

# **SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) FORMERLY KNOWN AS FOOD STAMPS: THE UNFAIR TARGET OF CONSTITUTIONALLY SUSPECT CONDITIONS**

## **I. INTRODUCTION**

Imagine being a family of four struggling to make ends meet and you or your spouse as the sole income earner of your family, loses their job. How will you and your spouse continue to support your family? Imagine being in this emotional dilemma and you decide to apply for Supplemental Nutrition Assistance Program (SNAP) benefits to help your family with food expenses. As part of the application process you provide personal documentation. Then you are told that as a requirement you have to consent to a drug test and allow an investigator from the District Attorney's office to show up at your home without notice, and conduct a "walk through" of your home to confirm the information you provided on your application was true and correct.<sup>1</sup> After dealing with the stress and emotions of the situation you are going through, would you consent to these requirements for the sake of obtaining the assistance your family needs?<sup>2</sup> The unfortunate reality is that many people who face these circumstances in life have to consent to home searches<sup>3</sup> in order to obtain the assistance they need from government programs.<sup>4</sup> Drug testing and home inspections are not currently part of SNAP's verification processes, but legislators have a political agenda to drug test people who receive SNAP

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<sup>1</sup> See *Project P100*, PUB. INT. L. PROJECT (Aug. 4, 2014), <http://www.pilpca.org/2014/08/04/project-p100/>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* ("home searches" and "home inspections" are used interchangeably).

<sup>4</sup> See *id.*

benefits.<sup>5</sup> Unfortunately, legislators have been successful in implementing drug testing and home searches in other government assistance programs.<sup>6</sup>

In 2015, about 42 million Americans relied on SNAP, formerly known as food stamps, to feed their families.<sup>7</sup> SNAP has been a part of our nation's history for more than eighty years.<sup>8</sup> It has benefitted individuals, farmers and the nation as a whole by fighting against hunger and providing economic stimuli during economic downturns.<sup>9</sup> However, despite these benefits, SNAP is a very controversial topic among taxpayers and legislators.<sup>10</sup> Critics and opponents of SNAP are often misinformed about the program and rely on flawed facts regarding the benefits and operation of SNAP.<sup>11</sup>

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<sup>5</sup> Ralph M. Chite, *The 2013 Farm Bill: A Comparison of the Senate-Passed (S. 954) and House-Passed (H.R. 2642, H.R. 3102) Bills with Current Law*, CONG. RES. SERV. (Oct. 18, 2013), <https://fas.org/sgp/crs/misc/R43076.pdf>; Bryce Covert & Josh Israel, *What 7 states discovered after spending more than \$1 million drug testing welfare recipients*, THINKPROGRESS (Feb. 26, 2015, 1:36 PM), <https://thinkprogress.org/what-7-states-discovered-after-spending-more-than-1-million-drug-testing-welfare-recipients-c346e0b4305d>.

<sup>6</sup> Scott Bauer, Associated Press, *Wisconsin plan to be first state to drug test Medicaid applicants wins committee approval*, CHI. TRIB. (May 25, 2017, 8:30 PM), <http://www.chicagotribune.com/news/nationworld/midwest/ct-wisconsin-drug-test-medicaid-20170525-story.html>; *Project P100*, *supra* note 1; Covert & Israel, *supra* note 5.

<sup>7</sup> Kelsey Farson Gray & Karen Cunnyngham, *Trends in Supplemental Nutrition Assistance Program Participation Rates: Fiscal Year 2010 to Fiscal Year 2015*, FOOD & NUTRITION SER., OFF. OF POL'Y SUPPORT (Jun. 2017), <https://fns-prod.azureedge.net/sites/default/files/ops/Trends2010-2015.pdf>.

<sup>8</sup> Renée Johnson & Jim Monke, *What is the Farm Bill?*, CONG. RES. SERV. (Oct. 5, 2017), <https://fas.org/sgp/crs/misc/RS22131.pdf>.

<sup>9</sup> Kenneth Hanson, *The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP*, U.S. DEPT. OF AGRIC., ECON. RES. SERV. (Oct. 2010), [https://www.ers.usda.gov/webdocs/publications/44748/7996\\_err103\\_1\\_.pdf?v=41056](https://www.ers.usda.gov/webdocs/publications/44748/7996_err103_1_.pdf?v=41056).

<sup>10</sup> Donna Brazile, *Opinion: Brazile takes on food stamp critics*, CNN (Oct. 01, 2013), <http://www.cnn.com/2013/10/01/opinion/brazile-food-stamp-commenters/index.html>.

<sup>11</sup> See Glenn Kessler, *Politics: The 'SNAP Challenge: The claim that food stamp recipients get by on \$4.50 a day*, THE WASH. POST (Jun. 20, 2013), [https://www.washingtonpost.com/blogs/fact-checker/post/the-snap-challenge-the-claim-that-food-stamp-recipients-get-by-on-450-a-day/2013/06/19/110f6b14-d925-11e2-a016-92547bf094cc\\_blog.html?utm\\_term=.cacf343dab4f](https://www.washingtonpost.com/blogs/fact-checker/post/the-snap-challenge-the-claim-that-food-stamp-recipients-get-by-on-450-a-day/2013/06/19/110f6b14-d925-11e2-a016-92547bf094cc_blog.html?utm_term=.cacf343dab4f); Tom Philpott, *It's Time to Stop Shaming Poor People for What They Buy With Food Stamps*, MOTHER JONES (Jan. 18, 2017, 11:00 AM), <http://www.motherjones.com/politics/2017/01/food-stamps-snap-soda-nyt/>.

People mistakenly believe and judge those who receive SNAP benefits, as lazy people who want to live off of government benefits.<sup>12</sup> Research shows that almost “half of SNAP recipients are children...[E]ight percent of all participants are age sixty or older...and about twenty percent include a disabled member.”<sup>13</sup> Furthermore, the program is designed to help “low income”<sup>14</sup> families which means that most recipients have some form of income.<sup>15</sup> Additionally, the SNAP program requires adults who are not disabled or do not have dependents, to enroll in employment training programs and limits the amount of time they can receive benefits.<sup>16</sup>

Moreover, some of the biggest misconceptions among critics and opponents of the program are that a majority of the people who receive SNAP benefits commit fraud and trade their benefits “for cash, drugs, and even sex.”<sup>17</sup> However, facts show that recipient fraud occurs relatively infrequently and that retailers are responsible for most of the fraud reported.<sup>18</sup> The mistaken

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<sup>12</sup> See generally Brazile, *supra* note 10 (“A lot of people who commented on the column wanted to regulate what foodstuffs program participants can buy -often not realizing that alcohol and prepared foods are banned. And many respondents bashed food stamp recipients, declaring they should get a job, stop having kids on my dime or giving a variation on such clichés. Chiefpr writes to one reader who's been out of work: Get training to better yourself and DO NOT have kids until you can feed them. But do not demand I do all that and support you.”).

<sup>13</sup> *Building a Healthy America: A Profile of the Supplemental Nutrition Assistance Program*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. OFF. OF RES. & ANALYSIS (Apr. 2012), <https://fns-prod.azureedge.net/sites/default/files/BuildingHealthyAmerica.pdf>.

<sup>14</sup> *Id.* (“Generally SNAP households must have monthly gross income less than 130 percent of the Federal poverty guidelines (\$2,422 for a family of four in fiscal year 2012), monthly net income less than 100 percent of the poverty guidelines, and assets of less than \$2,000. Households with elderly (age 60 and older) and disabled members are exempt from the gross income limit and must have assets less than \$3,250.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (“States are required to establish a SNAP E&T program to help SNAP participants find work or gain the skills, training, and experience needed to obtain employment. Many persons subject to work registration are also subject to time limited participation in SNAP. Able-bodied Adults without Dependents (ABAWDs) are limited to 3 months of SNAP benefits within a 36-month period unless they meet specific work expectations, such as working 20 hours per week or participating in a work program. SNAP E&T programs can help ABAWDs meet these work expectations through workfare and work experience.”).

<sup>17</sup> Philpott, *supra* note 11.

<sup>18</sup> Press Release, *USDA Releases New Report on Trafficking and Announces Additional Measures to Improve Integrity in the Supplemental Nutrition Assistance Program*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Aug. 15, 2013), <https://www.fns.usda.gov/pressrelease/2013/fns-001213> [hereinafter *USDA Releases New Report*].

belief that recipient fraud is rampant, is what has led political figures to push for bad policies that penalize and violate recipients' constitutional rights.<sup>19</sup>

This Comment will explore the history of the SNAP program, discuss the fraud concerns within the program, and analyze proposed and probable unconstitutional tactics that can potentially become part of the SNAP program. Part II provides background information on SNAP, discusses the impact SNAP has on the economy, and the policy structure of the program. Part III discusses concerns about SNAP, particularly the types of foods that can be purchased with SNAP benefits and fraud within the program. Part III will also explore the implementation of the Electronic Benefit System that helped significantly reduce SNAP fraud. Part IV will discuss bad policy considerations of drug testing government assistance recipients as well as conducting home searches. Part V will discuss what the Fourth Amendment right is and how it is implicated by drug testing and home searches through the analysis of two different appellate court decisions: *Lebron v. Secretary of Florida Department of Children & Families*, 772 F.3d 1352 (11th Cir. 2014) and *Sanchez v. City of San Diego*, 464 F.3d 916 (9th Cir. 2006). Part VI will provide recommendations that shift the focus from recipients to retailers by adopting fraud prevention policies from Medicaid, another government assistance program. Finally, Part VII will conclude that fighting fraud is important but targeting the appropriate actor is also key to reducing fraud rates.

## II. HISTORICAL BACKGROUND AND THE IMPACT SNAP HAS ON THE ECONOMY

### A. Background

In 1862, the United States Department of Agriculture (USDA) was established by President Abraham Lincoln to improve agriculture and increase soil production.<sup>20</sup> Over the years, the USDA's vision has developed into what it is today: a commitment to innovatively expand economic opportunities to all geographical areas of the country by promoting agricultural production and preservation, and feeding not only Americans but also others around the world.<sup>21</sup> To accomplish these goals, the USDA receives its funding through the Farm Bill.<sup>22</sup>

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<sup>19</sup> Chite, *supra* note 5; See Rosa L. Delauro, *Why America Should Save Snap*, 52 HARV. J. ON LEGIS. 267, 296, 283–84 (2015).

<sup>20</sup> Wayne D. Rasmussen, *Lincoln's Agricultural Legacy*, NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/lincolns-agricultural-legacy> (last visited Aug. 23, 2017).

<sup>21</sup> *Strategic Plan FY 2014 – 2018*, U.S. DEPART. OF AGRIC., [www.usda.gov/sites/default/files/documents/usda-strategic-plan-fy-2014-2018.pdf](http://www.usda.gov/sites/default/files/documents/usda-strategic-plan-fy-2014-2018.pdf).

<sup>22</sup> Johnson & Monke, *supra* note 8.

Congress passed the first Farm Bill in the 1930s.<sup>23</sup> The Farm Bill is, “an omnibus, multi-year law that governs an array of agricultural and food programs” and is reauthorized by Congress about every five years.<sup>24</sup> The most recent Farm Bill was reauthorized in 2014.<sup>25</sup> The Farm Bill is divided into twelve titles however, this comment primarily focuses on Title IV Nutrition, which codifies SNAP.<sup>26</sup> The SNAP program is administered through two agencies created by the USDA: the Food and Nutrition Service agency (FNS) and Center for Nutrition Policy and Promotion agency (CNPP).<sup>27</sup>

The history of SNAP dates back to the period of the Great Depression when the Nation was stricken with hunger and crop prices were extremely low causing farmers to suffer great losses.<sup>28</sup> In response to this situation, in 1933, Congress enacted the Agricultural Adjustment Act to help alleviate hunger and malnutrition among low-income households by using farmers’ excess crops.<sup>29</sup> The Agricultural Adjustment Act essentially allowed the government to buy the farmers’ excess crops at a discount and distribute them to people in need.<sup>30</sup> Through this piece of legislation, eligible households received monetary assistance from Congress to purchase nutritious food from agricultural producers.<sup>31</sup> Subsequently, in 1961, the first food stamp program was enacted and was then initiated in other parts of the country.<sup>32</sup> Over the years the program changed as the economy and political climate changed.<sup>33</sup>

In 2008, the Food Stamp program was renamed SNAP in an effort to eliminate the stigma that followed the program over time.<sup>34</sup> SNAP is codified in Title 7 of the Code of Federal Regulations along with other federal rules and regulations governing agriculture.<sup>35</sup> SNAP is one of four major food assistance programs implemented by the USDA.<sup>36</sup> SNAP is unique because it makes up

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (twelve titles are: Commodity Programs, Conservation, Trade, Nutrition, Credit, Rural Development, Research, Forestry, Energy, Horticulture, Crop Insurance, and Miscellaneous Programs).

<sup>27</sup> *About FNS*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Mar. 24, 2017), <https://www.fns.usda.gov/about-fns>.

<sup>28</sup> *The History of SNAP*, SNAP TO HEALTH, <https://www.snapttohealth.org/snap/the-history-of-snap/> (last visited Aug. 23, 2017).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *A Short History of SNAP*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Nov. 20, 2014), <https://www.fns.usda.gov/snap/short-history-snap>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 7 C.F.R. § 271.1 (2013).

<sup>36</sup> *Building a Healthy America: A Profile of the Supplemental Nutrition Assistance Program*, *supra* note 13.

almost eighty percent of the total 2014 Farm Bill budget which was estimated to be \$489 billion.<sup>37</sup>

Title VII grants the States the power to implement and administer the SNAP program in accordance with guidance and regulations set forth by the USDA through the FNS agency.<sup>38</sup> States can further delegate program administration to individual counties.<sup>39</sup> In order for someone to receive SNAP benefits they have to apply and meet program eligibility requirements.<sup>40</sup> The general criteria assessed include: resources, income, deductions, employment requirements, special rules for elderly or disabled, and immigration eligibility.<sup>41</sup> These requirements are the same for the contiguous states, however, specific program details most likely differ from state to state.<sup>42</sup>

The USDA has also established eligibility tests to screen applicants and ensure that SNAP benefits are granted to those who need it most, low-income families.<sup>43</sup> Once an applicant is approved to receive benefits, the monetary amount issued is determined on an as needed basis.<sup>44</sup> The allotments are issued on a monthly basis and allow recipients to purchase food for their family.<sup>45</sup> Research shows that the amount of daily food benefits SNAP recipients receive is about \$1.39 per person per meal.<sup>46</sup> Contrary to what critics believe, it is difficult to imagine someone choosing to live off of this amount comfortably without an additional source of income.<sup>47</sup> Further, this program is important not only because it helps those in need maintain a nutritious diet, but also strengthens the agricultural economy.<sup>48</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> See 7 C.F.R. § 271.4 (1982).

<sup>39</sup> 7 C.F.R. § 272.2 (2017).

<sup>40</sup> *Am I Eligible for SNAP?*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Nov. 15, 2017), <https://www.fns.usda.gov/snap/eligibility>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *id.*

<sup>45</sup> *A Short History of SNAP*, *supra* note 32.

<sup>46</sup> Stacy Dean, *SNAP: Combating Fraud and Improving Program Integrity Without Weakening Success Testimony of Stacy Dean, Vice President for Food Assistance Policy, Center on Budget and Policy Priorities, Before the Subcommittees on Government Operations and the Interior of the Committee on Oversight and Government Reform U.S. House of Representatives*, CTR. ON BUDGET & POL'Y PRIORITIES (Jun 09, 2016), <http://www.cbpp.org/food-assistance/snap-combating-fraud-and-improving-program-integrity-without-weakening-success>.

<sup>47</sup> See Dean, *supra* note 46; Delauro, *supra* note 19, at 292.

<sup>48</sup> *A Short History of SNAP*, *supra* note 32.

### *B. SNAP Impact on the Economy*

The USDA created the Economic Research Service agency (ERS) to provide social science research analysis and reports on its programs.<sup>49</sup> In order to assess the effects food assistance programs have on the economy, the ERS developed the Food Assistance National Input-Output Multiplier (FANIOM) model.<sup>50</sup> With the FANIOM model, they are able “to represent and measure linkages between USDA’s domestic food assistance programs, agriculture, and the U.S. economy.”<sup>51</sup> This research strategy explains how SNAP directly and indirectly affects agriculture and other sectors of the economy.<sup>52</sup> The relation between SNAP, agriculture, and the U.S. economy is a multiplier effect:

SNAP benefits increase household food expenditures and allow recipients to shift some cash income from the purchase of food to the purchase of other goods and services. The new demand for food and nonfood goods and services, along with inter-industry linkages, has an impact on production, GDP, and employment for a number of industries, including agriculture, food processing, retail stores, wholesale-transportation, energy, and various other manufacturing and service industries. The induced effects on household expenditures from labor and capital income compound the multiplier effect across industries, while the import share reduces the impact on domestic producers. The shift of cash income from food to nonfood expenditures as households receive more SNAP benefits has a significant impact on how the multiplier effects are distributed over industries.<sup>53</sup>

Researchers found that “\$1 billion dollars of SNAP expenditures increases the economic activity (GDP) by an estimate of \$1.79 billion.”<sup>54</sup> Likewise, new employment opportunity “estimates from FANIOM range from 8,900 to 17,900 full-time-equivalent jobs plus self-employed.”<sup>55</sup> These statistical figures are extremely important because they represent a contrary view to the

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<sup>49</sup> *Agencies*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/our-agency/agencies> (last visited Aug. 23, 2017).

<sup>50</sup> Hanson, *supra* note 9.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

usual stigma that follows the SNAP program.<sup>56</sup> As shown by the FANIOM model, SNAP benefits the overall economy.<sup>57</sup>

### C. SNAP Policy Structure

The SNAP program is an open-ended federal program that is principally administered by the federal government.<sup>58</sup> However, program administrative costs are shared between the States and the federal government.<sup>59</sup> This type of structure allows the USDA to maintain control and oversight of the program including the type of eligibility requirements States can impose upon applicants.<sup>60</sup> This type of program structure is a critical part of SNAP because it gives Congress the ability to increase SNAP benefits or make changes to the program nationwide in order to help stimulate the economy during an economic downturn, e.g. a recession.<sup>61</sup> On the other hand, if SNAP was a “block grant,” the states would have control over program funding allocation leaving the federal government with little to no control over the program.<sup>62</sup> With block grants, the federal government provides funding for programs but retains very little control over the administration of programs.<sup>63</sup>

Without this flexibility, our nation’s economy can truly suffer exponentially, making it imperative that SNAP does not change to a block grant.<sup>64</sup> However,

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<sup>56</sup> David A. Super, *Food Stamps & the Criminal Justice System*, CHAMPION, 20, 26 (2001); Paul Rosenberg, *GOP debunked on food stamps: Everything they say about SNAP is wrong*, SALON (Dec. 4, 2013), [https://www.salon.com/2013/12/04/gop\\_debunked\\_on\\_food\\_stamps\\_everything\\_the\\_y\\_say\\_about\\_snap\\_is\\_wrong/](https://www.salon.com/2013/12/04/gop_debunked_on_food_stamps_everything_the_y_say_about_snap_is_wrong/) (“food stamps not only relieve hardship in the moment but can trigger long-lasting gains in participating children’s later health and education...it’s a good investment in the next generation of citizens and workers.”).

<sup>57</sup> Hanson, *supra* note 9.

<sup>58</sup> See Robert Jay Dilger & Eugene Boyd, *Block Grants: Perspectives and Controversies*, U.S. DEPT. OF AGRIC., CONG. RES. SERV. (July 15, 2014), <https://perma.cc/T8D8-PWST>.

<sup>59</sup> *Supplemental Nutrition Assistance Program State Activity Report Fiscal Year 2014*, FOOD & NUTRITION SERV. SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PROGRAM ACCOUNTABILITY & ADMIN. DIVISION (Oct. 2015), <https://fns-prod.azureedge.net/sites/default/files/FY14%20State%20Activity%20Report.pdf>.

<sup>60</sup> See Jason Stein, *Scott Walker wants fewer federal rules from Trump*, MILWAUKEE J. SENTINEL (Dec. 20, 2016, 9:29 AM), <http://www.jsonline.com/story/news/politics/2016/12/20/scott-walker-wants-fewer-federal-rules-trump/95648344/>.

<sup>61</sup> Delauro, *supra* note 19, at 289.

<sup>62</sup> See Dean, *supra* note 46.

<sup>63</sup> Dilger & Boyd, *supra* note 58.

<sup>64</sup> Delauro, *supra* note 19, at 296.



the SNAP program is far from perfect.<sup>65</sup> There are concerns with a lack of restriction on the types of foods that can be purchased with program benefits and with fraud within the program.<sup>66</sup>

### III. CONCERNS WITH SNAP

#### A. Eligible Food Items

To fulfill the program purpose of providing low-income families with nutritious food, SNAP benefits can only be used to purchase “eligible food” from retail food stores approved to participate in the program.<sup>67</sup> The technical definition of “eligible food” is,

any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption and any deposit fee in excess of the amount of the State fee reimbursement (if any) required to purchase any food or food product contained in a returnable bottle, can, or other container, regardless of whether the fee is included in the shelf price posted for the food or food product.<sup>68</sup>

The definition also provides exceptions for seeds and plants,<sup>69</sup> people who may live in Alaska and rely on hunting,<sup>70</sup> and meals prepared for program

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<sup>65</sup> See *USDA Efforts to Reduce Waste, Fraud and Abuse in the Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Dec. 2011), <https://fns-prod.azureedge.net/sites/default/files/Integrity.pdf>.

<sup>66</sup> Philpott, *supra* note 11.

<sup>67</sup> 7 C.F.R. § 274.7 (2015).

<sup>68</sup> 7 C.F.R. § 271.2 (2017).

<sup>69</sup> *Id.* (noting “Seeds and plants to grow foods for the personal consumption of eligible households”).

<sup>70</sup> *Id.* (noting “In the case of certain eligible households living in areas of Alaska where access to food stores is extremely difficult and the households rely on hunting and fishing for subsistence, equipment for the purpose of procuring food for eligible households, including nets, lines, hooks, fishing rods, harpoons, knives, and other equipment necessary for subsistence hunting and fishing but not equipment for the purpose of transportation, clothing or shelter, nor firearms, ammunition or other explosives”).

beneficiaries who are elderly, disabled,<sup>71</sup> in rehabilitation centers,<sup>72</sup> shelters for battered women,<sup>73</sup> or are homeless.<sup>74</sup> The SNAP program does not impose strict requirements on what recipients should purchase.<sup>75</sup> For example, it does not require recipients to only purchase “nutritious” foods or to spend a percentage of their benefits on “nutritious” foods.<sup>76</sup> As a result, the expansive definition of eligible foods allows program recipients to purchase “unhealthy” options such as candy, chips, and cookies.<sup>77</sup>

Many opponents of SNAP disagree with this liberty and feel that benefits should strictly be used for “healthy” foods and the “unhealthy” options should be prohibited.<sup>78</sup> Some even believe that the freedom to purchase “unhealthy” foods contributes to the country’s obesity problem because foods with low nutritional value are cheaper.<sup>79</sup> Studies have been conducted to determine if these opinions are true and even though researchers agree that it is difficult to accurately measure this type of impact, they conclude that there is no correlation between obesity and SNAP recipients.<sup>80</sup> The SNAP population consumes the same amount of “unhealthy” foods as the general population.<sup>81</sup>

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<sup>71</sup> *Id.* (noting “Meals prepared and delivered by an authorized meal delivery service to households eligible to use coupons to purchase delivered meals; or meals served by an authorized communal dining facility for the elderly, for SSI households or both, to households eligible to use coupons for communal dining” “Meals prepared and served by a group living arrangement facility to residents who are blind or disabled as defined in paragraphs (2) through (11) of the definition of “Elderly or disabled member” contained in this section”).

<sup>72</sup> *Id.* (noting “Meals prepared and served by a drug addict or alcoholic treatment and rehabilitation center to narcotic addicts or alcoholics and their children who live with them”).

<sup>73</sup> *Id.* (noting “Meals prepared by and served by a shelter for battered women and children to its eligible residents”).

<sup>74</sup> *Id.* (noting “meals prepared for and served by an authorized public or private nonprofit establishment (e.g. soup kitchen, temporary shelter), approved by an appropriate State or local agency, that feeds homeless persons; and meals prepared by a restaurant which contracts with an appropriate State agency to serve meals to homeless persons at concessional (low or reduced) prices.”).

<sup>75</sup> *The History of SNAP*, *supra* note 28.

<sup>76</sup> Philpott, *supra* note 11.

<sup>77</sup> *The History of SNAP*, *supra* note 28.

<sup>78</sup> *See id.*

<sup>79</sup> *See SNAP and Obesity: The Facts and Fictions of SNAP Nutrition*, SNAP TO HEALTH, <https://www.snapttohealth.org/snap/snap-and-obesity-the-facts-and-fictions-of-snap-nutrition/> (last visited Sept. 13, 2017).

<sup>80</sup> Judith Bartfeld, Timothy M. Smeeding, & James P. Ziliak, *SNAP, Food Security, and Health*, U. OF WISCONSIN-MADISON, INST. FOR RES. ON POVERTY (Nov. 2015), <http://www.irl.wisc.edu/publications/policybriefs/pdfs/PB8-SNAPFoodSecurityHealth.pdf>.

<sup>81</sup> Diane Whitmore Schanzenbach, *Testimony: Pros and cons of restricting SNAP purchases*, BROOKINGS (Feb. 16, 2017),

Nonetheless, FNS has implemented strategies to help recipients make better food choices.<sup>82</sup> Some of those strategies include education on nutrition.<sup>83</sup> However, this comment focuses primarily with the issues and concerns of fraud within SNAP.<sup>84</sup>

### *B. Fraud*

The most common type of SNAP fraud is called “trafficking.”<sup>85</sup> Trafficking means that benefits are exchanged for cash.<sup>86</sup> Fraud can also occur when someone makes “intentional program violations.”<sup>87</sup> Intentional program violations occur when someone lies, withholds or provides false information to qualify for program benefits when they otherwise would not be eligible.<sup>88</sup>

There are examples of fraud committed by retailers, recipients, and government employees all over the nation.<sup>89</sup> In April of 2016, the District Attorney’s office in Tulare County, California arrested eighteen people for welfare fraud that totaled about \$110,573.<sup>90</sup> In February of 2015, thirteen women were arrested in Texas for SNAP fraud because they lied on their applications and received benefits they did not qualify for.<sup>91</sup> The fraud in that

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<https://www.brookings.edu/testimonies/pros-and-cons-of-restricting-snap-purchases/> (testifying that implementing restrictions on the types of foods that can be purchased with SNAP benefits will most likely increase administrative costs and not make a difference in the consumption of “unhealthy” foods because studies are inconclusive that those who receive SNAP benefits spend more or consume more “unhealthy” foods than those who do not receive SNAP benefits).

<sup>82</sup> *Nutrition Education and Promotion: The Role of FNS in Helping Low-Income Families Make Healthier Eating and Lifestyle Choices - A Report to Congress*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Aug. 27, 2015), <https://www.fns.usda.gov/nutrition-education-and-promotion-role-fns-helping-low-income-families-make-healthier-eating-and>.

<sup>83</sup> *Id.*

<sup>84</sup> Emelyn Rude, *History Politics: The Very Short History of Food Stamp Fraud in America*, TIME (Mar. 30, 2017), <http://time.com/4711668/history-food-stamp-fraud/>.

<sup>85</sup> *Fraud*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Jan. 20, 2017), <https://www.fns.usda.gov/fraud/what-snap-fraud>.

<sup>86</sup> *Id.*

<sup>87</sup> 7 C.F.R. § 273.16 (2017).

<sup>88</sup> *Id.*

<sup>89</sup> Super, *supra* note 56, at 26.

<sup>90</sup> Troy Pope, *14 arrested, 4 surrender in Tulare welfare fraud investigation*, FRESNO BEE (Apr. 13, 2016, 11:36 PM), <http://www.fresnobee.com/news/local/crime/article71755167.html>.

<sup>91</sup> Asly Custer, *More than a dozen women accused of food stamp fraud*, VALLEY CENT. (Feb. 17, 2015), <http://valleycentral.com/news/local/more-than-a-dozen-women-accused-of-food-stamp-fraud>.

case totaled over \$336,000.<sup>92</sup> In 2017, fourteen people were arrested in New Jersey, for obtaining nearly two million dollars in fraudulent public benefits.<sup>93</sup> In 2017, an Arizona state lawmaker was also charged with fraudulent schemes and practices, unlawful use of food stamps, and theft of SNAP benefits.<sup>94</sup> In 2016, seven SNAP caseworkers were arrested in Delaware for a scam in which the caseworkers created false applicants and personally used or sold the benefits issued.<sup>95</sup> The scam totaled almost one million dollars in benefits.<sup>96</sup> Clearly, recipients and other individuals involved in the SNAP process commit fraud, but they are not the only ones who are costing the country millions of dollars.<sup>97</sup> The reality is that according to the FNS, authorized retailers are responsible for most of the SNAP fraud.<sup>98</sup>

In order for a retail food store or wholesale food store to accept SNAP benefits as a form of payment they have to apply and become authorized by the USDA.<sup>99</sup> When reviewing an application, the USDA considers various factors including, business integrity, reputation, whether the retailer has previously violated the program or other consumer protection laws, and other requirements such as maintaining a minimum amount of perishable items.<sup>100</sup> If a retailer is approved, they maintain approval for a period of five years and are then required to reapply for re-authorization.<sup>101</sup> Retailers commit fraud when they sell ineligible food items in exchange for benefits or when they engage in trafficking of SNAP benefits.<sup>102</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> Payton Guion, Alex N. Gecan & Andrew Ford, *14 arrested in New Jersey welfare fraud investigation*, USA TODAY (Jun. 28, 2017, 12:45 PM), <https://www.usatoday.com/story/news/nation-now/2017/06/28/new-jersey-arrests-welfare-fraud-investigation/435144001/>.

<sup>94</sup> Alia Beard Rau, *Ariz. lawmaker charged with food stamp fraud*, USA TODAY (June 22, 2016, 11:07 PM), <https://www.usatoday.com/story/news/nation-now/2016/06/22/ariz-lawmaker-charged-food-stamp-fraud/86274424/>.

<sup>95</sup> Esteban Parra, *7 state workers indicted for food stamp fraud that cost U.S. nearly \$1M*, USA TODAY (Jun. 15, 2016, 6:28 PM), <https://www.usatoday.com/story/news/nation-now/2016/06/15/del-indicted-food-stamp-fraud/85951548/>.

<sup>96</sup> *Id.*

<sup>97</sup> *See Super*, *supra* note 56, at 26.

<sup>98</sup> *USDA Releases New Report*, *supra* note 18.

<sup>99</sup> 7 C.F.R. § 278.1 (2017); *How Do I Apply to Accept Benefits?*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Nov. 16, 2017), <https://www.fns.usda.gov/snap/retailer-apply>.

<sup>100</sup> 7 C.F.R. § 278.1.

<sup>101</sup> *Id.*

<sup>102</sup> Richard Mantovani, Eric Sean Williams, & Jacqueline Pflieger, *The Extent of Trafficking in the Supplemental Nutrition Assistance Program: 2009–2011*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SER. (Aug. 2013), <https://fns-prod.azureedge.net/sites/default/files/Trafficking2009.pdf>.

Research conducted by the FNS on trafficking revealed that an alarming eighty-five percent of all trafficking was predominantly committed by privately owned stores in poverty-stricken neighborhoods.<sup>103</sup> This finding was attributed to the authorization of smaller stores that become eligible for the program by meeting minimal eligible food requirements.<sup>104</sup> In other words, perishable foods, meat, poultry, fish, bread, cereal, vegetables, fruits, and dairy products are not the main types of products the store normally sells but they sell just enough to obtain eligibility and accept benefits as a form of payment.<sup>105</sup>

Fraud within the SNAP program has been an issue widely discussed among Americans and legislators since the program's inception.<sup>106</sup> Many speculate whether the program is fulfilling its purpose or if government funds are just wasted by fraud.<sup>107</sup> The USDA does not deny that there is and has been an issue of fraud within the SNAP program and agrees that it is a very real concern.<sup>108</sup> They continuously work to improve their tactics to reduce fraud among recipients and retailers.<sup>109</sup> In the late 1990's, the USDA implemented one of their most successful tools to combat fraud, the Electronic Benefit Transfer (EBT) system.<sup>110</sup>

### *C. Electronic Benefit Transfer System*

The EBT system changed the way benefits are received and used by program recipients.<sup>111</sup> Instead of using a paper "food stamp," benefits are now issued electronically through a card system similar to a bank issued credit or debit card.<sup>112</sup> This new technology allowed the USDA to track retailer and recipient transactions to identify possible patterns of fraud.<sup>113</sup> According to the USDA,

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<sup>103</sup> *Id.*

<sup>104</sup> *USDA Releases New Report*, *supra* note 18.

<sup>105</sup> *USDA Releases New Report*, *supra* note 18; 7 C.F.R. § 271.2.

<sup>106</sup> Rude, *supra* note 84.

<sup>107</sup> *USDA Efforts to Reduce Waste, Fraud and Abuse in the Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 65.

<sup>108</sup> See Press Release, *USDA Announces Additional Steps to Reduce Fraud and Misuse in Supplemental Nutrition Assistance Program*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Feb. 21, 2013), <https://www.fns.usda.gov/pressrelease/2013/fns-000213>.

<sup>109</sup> *USDA Efforts to Reduce Waste, Fraud and Abuse in the Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 65.

<sup>110</sup> *A Short History of SNAP*, *supra* note 32.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

the technology upgrade in the program decreased trafficking rates from almost four percent in the 1990's to one percent in 2006-2008.<sup>114</sup>

Stacey Dean, the Vice President for Food Assistance Policy at the Center on Budget and Policy Priorities,<sup>115</sup> testified before the Subcommittees on Government Operations and the Interior of the Committee on Oversight and Government Reform U.S. House of Representatives, that “trafficking is at a record low in the program.”<sup>116</sup> However, despite her assertion, recent data shows that in 2009-2011, trafficking rates increased to 1.3 percent.<sup>117</sup> Additionally, because of the size of the SNAP budget, the 1.3 percent increase in trafficking rates translates to about \$858 million in fraud.<sup>118</sup> This is a huge increase in terms of millions of dollars considering that the one percent trafficking rate in 2006-2008 represented about \$330 million in fraud.<sup>119</sup> Further, the increase has been attributed to growth in the program and a rise in authorized stores engaging in trafficking.<sup>120</sup> The USDA acknowledges that while fraud cannot be completely eliminated, it is constantly looking for ways to limit or mitigate fraud.<sup>121</sup>

#### IV. ALTERNATIVE CONSIDERATIONS ARE BAD POLICY

##### A. Drug Testing

Additionally, taxpayers want to be assured the program is still serving its intended dual purpose, which is to provide needy families with nutritious foods, while also stimulating the agricultural economy.<sup>122</sup> These discussions have prompted legislators to unfairly target program recipients through their legislative agendas.<sup>123</sup> In recent years, there has been a push from lawmakers to implement drug testing for “welfare” recipients, including SNAP recipients.<sup>124</sup> This type of legislation in relation to SNAP has not been carried

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<sup>114</sup> Mantovani, Williams, & Pflieger, *supra* note 102.

<sup>115</sup> Dean, *supra* note 46 (an independent, non-profit, nonpartisan policy institute).

<sup>116</sup> *Id.*

<sup>117</sup> Mantovani, Williams, & Pflieger, *supra* note 102.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *USDA Announces Additional Steps to Reduce Fraud and Misuse in Supplemental Nutrition Assistance Program*, *supra* note 108.

<sup>122</sup> *See USDA Efforts to Reduce Waste, Fraud and Abuse in the Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 65; Delauro, *supra* note 19, at 297.

<sup>123</sup> *Drug Testing For Welfare Recipients And Public Assistance*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 24, 2017), <http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx#4>.

<sup>124</sup> *Id.*

out because SNAP is not a block grant like other welfare programs.<sup>125</sup> However, the possibility of it becoming a policy is not completely out of the question.<sup>126</sup>

Republicans want Congress to grant the States more authority to change SNAP eligibility requirements but their proposals have been blocked by Democrats.<sup>127</sup> The Democratic Party believes in the purpose and benefits of SNAP and is against changes to the program including funding reduction or major structural changes such as converting it into a block grant.<sup>128</sup> During the reauthorization negotiations of the Farm Bill in 2013, the House Majority (Republicans) proposed to make SNAP part of one omnibus block grant that allowed drug testing of SNAP applicants.<sup>129</sup> The proposal did not make it through negotiations, but it came close.<sup>130</sup>

In 2015, Wisconsin Governor Scott Walker made another proposal to drug test SNAP recipients and in 2017, he called on President-elect Trump to give Republicans more flexibility and fewer rules to implement his proposal.<sup>131</sup> Although Governor Walker has not been able to achieve the implementation of drug testing in the SNAP program, in 2017 he was successful in implementing drug testing for applicants of the Medicaid program.<sup>132</sup> The Associated Press suggested he won committee approval because Democrats no longer have the votes to block the proposal.<sup>133</sup> This is a concern for SNAP recipients because if lawmakers continue to push for this type of legislation and are successful, particularly in making SNAP a block grant, the states would have the authority to implement drug testing or any other requirement that may encroach upon recipients' constitutional rights.<sup>134</sup> The Temporary Assistance for Needy Families program (TANF) is an example of what legislators are able to implement in their efforts to fight fraud.<sup>135</sup>

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<sup>125</sup> Delauro, *supra* note 19, at 305.

<sup>126</sup> *Id.* at 299.

<sup>127</sup> Arthur Delaney, *Court Tosses Scott Walker's Food Stamp Drug Testing Lawsuit*, HUFF POST POLITICS (Oct. 06, 2016, 1:18 PM), [http://www.huffingtonpost.com/entry/scott-walker-drug-testing\\_us\\_57f65f53e4b05f39c51e7aad](http://www.huffingtonpost.com/entry/scott-walker-drug-testing_us_57f65f53e4b05f39c51e7aad).

<sup>128</sup> *The 2016 Democratic Platform*, DEMOCRATS, <https://www.democrats.org/party-platform> (last visited Oct. 2, 2017).

<sup>129</sup> Chite, *supra* note 5; Delauro, *supra* note 19, at 305.

<sup>130</sup> Chite, *supra* note 5.

<sup>131</sup> Jason Stein, Milwaukee Journal Sentinel, *Official: Food stamp drug tests would violate federal law*, USA TODAY (Jan. 11, 2017, 2:52 PM), <https://www.usatoday.com/story/news/politics/2017/01/11/official-food-stamp-drug-tests-would-violate-federal-law/96438832/>.

<sup>132</sup> Bauer, *supra* note 6.

<sup>133</sup> *Id.*

<sup>134</sup> *See* Stein, *supra* note 131.

<sup>135</sup> *Drug Testing For Welfare Recipients And Public Assistance*, *supra* note 123.

TANF is a program that was created through the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>136</sup> It was created as part of the welfare reform to “end welfare dependency” and reform the welfare system.<sup>137</sup> Program recipients receive a monthly cash benefit based on their family size and income level to help support them for a temporary period of time.<sup>138</sup> The ultimate purpose of the program is to assist families during their time of need but get them back to work and off welfare.<sup>139</sup> In contrast to SNAP, States do have wide flexibility in the development and implementation of TANF program eligibility requirements because it is a block grant.<sup>140</sup>

Opponents of drug testing proposals for SNAP and other welfare programs such as Medicaid or TANF, believe that subjecting recipients to drug testing further stigmatizes welfare recipients and violates their Fourth Amendment right to privacy.<sup>141</sup> Many believe that if SNAP follows some of the tactics TANF has implemented, the legislation will be challenged as unconstitutional and or that most States will not implement the tactics.<sup>142</sup> These opinions are based on the ineffectiveness of drug testing due to cost, and the small number of applicant’s that actually test positive.<sup>143</sup>

### B. Home Searches

Moreover, TANF applicants are currently subject to home searches in San Diego County, California.<sup>144</sup> This tactic raises privacy concerns because if legislators become successful in converting SNAP into a block grant, lawmakers could also implement home searches as part of the SNAP program.<sup>145</sup> The USDA currently allows SNAP offices to conduct home visits to verify eligibility when other means of verification have been

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<sup>136</sup> Dilger & Boyd, *supra* note 58.

<sup>137</sup> Delauro, *supra* note 19, at 285-86.

<sup>138</sup> *Temporary Assistance for Needy Families Program (TANF) Eleventh Report to Congress*, U.S. DEP’T OF HEALTH & HUM. SERV. ADMIN. FOR CHILD. AND FAMILIES (Apr. 7, 2016), [https://www.acf.hhs.gov/sites/default/files/ofa/eleventh\\_report\\_to\\_congress.pdf](https://www.acf.hhs.gov/sites/default/files/ofa/eleventh_report_to_congress.pdf).

<sup>139</sup> *Id.*

<sup>140</sup> Dilger & Boyd, *supra* note 58.

<sup>141</sup> *See* Bauer, *supra* note 6.

<sup>142</sup> *Id.*

<sup>143</sup> Covert & Israel, *supra* note 5.

<sup>144</sup> John Lawrence, *San Diego’s P100 Program Targets the Poor and Vulnerable While Letting the Rich and Powerful Off the Hook*, SAN DIEGO PRESS (July 29, 2014), <https://sandiegofreepress.org/2014/07/san-diegos-p100-program-targets-the-poor-and-vulnerable-while-letting-the-rich-and-powerful-off-the-hook/>.

<sup>145</sup> *See generally* Delauro, *supra* note 19, at 305 (explaining how block grants reduce federal oversight).



unsuccessful.<sup>146</sup> Some States circumvent that rule and “avoid complying with food stamp rules on the verification process...have established pre-eligibility fraud detection units that may seek to visit applicants in their homes prior to the granting of benefits even where there is no evidence of fraud.”<sup>147</sup> They do this because to them, if they are “investigating fraud” it is not part of the verification process.<sup>148</sup> If this is already occurring in that facet, it could turn into home searches in the future.<sup>149</sup>

Whether it is drug testing or conducting home searches of welfare applicants, both tactics have gained national attention because they encroach upon an individual’s Fourth Amendment right.<sup>150</sup> In recent years, two appellate courts have issued rulings as to whether or not these tactics implicate the Fourth Amendment of welfare recipients.<sup>151</sup> In the case of *Lebron v. Sec’y of the Florida Dep’t of Children & Families*, 772 F.3d 1352 (11th Cir. 2014), the Eleventh Circuit Court of Appeals made a ruling as to drug testing<sup>152</sup> and in the case of *Sanchez v. City of San Diego*, 464 F.3d 916 (9th Cir. 2006), the Ninth Circuit Court of Appeals made a ruling as to the issue of home searches.<sup>153</sup>

It is important to further analyze Fourth Amendment implications these tactics might have on welfare recipients because if they are implemented as part of the SNAP program, they may keep individuals from receiving the aid they need.<sup>154</sup> Thus, this would frustrate the purpose of SNAP in providing nutritious meals to needy families.<sup>155</sup> The two different Court of Appeals analyzed and applied Fourth Amendment law to ultimately decide that drug testing violated welfare applicants’ Fourth Amendment rights and warrantless home searches did not.<sup>156</sup>

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<sup>146</sup> 7 C.F.R. § 273.2 (2017).

<sup>147</sup> Super, *supra* note 56, at 27.

<sup>148</sup> *Id.*

<sup>149</sup> See *Project P100*, *supra* note 1.

<sup>150</sup> See *id.*

<sup>151</sup> See *Sanchez v. City of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006); See *Lebron v. Sec’y of the Florida Dep’t of Children & Families*, 772 F.3d 1352, 1355 (11th Cir. 2014).

<sup>152</sup> *Lebron*, 772 F.3d at 1352.

<sup>153</sup> *Sanchez*, 464 F.3d at 916.

<sup>154</sup> *Lebron*, 772 F.3d at 1356; See *DeLauro*, *supra* note 19, at 306-07.

<sup>155</sup> See *DeLauro*, *supra* note 19, at 306-07.

<sup>156</sup> *Sanchez*, 464 F.3d at 918; *Lebron*, 772 F.3d at 1357.

## V. THE FOURTH AMENDMENT

A. *What is the Fourth Amendment Right?*

The Fourth Amendment of the Constitution of the United States guarantees,

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>157</sup>

Historically, the Supreme Court has held that a search is presumed unreasonable when it is conducted without a warrant and a violation of a person's reasonable expectation of privacy.<sup>158</sup> Governmental action refers to a search or seizure of a protected area conducted by law enforcement or government officers including those who work for governmental agencies.<sup>159</sup> Persons and houses are specifically enumerated in the United States Constitution as "protected areas" by the Fourth Amendment.<sup>160</sup>

In the famous case of *Katz v. United States*, 389 U.S. 347, 361 (1967), Justice Harlan stated in his concurring opinion, that the privacy rule is "a twofold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>161</sup> Meaning, that someone claiming a constitutional violation under this privacy right has to prove they expected or believed their actions were private or that the place searched was private, and society recognizes that belief in privacy as reasonable.<sup>162</sup> Warrantless searches are presumed unreasonable but the U.S. Supreme Court has recognized exceptions that will render a warrantless search constitutional.<sup>163</sup> *Lebron* and *Sanchez* particularly deal with two exceptions: special needs and consent.<sup>164</sup>

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<sup>157</sup> U.S. CONST. amend. IV.

<sup>158</sup> *Kentucky v. King*, 563 U.S. 452, 459 (2011), quoting *Brigham City v. Stuart*, 547 U.S. 398 (1943).

<sup>159</sup> *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

<sup>160</sup> GREGORY M. CASKEY, CALIFORNIA SEARCH AND SEIZURE 118 (2017 ed. 2017).

<sup>161</sup> *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

<sup>162</sup> See CASKEY, *supra* note 160 at 143.

<sup>163</sup> *Id.* at 881.

<sup>164</sup> *Lebron*, 772 F.3d at 1358-59.

*B. Lebron v. Secretary of Florida Dept. of Children and Families*

In 2011, the State of Florida enacted a statute that mandated all TANF applicants to submit to a drug test.<sup>165</sup> A person who was in need of government assistance through the TANF program not only had to consent to a drug test but also pay for the drug test.<sup>166</sup> The State would only reimburse the applicant for the cost of the drug test if the drug results were negative.<sup>167</sup> If an applicant's drug test was positive, the State would deny benefits and render the applicant ineligible for a year.<sup>168</sup> The applicant had the option to reapply after 6 months if they were able to show that they completed a substance abuse program and pass a new drug test.<sup>169</sup> Luis Lebron (Lebron), a single father, college student, and retiree of the U.S. Navy who lived with and cared for his disabled mother, was denied TANF benefits after he refused to take the required drug test.<sup>170</sup> Lebron was denied benefits he would have qualified for had the drug test not been a requirement.<sup>171</sup> Subsequently, Lebron filed a class action lawsuit seeking a court order to stop the enforcement of Florida's statute alleging that the drug testing requirement violated his and all other applicant's Fourth Amendment right to be free from unreasonable searches and seizures.<sup>172</sup>

The district court granted the preliminary injunction and ordered Florida to stop the drug testing requirement.<sup>173</sup> The State then appealed the district court's decision to the Eleventh Circuit Court of Appeals.<sup>174</sup> The Eleventh Circuit Court reviewed the district court's decision to grant the preliminary injunction and determined the decision was correct.<sup>175</sup>

The Eleventh Circuit Court "found it undisputed that government-mandated drug testing is a Fourth Amendment 'search.'"<sup>176</sup> The Court determined that requiring all TANF applicant's to submit to a drug test violated their Fourth Amendment right against unreasonable searches and declared Florida's statute unconstitutional.<sup>177</sup> In fact after this ruling, Florida's Governor Rick Scott,

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<sup>165</sup> *Id.* at 1356.

<sup>166</sup> *Id.* at 1356-57.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Lebron*, 772 F.3d at 1357-58.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1358.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Lebron*, 772 F.3d at 1358.

<sup>177</sup> *Id.* at 1358-59.

decided not to appeal the decision further to the United States Supreme Court.<sup>178</sup>

When deciding this case, the Eleventh Circuit Court immediately recognized that the drug testing tactic implicated Fourth Amendment protections and referenced a string of cases decided by the U.S. Supreme Court on those protections.<sup>179</sup> The Court then turned to the question as to whether or not the search was reasonable because drug testing was done without a warrant.<sup>180</sup> To make this determination, the Court applied the special needs exception.<sup>181</sup>

The special needs exception helps determine if the warrantless search was reasonable by balancing governmental and private interests.<sup>182</sup> However, this balancing test takes place after the government proves that there was exceptional circumstances and had a substantial special need to search and therefore, obtaining a warrant with probable cause would be impracticable.<sup>183</sup> The Eleventh Circuit Court noted that, suspicion-less drug testing has been permitted by the Supreme Court only in “closely guarded categories...where the asserted special need addresses a substantial concern for public safety or where the state is fulfilling its well-recognized role as the guardian and tutor of public school children.”<sup>184</sup>

Florida’s “special needs” argument in *Lebron* was that they needed to drug test all TANF applicants because they did not want recipients to use program funds for drugs because that “undermine[s] the program’s goals of moving applicants into employment and promoting child welfare and family stability.”<sup>185</sup> The Eleventh Circuit Court rejected this argument and determined there was no connection between drug testing and the interests Florida sought to protect.<sup>186</sup> The Court determined that the employment and fiscal interests were not specific to TANF because they were general interests that a government has for all citizens and other government programs.<sup>187</sup> The Court also stated that the evidence presented suggested that “rates of drug use in the TANF population are no greater than for those who receive other government benefits, or even for the general public.”<sup>188</sup> The Court also concluded that there

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<sup>178</sup> Associated Press, *Florida Gov. Rick Scott drops appeals in welfare drug testing case*, TAMPA BAY TIMES (Mar. 4, 2015), <http://www.tampabay.com/news/politics/stateroundup/florida-gov-rick-scott-drops-appeals-in-welfare-drug-testing-case/2220093>.

<sup>179</sup> *Lebron*, 772 F.3d at 1360-64.

<sup>180</sup> *Id.* at 1363-64.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1361.

<sup>185</sup> *Lebron*, 772 F.3d at 1364-65.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1364-66.

would not be an immediate or direct threat to public safety if government officials delayed the approval process to obtain a search warrant if they suspected a TANF recipient was violating the law.<sup>189</sup> Therefore, the Eleventh Circuit Court did not engage in the special needs balancing test because Florida failed to show a substantial need to bypass Fourth Amendment protections.<sup>190</sup>

Florida also argued that their drug testing statute was constitutional because applicant's consented to the drug test.<sup>191</sup> The Court did not agree with Florida's reasoning because the statute required applicants to sign a consent form as part of the eligibility process if they wanted to receive benefits.<sup>192</sup> The Court stated that "a valid consent means one which is "in fact, freely and voluntarily given," and concluded that the consent given by TANF applicants "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."<sup>193</sup>

The Eleventh Circuit Court determined that Florida used its power and authority to require a needy population to "consent" to the drug test to obtain a benefit that they needed or otherwise qualified for.<sup>194</sup> The Court ultimately decided that the consent obtained from applicants was not valid making Florida's drug testing statute unconstitutional.<sup>195</sup> However, the Court also stated that drug testing of TANF recipients is not always unconstitutional.<sup>196</sup> States can drug test recipients when they have a reasonable suspicion.<sup>197</sup>

This decision by the Eleventh Circuit Court serves as a great example of the stigmatization that people who receive government assistance often face.<sup>198</sup> Florida residents who needed the help TANF offered, were unfairly prejudiced as drug users and had to submit to intrusive drug testing.<sup>199</sup> Unfortunately, these beliefs have led to the generalization of the population and subjected them to unconstitutional violations of their right to privacy simply for being a low-income individual.<sup>200</sup> Moreover, despite this victory on drug testing for TANF recipients, the same cannot be said of San Diego's policy to conduct home searches of all TANF applicants.<sup>201</sup>

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<sup>189</sup> *Id.* at 1378.

<sup>190</sup> *Id.*

<sup>191</sup> *Lebron*, 772 F.3d at 1374-78.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1358.

<sup>197</sup> *Lebron*, 772 F.3d at 1358.

<sup>198</sup> *See id.* at 1365-66.

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

<sup>201</sup> *See Sanchez*, 464 F.3d at 918.

*C. Sanchez v. County of San Diego*

In 1997, San Diego County's District Attorney's (D.A.) office started the Project 100% program as part of the eligibility process to fight fraud in the CalWORKS program (the State of California's name for TANF).<sup>202</sup> Project 100% required all applicants to consent to warrantless home visits even if they were not suspected of fraud or ineligibility.<sup>203</sup> CalWORKS recipients living in San Diego County filed a class action lawsuit alleging the program violated their Fourth Amendment rights.<sup>204</sup>

Project 100% home searches were conducted by D.A. investigators who were sworn peace officers and part of the D.A.'s Public Assistance Fraud Division.<sup>205</sup> During the home searches, the D.A. investigators verified information provided by applicants on their applications.<sup>206</sup> They verified: "(1) the applicant has the amount of assets claimed; (2) the applicant has an eligible dependent child; (3) the applicant lives in California; and (4) an 'absent' parent does not live in the residence."<sup>207</sup> If the applicant did not consent to the home inspection they were denied benefits for failing to cooperate.<sup>208</sup> In contrast to the *Lebron* case, in this case, both the district court and the Ninth Circuit Court of Appeals decided that the warrantless home inspections were not a violation of an applicant's constitutional rights.<sup>209</sup>

The Ninth Circuit Court reached that decision by following the majority decision in *Wyman v. James*, 400 U.S. 309, 317-18 (1971).<sup>210</sup> The Ninth Circuit Court followed the Supreme Court's conclusion that home inspections for the purpose of welfare verification did not amount to "searches" that implicated Fourth Amendment protections.<sup>211</sup> The Ninth Circuit Court contended that *Sanchez* and *Wyman* had similar facts and the minor differences between the two cases were not enough to distinguish the cases.<sup>212</sup> However, an argument can be made and was made by Justice Fisher's dissent in *Sanchez*, that the differences were significant enough to conclude the home inspections implicated Fourth Amendment protections.<sup>213</sup>

In *Wyman*, the State of New York allowed social workers to conduct home visits of welfare recipients because it served the needs of the children in the

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<sup>202</sup> *Id.* at 918-19.

<sup>203</sup> *Id.* at 918.

<sup>204</sup> *Id.* at 918-19.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Sanchez*, 464 F.3d at 918-19.

<sup>208</sup> *Id.* at 916.

<sup>209</sup> *Id.* at 918.

<sup>210</sup> *Id.* at 921-23.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Sanchez*, 464 F.3d at 931-32 (Fisher, J., dissenting).

home and provided rehabilitative services.<sup>214</sup> If the welfare recipient did not consent to the home visit they would lose their benefits but not experience any form of criminal prosecution.<sup>215</sup> Some of the key differing facts in *Sanchez* from *Wyman* were that the home visits in *Wyman* were conducted by social workers wherein *Sanchez*, they were conducted by D.A. investigators.<sup>216</sup> Additionally, the social workers' main objective was the welfare of the child and providing rehabilitative services to the parents.<sup>217</sup> In *Sanchez*, the primary objective of the D.A. fraud investigators was to verify eligibility and due to their status as a peace officer, they had a simultaneous obligation to report any evidence of a crime detected while inside the home.<sup>218</sup> Further, the role and training of a social worker is much different from that of a sworn peace officer.<sup>219</sup> Justice Fisher's dissent relies on the historical principle that people have an expectation of privacy in their home and society has recognized that privacy.<sup>220</sup>

However, the Ninth Circuit Court in *Sanchez* further supported their decision by applying the special needs exception.<sup>221</sup> The Court acknowledged that privacy interests in the home are significant, but San Diego County had a special need to verify the eligibility of welfare recipients and prevent fraud.<sup>222</sup> The Court compared the government's special need to that in *Griffin v. Wisconsin*, 483 U.S. 868, 873, (1987), in which a probation system composed of warrantless searches was a special need because of the State's interest to rehabilitate and supervise probationers.<sup>223</sup> In the *Griffin* case, the Supreme Court concluded a special needs exception existed because stopping to obtain a warrant would interrupt the need to supervise and rehabilitate a probationer.<sup>224</sup> As Justice Fisher noted in his dissent, it was erroneous for the *Sanchez* majority to rely on *Griffin* because the population of people are different therefore, the analysis as to a convicted felon's privacy interest will naturally differ from someone who is a low income individual seeking welfare aid.<sup>225</sup>

Furthermore, the Ninth Circuit Court dismissed the fact that the requirement imposed on D.A. investigators to report evidence of a crime they may

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 921.

<sup>216</sup> *Id.* at 933-36.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Sanchez*, 464 F.3d at 933-36 (Fisher, J., dissenting).

<sup>220</sup> *Id.* at 937.

<sup>221</sup> *Id.* at 925-28.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Sanchez*, 464 F.3d at 925-28 (Fisher, J., dissenting).

encounter while inside a home, encroaches upon a person's right to be secure in their home against unreasonable government searches.<sup>226</sup> Instead, the Court concluded that because the "underlying purpose of the home visits are to verify eligibility for welfare benefits, and not for general law enforcement purposes, San Diego County articulated a valid special need."<sup>227</sup>

The issue of consent was also raised in *Sanchez* as it was in *Lebron*.<sup>228</sup> Even though the consent to search in *Sanchez* was obtained the same way and upon the same conditions as in *Lebron*, the Ninth Circuit Court reasoned that the consent was voluntary because the only penalty for refusing to sign it was a denial of benefits.<sup>229</sup> Justice Fisher called this coercion.<sup>230</sup> He added that under circumstances where you have someone in need of benefits, it is not reasonably expected that they will deny "consent" and lose the opportunity to get the help they need.<sup>231</sup> Nonetheless, under the *Sanchez* decision, home inspections for the purposes of welfare eligibility verification do not implicate the Fourth Amendment.<sup>232</sup>

Unfortunately, the Ninth Circuit Court failed to see that the facts in *Sanchez* were sufficiently different from the *Wyman* case to warrant a different outcome.<sup>233</sup> Clearly the home searches allowed under San Diego County's Project 100% implicated applicant's Fourth Amendment right and violated their privacy.<sup>234</sup> D.A. investigators are trained to look for incriminating activity, and even though that may not be their main priority during a home search, it can lead to a criminal conviction.<sup>235</sup>

This home inspection policy should not be allowed because it can deter individuals from applying for welfare benefits they need because they may not want to give up their right to privacy in order to obtain benefits.<sup>236</sup>

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<sup>226</sup> *Id.* at 921-22.

<sup>227</sup> *Sanchez*, 464 F.3d at 926.

<sup>228</sup> *Id.* at 919-25.

<sup>229</sup> *Sanchez*, 464 F.3d at 925-28 (Fisher, J., dissenting).

<sup>230</sup> *Id.* at 942-43.

<sup>231</sup> *Id.*

<sup>232</sup> *Sanchez*, 464 F.3d at 931.

<sup>233</sup> *Id.* at 934.

<sup>234</sup> *Id.* at 944.

<sup>235</sup> See *Wyman v. James*, 400 U.S. 309, 338-340 (1971) (Justice Marshall, whom Justice Brennan joins, dissenting "The fact that one purpose of the visit is to provide evidence that may lead to an elimination of benefits is sufficient to grant appellee protection since *Camara* stated that the Fourth Amendment applies to inspections which can result in only civil violations, 387 U.S., at 531. But here the case is stronger since the home visit, like many housing inspections, may lead to criminal convictions.").

<sup>236</sup> *Sanchez*, 464 F.3d at 942-44.



As such, the benefits of drug testing welfare recipients are almost none.<sup>237</sup> States that have drug tested all TANF recipients as a requirement have spent a lot of money and have yielded few results.<sup>238</sup> The State of Missouri had a law similar to the one Florida adopted and found that in 2014, the State of Missouri tested 446 TANF applicants and only forty-eight tested positive costing the State's testing program \$336,297.<sup>239</sup>

Even States that have implemented drug testing with a reasonable suspicion requirement, have not seen the savings they purport to gain with this invasive tactic.<sup>240</sup> The same can be said about home searches as "no locality in the nation" has a policy that applies to all applicants like San Diego County.<sup>241</sup> There have been other counties in the State of California that have implemented similar Project 100% policies but have discontinued them because of its lack of effectiveness.<sup>242</sup> Los Angeles County, California discontinued the policy in 2009 because they uncovered fraud in less than one-half-percent of homes searched.<sup>243</sup> San Francisco County, California also discontinued the practice after realizing it was a costly and ineffective way to combat fraud unless there was a reason to suspect a problem.<sup>244</sup> If these tactics are implemented into the SNAP program, applicants will be subjected to questionable constitutional searches when they are simply trying to obtain assistance to feed their family.<sup>245</sup>

## VI. RECOMMENDATIONS

Given that these tactics are constitutionally questionable and ineffective, Congress and the USDA should look to other similar government assistance programs and adopt their fraud prevention tactics. The Medicaid program is a government assistance program similar to SNAP because it provides health

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<sup>237</sup> Covert & Israel, *supra* note 5.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Project P100, supra* note 1.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Expert Rep. & Affidavit of Dolores Heaven, *Sanchez v. San Diego Cty*, 464 F.3d 916 (9th Cir. Cal. Sept. 2006) (No. 3:00cv1467), 2002 WL 32932525 ("Home visits are of value when you need to verify household composition or income but unless there is cause to suspect a problem, these requirements and other requirements can be more effectively verified by other methods.") ("We have not found that home visits on all cases are cost effective and would prefer to use funds for other purposes related to CalWORKs.").

<sup>245</sup> *See Project P100, supra* note 1.

care to low income individuals and other qualifying individuals.<sup>246</sup> Medical providers such as doctors and hospitals have a role similar to that of SNAP retailers because program recipients go to them to “use” their benefits.<sup>247</sup> Therefore, there are a few tools that the USDA can borrow from the Medicaid program.

In 2010, the Affordable Care Act (ACA) reformed the healthcare system and introduced various requirements aimed at improving Medicaid program integrity.<sup>248</sup> Among those improvements was informing the public of their right to bring a civil action against medical providers or program recipients engaged in fraud. The USDA has the ability to take advantage of the same policy under the qui tam provision within the False Claims Act (FCA) and should seek to enforce it against retailers that engage in SNAP fraud.<sup>249</sup> The qui tam provision allows a citizen to bring a lawsuit on behalf of the government against “[V]irtually any individual or corporate entity that makes a claim for federal payment.”<sup>250</sup> This provision provides an incentive to private citizens to protect government funds because they can receive “at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.”<sup>251</sup> Under this type of action, a retailer could have civil sanctions imposed that can be “triple the amount of actual damage suffered by the United States, plus a “civil penalty” of \$5,000.00 to \$10,000.00 for each violation.”<sup>252</sup>

The ACA took advantage of this existing statute and took the FCA to a new level.<sup>253</sup> It made substantive changes to the definitions within the law to make them beneficial when used to combat fraud in the Medicaid context.<sup>254</sup> For example, “the FCA intent requirement was eliminated, meaning that violations can arise whenever a false statement is made that is “material to a false or fraudulent claim”; no longer must a defendant be shown to have used a false statement “to get” a false claim “paid or approved by the Government.”<sup>255</sup> The implementation of this provision in the Medicaid integrity plan has proven success as research shows, that qui tam provision cases were very successful

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<sup>246</sup> *Medicaid*, MEDICAID, <https://www.medicaid.gov/medicaid/index.html> (last visited Dec. 16, 2017).

<sup>247</sup> Julie E. Kass & John S. Linehan, *Fostering Healthcare Reform Through A Bifurcated Model of Fraud and Abuse Regulation*, 5 J. HEALTH & LIFE SCI. L. 75, 79, 92 (2012).

<sup>248</sup> *Id.* at 89.

<sup>249</sup> Jan P. Mensz, Note, *Citizen Police: Using the Qui Tam Provision of the False Claims Act to Promote Racial and Economic Integration in Housing*, 43 U. MICH. J.L. REFORM 1137, 1149 (2010).

<sup>250</sup> *Id.* at 1153.

<sup>251</sup> CAL. GOV'T CODE § 12652 (West 2013).

<sup>252</sup> *United States v. Truong*, 860 F. Supp. 1137, 1140 (E.D. La. 1994).

<sup>253</sup> Kass & Linehan, *supra* note 247 at 92.

<sup>254</sup> *Id.* at 87.

<sup>255</sup> *Id.*

“netting over \$2.3 billion in recoveries, and \$385 million going to private plaintiffs.”<sup>256</sup>

Raising awareness of this anti-fraud measure, can help deter retailers from committing fraud because it empowers any citizen to bring a qui tam action in conjunction with the FNS.<sup>257</sup>

## VII. CONCLUSION

Congress developed and codified the food stamp program, now named SNAP, because it was necessary to alleviate hunger in America and stabilize the agricultural economy.<sup>258</sup> SNAP benefits continue to be vital in assisting low income individuals obtain nutritious foods.<sup>259</sup> Unfortunately, many opponents of SNAP fail to see the positive impact SNAP has on households that receive benefits and on the agricultural economy.<sup>260</sup> The focus of opponents is centered on restricting the types of foods SNAP recipients are allowed to purchase and fraud within the program.<sup>261</sup>

Those misconceptions have unfairly targeted SNAP recipients, leading lawmakers to push for policies that change the structure of the SNAP program and implement fraud prevention tactics that implicate recipients' constitutional rights.<sup>262</sup> Lawmakers have attempted to change SNAP into a block grant to shift program control from the Federal government to the States.<sup>263</sup> This would allow lawmakers to implement fraud prevention tactics that are constitutionally suspect such as home searches and drug testing.<sup>264</sup> Subjecting program recipients and applicants to drug testing and home searches has the potential to deter them from obtaining the benefits they need.<sup>265</sup> As the *Lebron* case showed, Lebron was denied TANF benefits after he refused to submit to a drug test even though he would have received the benefits had drug testing not been a requirement.<sup>266</sup> Additionally, mandatory home searches as a condition to receiving benefits are probably unconstitutional because they encroach upon individuals' Fourth Amendment rights to privacy and to be free from unreasonable government searches.<sup>267</sup>

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<sup>256</sup> *Id.* at 95.

<sup>257</sup> *See Mensz, supra* note 249 at 1153.

<sup>258</sup> *The History of SNAP, supra* note 28.

<sup>259</sup> *Id.*

<sup>260</sup> Hanson, *supra* note 9.

<sup>261</sup> *The History of SNAP, supra* note 28.

<sup>262</sup> *See Delaney, supra* note 127.

<sup>263</sup> Chite, *supra* note 5; *See Delauro, supra* note 19 at 300.

<sup>264</sup> *Drug Testing For Welfare Recipients And Public Assistance, supra* note 123.

<sup>265</sup> Sanchez, 464 F.3d at 942-44.

<sup>266</sup> *Lebron*, 772 F.3d at 1357-58.

<sup>267</sup> Sanchez, 464 F.3d at 944.

To reduce fraud in the SNAP program Congress should focus on implementing tactics that target retailers; the real culprits of the majority of the fraud.<sup>268</sup> Retailers are responsible for almost eighty five percent of all trafficking redemptions.<sup>269</sup> The most effective approach to accomplish this is through borrowing strategies from Medicaid because of its similarities to SNAP.<sup>270</sup> The Medicaid program has taken advantage of using the qui tam provision and that has saved the program billions of dollars.<sup>271</sup>

Reducing fraud in the SNAP program is particularly important because President Trump has proposed a \$230 billion reduction from the Farm Bill budget over the next ten years.<sup>272</sup> This proposal will cause a cut in spending to SNAP of more than twenty-five percent and billions of dollars in reduction to farm subsidies.<sup>273</sup> Reducing fraud rates among SNAP can help offset budget cuts to the program because statistics show that about \$858 million dollars are lost every year to SNAP fraud.<sup>274</sup>

MARIA E. VALENCIA<sup>275</sup>

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<sup>268</sup> See Mantovani, Williams, & Pflieger, *supra* note 102.

<sup>269</sup> *Id.*

<sup>270</sup> See *Medicaid*, *supra* note 246.

<sup>271</sup> Kass & Linehan, *supra* note 247, at 95.

<sup>272</sup> Carol Ryan Dumas, *Trump budget slashes farm bill funding*, CAP. PRESS (May 24, 2017, 11:24 AM),

[http://www.capitalpress.com/Nation\\_World/20170524/trump-budget-slashes-farm-bill-funding](http://www.capitalpress.com/Nation_World/20170524/trump-budget-slashes-farm-bill-funding).

<sup>273</sup> Catherine Boudreau, *Trump budget is not kind to the farm bill*, POLITICO MORNING AGRIC. (May 23, 2017, 10:00 AM), <http://www.politico.com/tipsheets/morning-agriculture/2017/05/23/trump-budget-is-not-kind-to-the-farm-bill-220457>.

<sup>274</sup> Mantovani, Williams, & Pflieger, *supra* note 102.

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