destroy SNAP. *Cf.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In 1985, Senate Agriculture Committee Chairman Jesse Helms led a successful effort to amend the Act to prohibit states from charging sales tax on food purchased with food stamp benefits. 7 U.S.C. § 2012(b). Although Senator Helms was generally a severe critic of food stamps and a determined advocate of cutting the program's eligibility and benefit levels, he saw any state taxation of food stamp purchases as incompatible with the federal system. The Eleventh Circuit brushed aside Alabama's Tenth Amendment challenge to this prohibition because the benefits were entirely federal. *State of Alabama v. Lyng*, 811 F.2d 567 (11th Cir. 1987).

"Benefits issued pursuant to this Act shall be deemed to be obligations of the United States" for purposes of federal criminal statutes. 7 U.S.C. § 2024(d). SNAP also has a robust, vigorous system of federal audits that far surpasses those of other programs whose benefits include some state funds. 7 U.S.C. § 2026(c); 7 C.F.R. §§ 275.10-275.14. In all these ways, Congress has clearly and definitively exercised dominion over SNAP benefit funds consistent with its role in providing all those funds.

When the Delaware Department of Health and Social Services (hereinafter "the Department") becomes involved in collecting overissuances from households, it is doing so not on its own behalf but rather under a delegation of responsibility from the real party in interest: the federal government. 7 C.F.R. §§ 271.3, 271.4(b), 272.1(g)(1)(v). This delegation is strictly constrained by detailed federal regulations on the computation of claims against households. 7 C.F.R. § 273.18. These regulations give states some discretion in how to *collect* claims against households but none over the computation of those claims. *Id.* States must submit all funds collected from recipients' claims to the federal government; if any part of those funds is due to the state for its collection efforts, USDA sends that amount back to the state. 7 C.F.R. § 273.18(l). Because all funds in question are federal, federal regulations impose detailed accounting requirements on states. 7 C.F.R. § 273.18(m).

Allowing the State of Delaware to collect a judgment under the False Claims Act based on the issuance of benefits funded entirely by the federal government would be "an indirect subsidy to the state" from federal funds which Congress has not authorized. *State of Alabama*, 811 F.2d at 570. The Food and Nutrition Act allows the Department to retain 35% of any actually overissued benefits that are recovered from Ms. Gonzalez. 7 U.S.C. § 2026(a). The State is not free to overrule Congress to increase its take by invoking the False Claims Act.

II. Applying Delaware's False Claims Act to SNAP Benefits Would Reverse a Deliberate Policy Choice of Congress.

Although section 13(b) of the Food and Nutrition Act and its predecessors long have provided for recovering improperly issued benefits, this authority has been limited to "any overissuance of benefits issued to a household." 7 U.S.C. § 2022(b)(1). Accordingly, USDA's regulations require states to calculate claims against households by "subtract[ing] the correct amount of benefits from the benefits actually received. The answer is the amount of the overpayment." 7 C.F.R. § 273.18(c)(1)(ii)(C). Nothing in the statute authorizes recovery of more than the amount of the overissuance.

In only one instance has Congress ever provided for collecting more from an overissued household than the difference between what the household received and what the household would have received had its eligibility and benefit level been determined correctly. This was when section 805 of the Stewart B. McKinney Homeless Assistance Act of 1987, Pub. L. No. 100-77, 101 STAT. 482, 534-35, amended section 5(e)(2) of the Act to provide that calculations of the correct amount of benefits for a household that did not timely report earned income should not include the program's earned income deduction. 7 U.S.C. § 2014(e)(2)(C). Amicus David Super was closely involved in the discussions among congressional staff and members leading up to the enactment of section 805. Although they believed that this provision was an appropriate step to underline the importance of

timely income reporting, all agreed that it should not be taken as a precedent for further moves toward overcollection of overissued benefits. The concern was that excessive collections would undermine the program's primary mission, which is to prevent hunger and related health problems. Even where an adult has violated program rules, an excessive response is likely to cause hardship for children in the household. In a similar spirit, Congress has never enacted—indeed, has never seriously considered—any provision for disqualifying an entire household in cases of intentional program violations.

In the more than three decades since the agreement to enact section 805 as a limited exception to the principle of dollar-for-dollar overissuance recoveries, that agreement has been honored scrupulously. Even in legislation proposed to sharply reduce the program's eligibility and benefits, no serious proposal has been made to allow collection of more than the amount of overissued benefits from households. Thus, for example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-194, 110 STAT. 2105, contained provisions estimated to reduce food stamp spending by $27.7 billion dollars over six years. DAVID A. SUPER, ET AL., THE NEW WELFARE LAW (Ctr. on Budget & Pol'y Priorities, Sept. 1996). It made the collection of claims against households more efficient, but it did nothing to violate the principle of dollar-for-dollar recovery.

Applying Delaware's False Claims Act to SNAP overissuances would violate that principle. A purpose of the False Claims Act is to over-collect claims owed the State to deter the submission of false claims for the State's funds. To the extent that Ms. Gonzalez failed to report her earned income timely, the state agency should, and presumably did, apply section 5(e)(2)(C) to her. Further inflating the amount of the claim collected from Ms. Gonzalez under the False Claims Act would disturb the delicate balance Congress has established between deterring wrong-doing and preventing hunger. If the State believes that Congress has erred, it should direct its arguments to Congress, not to the courts.

In fact, the program's practices for recovering actual overissuances have evolved considerably over the years. Initially, the program relied heavily on reductions to the on-going allotments over overissued households. Because many such households no longer qualify for benefits, this caused USDA to accumulate large unpaid balances of claims that its auditors criticized. Thereafter, USDA developed methods of using the Treasury Offset Program (TOP), which intercepts income tax refunds and other federal payments due to adult members of overissued households. 7 C.F.R. §273.18(n). The simultaneous growth of the earned income tax credit has meant that many overissued individuals are scheduled to receive substantial refunds each year; TOP's interception of those refunds and attachment of federal benefits, as is happening in Ms. Gonzalez's case, has proven a highly

effective collection method and has sharply improved USDA's performance in collecting what is owed to it. In 2016, the most recent year for which published data is available, USDA collected $166 million through TOP. FOOD AND NUTRITION SERVICE, USDA, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM STATE ACTIVITY REPORT FISCAL YEAR 2016 at 31 (2017). Overall collections increased much faster than inflation as the program's efficiency in making collections increased. *Id.* With this steady progress through congressionally authorized collection methods, invoking Delaware's False Claims Act serves no constructive purpose.

III. Delaware Neither Suffered a Loss from Ms. Gonzalez's Overissuance Nor is It Entitled to Retain Any False Claims Act Penalties.

As noted above, the federal government pays SNAP benefits directly. Although the Department is responsible for certifying eligible Delaware residents to receive SNAP, determining the amount of their benefits under federal rules, and establishing an electronic account for the provision of benefits, no SNAP benefit dollars ever flow through Delaware's Treasury. Instead, when a recipient household makes a purchase at an authorized retailer, equipment at that retailer's place of business transmits a report of that transaction to a contractor operating SNAP's electronic benefit transfer (EBT) system in Delaware. That report causes

a financial institution under contract with SNAP to reimburse the retailer. The financial institution, in turn, is reimbursed through the federal reserve system.

This mechanism can be important at the time of various crises. When a natural disaster causes severe damage to a state's finances, as Hurricane Katrina did to Louisiana, SNAP benefits continue to flow uninterrupted because they do not depend on any fiscal role of the state. On the other hand, when the federal government faces a partial shutdown due to an impasse over appropriations bills, USDA has ordered states to establish mechanism for suspending the issuance of benefits to households and for freezing households' EBT accounts upon the exhaustion of federal SNAP benefit funds; no provision was made for states to continue the program with their own funds because state funds play no role in the issuance of SNAP benefits. During the most recent federal government shutdown, federal officials informally told some state officials that they could not continue SNAP because federal law does not authorize states to use the SNAP benefit issuance and redemption systems to distribute their own resources.

Thus, no Delaware funds are, or may ever be, involved in SNAP benefits.[1] This is in marked contrast with many other benefit programs that the Department administers, such as TANF and Medicaid, under which Delaware makes initial

[1] Section 7(i) of the Food and Nutrition Act (7 U.S.C. § 2016(i)) does allow states to spend their own resources to provide SNAP-like benefits to certain immigrants and childless adults that are ineligible for SNAP. A few states used this authority initially after its enactment in the 1990s but most soon dropped it. Delaware has never used this authority.

expenditures from its own funds and then receives reimbursement for some or all of its costs from federal funds. Although at the end of the day, the financial burden of those benefits may be shared with, or shifted to, the federal government, at the time of issue those benefits are state expenditures. In SNAP, by contrast, the Department is performing administrative functions but leaves the provision of benefit funds to the federal government. The State of Delaware therefore suffers no damage when a household receives an overissuance of SNAP benefits, whether fraudulent or otherwise, and has no damages to justify an action under the False Claims Act.

The State of Delaware also would not be allowed to benefit from an award under the False Claims Act. Because the federal government funds all SNAP benefits, the federal government tightly controls the disposition of all money states obtain from their role in the program. Thus, for example, even something as trivial as replacement fees for EBT cards must be reported to USDA. 7 C.F.R. § 274.6(b)(3). States may retain such program income only if they reduce their claims for reimbursement for administrative costs from the federal government accordingly. 7 C.F.R. § 277.10(e). Accordingly, if a court were to impose an award under Delaware's False Claims Act in excess of the amount actually overissued to a household, the excess would be program income controlled by federal regulations rather than a net benefit to the State's fisc.

CONCLUSION

For the foregoing reasons, application of Delaware's False Claims Act to Ms. Gonzalez is improper, unlawful, and inconsistent with sound congressional policy. Plaintiff's case should be dismissed.

RESPECTFULLY SUBMITTED,

/s/ Joanna J. Cline

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