STATE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM APPEALS BOARD

In Re:

Case No. 01-2025

State of Kansas SNAP Appeal

REPLY BRIEF IN SUPPORT OF APPEAL FILED BY KANSAS DEPARTMENT FOR CHILDREN AND FAMILIES

ARGUMENTS AND AUTHORITIES

At no point in the USDA's Response to the Kansas Department for Children and Families' (KDCF) appeal does it claim Routine Use 8, the very reason why KDCF is refusing to turn over requested data, is legal. It is entirely silent on the issue. Perhaps this is because a federal court has already found that other states resisting production of the data "are likely to show the SNAP Act prohibits them from disclosing to USDA the information demanded in the formal warnings and, consequently, that they have shown a likelihood of success on their claim that USDA, in making such demand, acted in a manner contrary to law." *State of California, et al. v. United States Department of Agriculture, et al., Case No. 3:25-cv-6310 (N.D. Ca., filed July 28, 2025),* Doc. No. 83, p. 12. It could also be because the USDA itself, via its Deputy Under Secretary for the Food, Nutrition, and Consumer Services mission area, swore under oath that it would be amending the June 23, 2025, System of Records Notice (SORN), specifically Routine Use 8 (KDCF's Motion to Reverse, Exhibit L).

Through nineteen (19) pages, USDA nibbles around the borders of saying Routine Use 8 is legal, but at no point does it actually do so. Instead, it offers the following (in highly summarized fashion): "Even though we explicitly state in the SORN that we intend to take the requested confidential data and circulate it to other local, state, federal, and foreign governments and their respective agencies to enforce civil, criminal, and administrative laws, we won't actually do it if we determine that doing so is illegal. By the way, we don't consider it to be illegal." It is difficult

to conceive of a more brazen assertion of absolute authority in light of established law. By way of the SORN, USDA seeks to change federal legislation with the following argument: "Ignore what we said. Trust us." When this Board considers that the confidential information of thousands of Kansans and tens of millions of dollars are at stake, "Trust us" simply will not suffice.

KDCF has complied with state and federal law at every stage of this process. KDCF has maintained the confidentiality of thousands of Kansans' personal information, as required by both the Food Nutrition Act (FNA) and the Kansas Cybersecurity Act (KCA). USDA's data demand is unlawful because Routine Use 8 intends to use SNAP benefit applicant data outside permissible FNA purposes. **USDA does not deny this**.

In Exhibit F to its Response, USDA notes that in analysis of public comments, "USDA agrees with the three commenters who suggested removing the reference to 'foreign' governments from the language on when and where to disclose records when a potential violation has been identified." In USDA's public declaration it admits the SORN *must and will* be updated to "remove reference to 'foreign agencies' agencies, as USDA does not foresee an instance when any such sharing would be necessary for administration and enforcement purposes" (KDCF's Motion to Reverse, Exh. L, ¶ 11). This is dispositive evidence that USDA recognized its Routine Use 8 failed to comply with 7 U.S.C. § 2020(e)(8), which only permits the SNAP applicant data's use for the "administration or enforcement" of SNAP.

USDA's argument that KDCF misconstrues the Routine Uses by citing to a prefatory clause that is made moot by the Routine Uses themselves is an incredible and disingenuous argument at this stage. On its face the very existence of this argument underscores how any presumption of regularity in USDA action has been rebutted since it places KDCF in an impossible position. Which provision should it rely upon? Routine Use 8 that everyone seems to agree violates FNA

but that is still in effect or a general introductory paragraph that seemingly contradicts Routine Use 8? Choosing incorrectly leaves the states, including KDCF, subject to the arbitrary and capricious whim of likely unlawful federal agency action. This is wholly untenable.

I. USDA's Representations About it Acting Legally Are Contradicted by Its Own Actions.

It appears that the parties are in agreement that KDCF is required to produce certain data to USDA as long as the request complies with the SNAP statute. KDCF maintains that producing the requested data given the existence of Routine Use 8 violates FNA. Interestingly, USDA does not argue that Routine Use 8 is legal. Instead, it argues that, despite what Routine Use 8 clearly reads, USDA won't use the data in a manner that violates FNA because USDA says it won't. This circular argument only bolsters KDCF's position, however.

A. USDA's Argument Concerning Prefatory Language in the SORN is Without Merit.

USDA argues that KDCF misinterprets the SORN because it provides for the following language as a preface to the Routine Uses:

> Records created or stored in this system may be disclosed pursuant to the permitted routine uses outlined below to the extent such uses are authorized by, among other authorities, 7 U.S.C. 2020(a)(3) and (e)(8), 7 CFR 272.1(c)(1) and (e), and Executive Orders 14218 and 14243.

In other words, USDA asserts that this paragraph stands for the proposition that USDA will only use the data collected as set forth in the Routine Uses so long as doing so complies with the referenced statutes and executive orders. This bootstrapping does not save USDA, however, since USDA has repeatedly asserted the Routine Uses complies with the referenced statutes and executive orders. First, the SORN itself lists all the same statutes and executive orders as the "Authority for Maintenance of the System" (KDCF's Appeal, Exh. B). Second, the July 9, 2025, and July 23, 2025, letters that immediately followed the publication of the SORN explicitly

reference Executive Order 14243 as a basis for the data demand (KDCF's Appeal, Exhs. C and D). Third, the August 12, 2025, and August 20, 2025, letters from USDA to Governor Kelly specifically refer to 7 U.S.C. 2020(e)(8)(a) as a basis for the demand (KDCF's Appeal, Exhs. F and H). In other words, USDA has repeatedly represented that it believes Routine Use 8 to comply with the referenced statutes and executive orders. Finally, one would assume USDA believes Routine Use 8 to be legal given its inclusion in the SORN in the first place. Simply put, USDA has made itself the sole arbiter of whether or not Routine Use 8 is legal and has made it very clear that it believes it to be legal. It is wildly disingenuous to argue that the referenced prefatory language saves USDA from KDCF's objections when it is clear USDA believes Routine Use 8 is legal. If it did not believe so, it would presumably revoke the Routine Use 8 altogether.[1]

B. USDA's Other Representations Concerning Its Conduct Should be Disregarded.

In addition to the foregoing, USDA offers two other arguments concerning the legality of the SORN that are equally unpersuasive. First, it asserts,

> USDA informed all State Agencies that USDA would use the SNAP data to ensure the integrity of SNAP, including by verifying SNAP eligibility and conducting other Program compliance checks (USDA Brief, 11).

The form of this argument is similar to the prior argument in that USDA argues that, despite what Routine Use 8 says, USDA will only use the requested data for administration and enforcement of the SNAP statute. For this argument to make any sense, Routine Use 8 would need to not exist.

Finally, USDA argues that there is a presumption that it is acting in compliance with applicable federal law "in absence of evidence to the contrary." Routine Use 8 is literally "evidence to the contrary." If an uninvolved person were to read USDA's brief, they would think

[1] Of course, USDA has already stated it will be revising the SORN and Routine Use 8 specifically, which is the subject to KDCF's Motion to Reverse or Stay.

Routine Use 8 did not exist. Instead of addressing the issue of Routine Use 8 directly, USDA dances around it with empty arguments about how will not use the data illegally. At no point does USDA argue that Routine Use 8 is legal, and if it is not legal, then KDCF could not have acted contrary to 7 U.S.C. § 2020(e)(8) in refusing to produce the requested data.

II. KDCF had "good cause" to not comply with USDA unlawful request—which USDA has admitted does not comply with the FNA.

USDA argues KDCF's noncompliance does not meet the regulatory framework in 7 C.F.R. § 276.6(a) for evaluating "good cause" (USDA Response, 12). USDA argues four enumerated circumstances provided in the regulation are inapplicable (*Id* at 13). USDA is wrong. First, good cause exists for noncompliance with an unlawful request. Agency action may be reversed where it is not in accordance with law or the agency action exceeded the scope of its authority. 5 U.S.C. §706. Given USDA's express admissions (Shiela Corley's Declaration in *California v. USDA* and Public Comment Analysis) that Routine Use 8 violates section 2020(e)(8)'s administration and enforcement purposes provision, KDCF had good cause to not transmit data that would be used illegally.

Good cause exists because USDA's data request results in a substantial adverse impact on KDCF's management of SNAP and there is ongoing legal uncertainty about the demand. As an initial matter, simply because FNS unilaterally has not "determine[d] good cause to exist," does not mean this Board is limited to USDA's decision. 7 C.F.R. § 276.6(a)(4). "Whenever" USDA makes a claim against a state agency, that state agency "may appeal the claim by requesting an administrative review." 7 C.F.R. § 276.7(a). The entire purpose of this administrative review process is to assess whether USDA's claim is correct, not to wholistically adopt their assertions as automatically true. KDCF extensively laid out its arguments that good cause existed in its opening

brief. This Board should consider KDCF's good cause arguments, including its reasonable concern about the legal uncertainty of the demand, even if USDA did not.

Moreover, while the federal court's decision in *California v. USDA* may not automatically apply to all judicial districts, it would apply to this Board's review. If the only federal court to review the legality of Routine Use 8 finds that it violates SNAP, how could that decision not, at the very least, constitute good cause? As previously indicated, the court has already found that Routine Use 8 likely violates SNAP when it entered a preliminary injunction against USDA. If a federal court finds that Routine Use 8 likely violates the FNA and USDA agrees that use violates the FNA, how can this Board find otherwise?

Additionally, USDA's data request changed the SNAP program and adversely affected KDCF's operation of the program. While USDA maintains its request "did not change any element or aspect of SNAP," it fails to reconcile that contention with the undeniable fact that USDA is seeking more data than it has ever demanded in SNAP's 60-year history. This position also ignores that while USDA has possessed certain mechanisms to obtain data since the Food Stamp Act of 1964, that does not inherently mean it has always been permitted to unlawfully use data, like transmitting it to foreign entities—indeed that has never been the case under section 2020(e)(8). Once again, USDA has expressly admitted that its original plan to use the data as described in Routine Use 8 was not for "administration and enforcement purposes." KDCF should not be permitted to transmit names, social security numbers, and addresses of American citizens when USDA's express plan is to send to that information to foreign entities.

USDA's disallowance may also be reversed where it is arbitrary and capricious. *Id.* "An agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.' *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 292, 144 S. Ct. 2040, 2053, 219 L. Ed. 2d

772 (2024) (internal quotations omitted). Here, USDA's actions in requesting the data were unlawful and unreasonable in light of repeatedly being notified of legal concerns about the data request. Further, USDA never bothered to justify its position as it does now with a fallback to non-controlling introductory language in the SORN. It simply ignored KDCF's protestations.

III. USDA Misreads the Plain Language of the Kansas Cybersecurity Act, Which Prohibits KDCF from Transmitting Data for Unauthorized, or Unlawful, Access.

USDA argues that production of data by KDCF to USDA would not be a breach under the Kansas Cybersecurity Act (KCA) (USDA Response, 15). The relevant statute, K.S.A. 75-7237(b) defines breach as follows under the KCA:

> 'Breach' or 'breach of security' means unauthorized access of data in electronic form containing personal information. Good faith access of personal information by an employee or agent of an executive branch agency does not constitute a breach of security, provided that the information is not used for a purpose unrelated to the business or subject to further unauthorized use.

USDA argues it would be impossible for there to be a breach because the data production would "not be unauthorized" (USDA Response, 15). The error in USDA's analysis is that the authorization must come from the law, not the person who wants the data. That USDA wants the data and authorizes it is of no legal importance in this state statute. Whether there is "unauthorized access" is a question of whether there is a lawful request permitting disclosure of the data otherwise protected by state and federal law. Here, there has not been a lawful request because up until now, USDA has not previously committed to use of the data only consistent with the Food Nutrition Act. Thus, at the time of the request, USDA was asking for data in Routine Use 8 outside federal law, and as such, disclosure of such data would be "unauthorized."

Moreover, KDCF's obligations under the KCA are not limited to just a "breach." K.S.A. 75-7240(a)(4) mandates that executive branch agency heads like KDCF Secretary Howard, shall "ensure that if an agency owns, licenses or maintains computerized data that includes personal

information, confidential information or information, the disclosure of which is regulated by law, such agency shall, in the event of a *breach* or *suspected breach* of system security or an *unauthorized exposure* of that information:[take specified actions]" (emphasis added). Not only would USDA accessing the data for the Routine Use 8 purposes be a "breach," but it would also be "unauthorized exposure" under the KCA. KDCF is precisely concerned with unauthorized exposure because a federal court has held: "Plaintiff States are likely to show the SNAP Act prohibits them from disclosing to USDA the information demanded in the formal warnings and, consequently, that they have shown a likelihood of success on their claim that USDA, in making such demand, acted in a manner contrary to law." *California v. USDA*, Doc. No. 83, p. 12. If federal law prohibits the production of the data requested, disclosure of the data by KDCF would be "unauthorized." In turn, DCF would be violating the KCA.

USDA further notes the KCA contains a good-faith access exception to disclosure of data (USDA Response, 15, 16). But that exception is limited to an "employee or agent of an executive branch agency." USDA fails to recognize that the state statute defines "executive branch agency" as limited to the State of Kansas. Specifically, K.S.A. 75-7237(g) provides, "'Executive branch agency' means any *agency in the executive branch of the state of Kansas*, including the judicial council but not the elected office agencies, the adjutant general's department, regents' institutions, or the board of regents" (Emphasis added). The exception does not permit good faith access by agencies like USDA in the executive branch of the *federal government*.

Lastly, USDA argues the requirements of the KCA "make it clear that the statute was intended to apply to circumstances vastly different from the one at hand" (USDA Response, 16). USDA argues that the terms "data breach" and "cyberattack" are "consistently grouped together by the [Kansas Cybersecurity Act], implying a commonality or similarity between the two terms."

(*Id.*). USDA reasons its request for records can "hardly be characterized in the same light as a cyberattack" (*Id*. at 16, 17). This argument fails because as noted above the obligations under the KCA are not only triggered by a "cyberattack;" rather they are triggered by "unauthorized access" or "unauthorized exposure" of the kind of information at issue here. The point of the statute is to protect personal information of individuals that is in the possession of executive branch agencies, which includes protection from unlawful disclosure as would be the case here. The plain language of the act does not support USDA's reading suggesting there is only a breach when there is a cyberattack. Such a reading would not encompass a rogue employee who disseminated or improperly accessed data. Such result is not consistent with the KCA.

IV. A Federal Court Found USDA's Data Request is Likely Unlawful and This is Good Cause for KDCF's Noncompliance with USDA's Request.

USDA argues the orders in *State of California, et al. v. United States Department of Agriculture, et al.*, "have no bearing on KDCF" (USDA Response, 17). Its basis for this argument is that Kansas is not a party to this litigation. This case has significant bearing to KDCF because it is the *only meaningful adjudication* of whether USDA's request is lawful. If USDA's actions violate federal law in the California matter, then under that same federal law it is illegal in Kansas. Regardless of whether the district court can afford relief to Kansas is an irrelevant question because USDA is now on notice its request is likely unlawful. If USDA is really arguing that "we know it's illegal in those states, but nobody has held us to account for it being illegal in these other states," then such an assertion is laughable. States cannot meaningfully maintain a federal state-partnership in the administration of multi-million-dollar benefit program if the federal partner operates a "catch me if you can" approach to whether its conduct is legal in different jurisdictions. The *California v. USDA* bears heavily on KDCF's actions and the outcome of this appeal.

USDA also argues KDCF's noncompliance predated the orders in the *California* litigation, noting "the preliminary injunction was not entered until October 15, 2025, and therefore could not have been a factor in KDCF's decision not to comply" (USDA Response, 18). But the lawsuit was filed on July 28, 2025. The notices sent by KDCF to USDA on July 30, 2025, August 14, 2025, September 5, 2025, and August 19, 2025, all noted the legal concerns regarding the data request. At least four times, KDCF notified USDA that it was tracking the *California* litigation, which dealt with the legality of USDA's request. That a federal court granted the preliminary injunction against USDA on October 15, 2025, after USDA had already disallowed funds to KDCF, further substantiates KDCF's position.

On September 5, 2025, KDCF asked USDA to hold the disallowance in abeyance pending the outcome of the litigation; USDA never responded. Instead, USDA rushed through the disallowance process, including a one-line denial of the CAP on September 19, 2025, just hours after it had been submitted, and then subsequently sent the disallowance letter the next day on Saturday, September 20, 2025. This shows USDA acted with haste or anger or both in rushing to complete a disallowance process despite being asked to wait for the outcome of litigation. As a result, USDA was wrong; a federal court found the request likely unlawful; KDCF has appealed the disallowance; and the disallowance now must be reversed.

Respectfully Submitted,

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