

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

HAIYAN CHEN, KENYA WATSON, S.O.,  
GERTRUDE CRIBBS, HANA BROOME, and MEI  
IENG LEE, individually, and on behalf of all  
similarly situated,

Plaintiffs,

v.

BROOKE L. ROLLINS, in her official capacity as  
Secretary of the U.S. Department of Agriculture  
(USDA), and JAMES C. MILLER, in his official  
capacity as Administrator of the USDA Food and  
Nutrition Service,

Defendants.

23-cv-1440-VEC

**Oral Argument Requested**

**PLAINTIFFS' MEMORANDUM OF LAW  
IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN  
OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 2

I. Liability for Replacement of Stolen SNAP Benefits ..... 3

II. Plaintiffs ..... 6

ARGUMENT ..... 6

I. The Court May Consider Materials Outside The Administrative Record. .... 6

II. The 2010 Regulation Is Contrary to Law and Should Be Set Aside. .... 8

A. A “Similar” Replacement Regime Would Permit The Replacement of Skimmed Benefits..... 8

B. Defendants’ Argument About Strict Liability for Losses Is Unavailing. .... 11

1. “Strict Liability” Does Not Bear Upon Recipients’ Rights to Replacement. . 11

2. Regardless, Even if Considered, Defendants’ Arguments Related to State Liability Are Based on a Flawed Premise..... 13

i. The Federal Government Was Primarily Liable for Issuance Losses Under The Paper Coupon Regime..... 13

ii. The 2023 Appropriations Act Does Not Change This Analysis. .... 17

III. The 2010 Regulation Is Arbitrary and Capricious and Should Be Set Aside..... 19

A. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Did Not Address Similarity at All. .... 19

B. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Failed to Consider an Important Aspect of the Problem—The Widespread Problem of Skimming..... 20

C. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Did Not Provide a Reasoned Explanation for Its Promulgation. .... 21

D. The 2010 Regulation Is Arbitrary and Capricious Because It Is Illogical, Since It Denies Protection to The Exact Population That Is Supposed to Benefit from the SNAP Program, Which Is Inconsistent with The Statutory Scheme. .... 22

IV.	The 2022 Policy Is Contrary to Law and Arbitrary and Capricious for The Same Reasons as The 2010 Regulation, and Should Be Set Aside. ....	23
A.	Plaintiffs’ Complaint Put Defendants on Notice of Plaintiffs’ Claims Concerning 2022 Policy.....	23
B.	OTDA and HRA are Defendants’ Agents and Their Statements Prove The Existence of The USDA’s Policy of Non-Replacement.....	24
C.	Defendants’ 2022 Policy Is Reviewable Agency Action.....	26
D.	The 2022 Policy Is Contrary to Law.....	27
E.	The 2022 Policy Is Arbitrary and Capricious. ....	28
V.	Permanent Injunction Is an Appropriate Remedy.....	28
A.	Defendants Fail to Address Plaintiffs’ Entitlement to a Permanent Injunction. ....	28
B.	Both Injunctive and Declaratory Relief Are Necessary and Appropriate.....	29
	CONCLUSION.....	31

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>In re 21st Birthday Denials of Special Immigrant Juv. Status Applications by USCIS,</i> 2023 WL 3949736 (E.D.N.Y. Feb. 10, 2023).....	7, 20
<i>Abrego Garcia v. Noem,</i> 2025 WL 1135112 (4th Cir. Apr. 17, 2025).....	29
<i>All. To Save Mattaponi v. U.S. Army Corps of Engineers,</i> 515 F. Supp. 2d 1 (D.D.C. 2007).....	26
<i>Amadei v. Nielsen,</i> 348 F. Supp. 3d 145 (E.D.N.Y. 2018).....	27
<i>Arkansas v. Block,</i> 825 F.2d 1254 (8th Cir. 1987).....	11
<i>Armstrong v. Exec. Off. of the President, Off. of Admin.,</i> 1 F.3d 1274 (D.C. Cir. 1993).....	29
<i>Atanackovic v. Duke,</i> 399 F. Supp. 3d 79 (W.D.N.Y. 2019).....	7
<i>Bar MK Ranches v. Yuetter,</i> 994 F.2d 735 (10th Cir. 1993).....	7
<i>Bennett v. Spear,</i> 520 U.S. 154 (1997).....	26
<i>Bowen v. Massachusetts,</i> 487 U.S. 879 (1988).....	28
<i>Cardenas v. Region 9 IV-D,</i> 2023 WL 9002726 (C.D. Cal. Dec. 28, 2023).....	7
<i>Christ the King Manor, Inc. v. Sec’y U.S. Dept. of Health and Hum. Servs.,</i> 730 F.3d 291 (3d Cir. 2013).....	20
<i>Cigar Ass’n of Am. v. U.S. Food &amp; Drug Admin.,</i> 964 F.3d 56 (D.C. Cir. 2020).....	19
<i>Columbia Gas Transmission, LLC v. Heaster,</i> 2021 WL 126204 (N.D. W. Va. Jan. 12, 2021).....	30
<i>Comprehensive Cmty. Dev. Corp. v. Sebelius,</i> 890 F. Supp. 2d 305 (S.D.N.Y. 2012).....	8

<i>Ctr. for Native Ecosystems v. Salazar</i> , 711 F. Supp. 2d 1267 (D. Colo. 2010).....	21
<i>Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm’n</i> , 106 F.4th 1113 (D.C. Cir. 2024).....	22
<i>Familias Unidas por la Justicia, AFL-CIO v. U.S. Dep’t of Lab.</i> , 2024 WL 3276419 (W.D. Wash. July 2, 2024) .....	22, 23
<i>f’real Foods, LLC v. Hamilton Beach Brands, Inc.</i> , 2020 WL 4015481 (D. Del. July 16, 2020) .....	30
<i>Gallegos v. Lyng</i> , 891 F.2d 788 (10th Cir. 1989) .....	15, 16, 22
<i>Glara Fashion, Inc. v. Holder</i> , 2012 WL 352309 (S.D.N.Y. Feb. 3, 2012).....	7
<i>Guertin v. United States</i> , 743 F.3d 382 (2d Cir. 2014).....	28
<i>Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.</i> , 912 F.2d 1525 (D.C. Cir. 1990).....	26
<i>Hettleman v. Bergland</i> , 642 F.2d 63 (4th Cir. 1981) .....	9, 10
<i>In re Initial Public Offering Sec. Litig.</i> , 241 F. Supp. 2d 281 (S.D.N.Y. 2003).....	24
<i>J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.</i> , 534 U.S. 124, 142 (2001).....	18
<i>Matter of Leggio v. Devine</i> , 34 N.Y.3d 448 (2020) .....	24
<i>In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.</i> , 457 F. Supp. 2d 298 (S.D.N.Y. 2006).....	24
<i>Monsanto Co. v. Geertson Seed Farms</i> , 561 U.S. 139 (2010).....	28, 30
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	19
<i>Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.</i> , 894 F.3d 95 (2d Cir. 2018).....	8

*Nat’l Audubon Soc’y v. Hoffman*,  
132 F.3d 7 (2d Cir. 1997).....7

*Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*,  
2015 WL 423090 (D. Or. Feb. 2, 2015).....20

*New Mexico Dep’t of Health & Soc. Servs. v. Sec’y of Agr.*,  
376 F. Supp. 953 (D.N.M. 1973) .....4

*New York v. Scalia*,  
490 F. Supp. 3d 748 (S.D.N.Y. 2020).....7

*New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v. New York*,  
588 U.S. 752 (2019).....29

*New York v. U.S. Dep’t of Health and Human Servs.*,  
414 F. Supp. 3d 475 (S.D.N.Y. 2019).....19, 22

*New York v. U.S. Dep’t of Lab.*,  
477 F. Supp. 3d 1 (S.D.N.Y. 2020) .....21

*Phillips v. Girdich*,  
408 F.3d 124 (2d Cir. 2005).....24

*Pub. Citizen, Inc. v. Mineta*,  
340 F.3d 39 (2d Cir. 2003).....8, 22

*Reynolds v. Giuliani*,  
118 F. Supp. 2d 352 (S.D.N.Y. 2000).....24

*Rodriguez v. Carson*,  
401 F. Supp. 3d 465 (S.D.N.Y. 2019).....28

*Safari Club Int’l v. Jewell*,  
111 F. Supp. 3d 1 (D.D.C. 2015).....7

*Stewart v. Butz*,  
356 F. Supp. 1345 (W.D. Ky. 1973), *aff’d*, 491 F.2d 165 (6th Cir. 1974) .....13, 22, 23

*Taylor v. City of New York*,  
269 F. Supp. 2d 68 (E.D.N.Y. 2003) .....10, 22

*Tyson v. Norton*,  
390 F. Supp. 545 (D. Conn. 1975), *aff’d in part, vacated in part on other grounds sub nom. Tyson v. Maher*, 523 F.2d 972 (2d Cir. 1975).....12

*United States v. Fausto*,  
484 U.S. 439 (1988).....17

*United States v. Texas*,  
507 U.S. 529 (1993).....4

**Statutes**

5 U.S.C. § 706(2)(A).....8, 19

7 U.S.C. § 2016(e) .....11, 12, 13

7 U.S.C. § 2016(h) ..... *passim*

15 U.S.C. § 1693, *et seq.*.....6, 16

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*..... *passim*

Appropriations Act, H.R. 2617, 117th Cong. § 501(b) (2023)..... *passim*

Electronic Funds Transfer Act, 15 U.S.C. § 1693, *et seq.* (1978) .....6, 16

Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66, Title I, §  
1011(j), 109 Stat. 710 (1995), codified at 7 U.S.C. § 2025(a).....14

Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified as  
amended at 7 U.S.C. § 2011 *et seq.*)..... *passim*

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.  
L. No. 104-193, § 825, 110 Stat. 2105, 2324 (1996) .....5

**Rules and Regulations**

7 C.F.R. § 274.6 (1989) ..... *passim*

46 Fed. Reg. 8935 (1981) .....14

46 Fed. Reg. 50,277 (1981) .....3

47 Fed. Reg. 50,681 (1982) .....3, 4, 5, 13, 15, 16

18 N.Y.C.R.R. § 387.0(a) .....24

Fed. R. Civ. P. 8(a) .....24

Fed. R. Civ. P. 12(e) .....24

Local Civ. R. 56.1(a).....6

**Other Authorities**

A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) .....18

Adam Liptak, *In Showdowns With The Courts, Trump Is Increasingly Combative*, N.Y. TIMES, Apr. 15, 2025, <https://www.nytimes.com/2025/04/15/us/politics/trump-defy-courts.html>.....30

Ashley L. Munger *et al.*, *The Role of the Supplemental Nutrition Assistance Program in the Relationship Between Food Insecurity and Probability of Maternal Depression*, 11 J. HUNGER & ENV’T NUTRITION 147 (2016) .....30

*Hearing on the Food Stamp Program Before the Subcomm. on Domestic Mktg., Consumer Rels. and Nutrition, 97th Cong. 97–98 (1981)* .....14

R. William Evans *et al.*, *Investigating the Poverty-Reducing Effects of SNAP on Non-nutritional Family Outcomes: A Scoping Review*, 28 MATERNAL & CHILD HEALTH J. 438 (2024) .....30

Stephanie Ettinger de Cuba *et al.*, *Loss Of SNAP Is Associated With Food Insecurity And Poor Health In Working Families With Young Children*, 38 HEALTH AFFAIRS 765 (2019) .....30

**TABLE OF DEFINITIONS AND ABBREVIATIONS**

<b>Term</b>	<b>Definition</b>
2010 Regulation	7 C.F.R. § 274.6
2022 Policy	Defendants' policy prohibiting replacement of skimmed SNAP benefits with federal funds
2023 Appropriations Act	2023 Appropriations Act, H.R. 2617, 117th Cong. § 501(b) (2023)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551 <i>et seq.</i>
Broome Decl.	Declaration of Hana Broome in support of Plaintiffs' Motion for Summary Judgment, made December 14, 2024
Chen Decl.	Declaration of Haiyan Chen in support of Plaintiffs' Motion for Summary Judgment, made October 22, 2024
Cribbs Decl.	Declaration of Gertrude Cribbs in support Plaintiffs' Motion for Summary Judgment, made December 16, 2024
Defendants	U.S. Department of Agriculture (USDA) and USDA Food and Nutrition Service
EBT	Electronic Benefits Transfer
Food Stamp Act	Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified as amended at 7 U.S.C. § 2011 <i>et seq.</i> )
HRA	Human Resources Administration of the New York City Department of Social Services
Lee Decl.	Declaration of Mei Ieng Lee in support of Plaintiffs' Motion for Summary Judgment, made December 8, 2024
OTDA	New York State Office of Temporary and Disability Assistance
Plaintiffs	Haiyan Chen, Kenya Watson, S.O., Gertrude Cribbs, Hana Broome, and Mei Ieng Lee
P-EBT	Pandemic Electronic Benefits Transfer
Record	Certified administrative record, produced by Defendants on September 4, 2024 (ECF No. 51)

<b>Term</b>	<b>Definition</b>
SNAP	Supplemental Nutrition Assistance Program
S.O. Decl.	Declaration of S.O. in support of Plaintiffs' Motion for Summary Judgment, made December 16, 2024
Watson Decl.	Declaration of Kenya Watson in support of Plaintiffs' Motion for Summary Judgment, made October 30, 2024

Plaintiffs respectfully submit this Memorandum of Law in further support of their Motion for Summary Judgment and in opposition to Defendants' Cross-Motion for Summary Judgment.

### **PRELIMINARY STATEMENT**

Plaintiffs' SNAP benefits were stolen from them through no fault of their own via a form of electronic theft known as "skimming." Plaintiffs are low-income, food insecure New York City residents who rely on their SNAP benefits to feed themselves and their families. Instead of helping skimming victims like Plaintiffs, Defendants implemented an arbitrary and capricious regulation and policy which prohibited replacement of skimmed benefits in contravention of federal law.

In promulgating the unlawful, arbitrary, and capricious regulation, codified at 7 C.F.R. § 274.6 (the 2010 Regulation), Defendants ignored the congressional mandate to implement a benefits replacement regime "similar" to the one that governed replacement of paper-based coupons, which would have permitted replacement of skimmed benefits. *See* 7 U.S.C. § 2016(h)(7). Rather than engaging with this clear requirement, Defendants cherry-pick language to suggest that the statutes and regulations governing SNAP prohibit the use of federal funds to replace stolen benefits because liability for losses is the responsibility of the states. Their argument is both misplaced and wrong. At issue here is SNAP participants' *entitlement* to replacement benefits, not the division of governmental responsibility for the cost of such replacements. As to the latter issue, Defendants' assertion that the states are "strictly liable" for costs is simply untrue. The federal budget is and always has been the primary source of funding for the SNAP program and for benefit replacements. That Congress has assigned some portion of financial responsibility to the states does not change this fact. In sum, Defendants' arguments to the contrary are unpersuasive and miss the fundamental point: Congress required Defendants to promulgate a regulation that permitted replacement of all benefits lost or stolen before receipt, which should have included skimmed benefits, but did not.

The 2010 Regulation also cannot withstand challenge because Defendants ignored the pervasive and widely-reported upon issue of skimming at the time of promulgation. Defendants seek to excuse their failure to consider this important aspect of the problem because, they say, they were not required to consider issues not specifically presented to them. But Defendants do not cite, because they cannot, any authority for their position. Permitting an agency to ignore a widely-known problem that directly impacts the rule they are promulgating would allow agencies to stick their metaphorical heads in the sand in clear violation of the goals of the APA.

In addition to the 2010 Regulation, Defendants promulgated the 2022 Policy which suffers from the same flaws as the Regulation. Defendants attempt to disclaim responsibility for the 2022 Policy, arguing that Plaintiffs failed to adequately plead that any such federal policy existed. In particular, they claim that the communiques issued by OTDA and HRA are just that and do not introduce any federal policy on point. Defendants' arguments on this score should be rejected for two reasons: (i) the communiques themselves reference USDA's prohibition on replacing skimmed benefits; and (ii) OTDA and HRA are both agents of USDA. Because Defendants have no answer to either point, the 2022 Policy should fail for the same reasons as the 2010 Regulation.

For all these reasons and more, Plaintiffs' motion for summary judgment should be granted, and Defendants' cross-motion should be denied.

### **STATEMENT OF FACTS**

Plaintiffs incorporate by reference the facts set out in their Memorandum of Law in support of their Motion for Summary Judgment (ECF No. 66),<sup>1</sup> their Rule 56.1 Statement of Undisputed

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<sup>1</sup> Citations to "Ex. \_\_\_" refer to exhibits to the Declaration of Maria Slobodchikova in Support of Plaintiffs' Motion for Summary Judgment, made December 18, 2024, ECF No. 75.

Facts (ECF No. 67), and the Record (ECF No. 51).<sup>2</sup> However, in Defendants’ Cross-Motion for Summary Judgment (ECF No. 85), Defendants raise an argument regarding the “strict liability” provision in the SNAP statutory scheme. Defs.’ Opp’n 17–21. Plaintiffs have included additional context regarding this provision here.

### **I. Liability for Replacement of Stolen SNAP Benefits**

Prior to the transition to EBT, SNAP participants received their benefits in the form of paper coupons. Food Stamp Act, § 6. In the 1980s, Defendants’ regulations permitted the replacement of benefits stolen or lost in the mail *prior* to their receipt by SNAP participants. 46 Fed. Reg. 50,277, 50,284 (Oct. 9, 1981) (later transferred to 7 C.F.R. § 274.6 (1989)). By contrast, no replacement was allowed for coupons lost or stolen after receipt unless the loss was due to some “devastating event beyond the control of the household,” such as a “fire, flood, [or] tornado.” CHEN-00000044, 46. This replacement scheme apportioned liability based on the level of control participants exercised over the benefits before and after receipt and their corresponding ability to protect against any losses. *See, e.g.*, CHEN-00000038–39, 44–46.

While SNAP at all times remained federally funded, federal and state agencies shared certain SNAP-related costs in a limited number of circumstances. As early as 1964, states were directed to “be responsible for financing” certain “administrative responsibilities” including the “the acceptance, storage, and protection of coupons ... and the issuance of such coupons.” CHEN-00000006–07. However, prior to 1981, “FNS [] assumed full financial liability for coupons lost in the mail in mail issuance systems.” 47 Fed. Reg. 50,681 (1982). As the SNAP program expanded, the precise scope of state liability was adjusted. However, the central function—to incentivize states to reduce losses by assigning some financial responsibility over areas of the program within

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<sup>2</sup> Citations to documents with Bates stamps “CHEN-00000XX” refer to documents in the Record, ECF No. 51.

their control—remained the same. In 1981, Congress modified the statutory language and provided that “the State agency shall be *strictly liable* to the Secretary for any financial losses involved in the acceptance, storage, or issuance of coupons.” CHEN-00000061 (emphasis added). However, despite the inclusion of the language of “strict liability,” states have never once in the history of the SNAP program been solely, or even primarily, responsible for covering losses related to the issuance of benefits, including coupons stolen or lost before receipt. Instead, Congress implemented a cost-sharing regime, under which the federal government reimbursed states for at least 50% of all administrative costs incurred in relation to the “acceptance, storage, and issuance” of paper coupons, including pre-receipt benefit losses.<sup>3</sup>

In addition to this cost-sharing arrangement for general issuance losses, in 1981 Congress specifically carved out mail issuance losses (which by definition occur prior to receipt) for distinct treatment.<sup>4</sup> Under the paper coupon system, mail issuance losses were always primarily the responsibility of the federal government. The federal government absorbed the costs of all benefits lost in the mail until they reached a certain “tolerance” threshold, at which point states would cover any excess losses.<sup>5</sup> Accordingly, as long as the percentage of mail losses remained below a certain

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<sup>3</sup> CHEN-00000023, 31 (providing that states shall be liable for any financial losses involved in the “acceptance, storage,” or “issuance of coupons,” but then requiring the federal agency to “pay to each State agency an amount equal to 50 per centum of all administrative costs involved in each State agency’s operation of the food stamp program” including costs related to “the issuance of coupons”); CHEN-00000037 (“[S]ince 1974 USDA has paid half of the states’ issuance costs.”); *see also New Mexico Dep’t of Health & Soc. Servs. v. Sec’y of Agr.*, 376 F. Supp. 953, 953, 956 (D.N.M. 1973) (holding that New Mexico could not be held liable to the federal government for the “full face value of unrecovered food stamps” stolen from a state-run storage facility prior to their issuance and corresponding receipt by beneficiaries).

<sup>4</sup> *See e.g., United States v. Texas*, 507 U.S. 529, 531–33 (1993) (detailing the pre-receipt theft of benefits from the mail by United States Postal Service (“USPS”) workers).

<sup>5</sup> CHEN-00000061 (providing that mail issuance losses should be exempted from the category of issuances losses for which states were generally liable subject to 50% reimbursement by the federal government); CHEN-00000154, 181 (explaining that “[f]ederal costs shall include ... [m]onthly mail issuance losses up to the tolerance limit approved by FNS”); 47 Fed. Reg. 50,681, 50,683 (1982) (“The amount of liability incurred by the State agency will be the amount by which each high volume reporting unit’s mail issuance losses exceed 0.5 percent

proportion of all benefits issued via the mail, the states would pay nothing at all. This system permitted states to continue to use the cost-effective method of mail issuance without unduly penalizing them for benefits lost while coupons were in control of a federal agency, the USPS. It simultaneously encouraged states to investigate mail losses when the percentage of losses exceeded the tolerance threshold.<sup>6</sup> Prior to the transition to EBT, the federal government remained at all times primarily responsible for such losses in the mail.<sup>7</sup> Importantly, however, none of this had any bearing on program recipients' entitlement to replacement benefits. This apportionment of liability between the state and federal governments and individual SNAP recipients was left largely unaltered until 2010 when Defendants promulgated the challenged 2010 Regulation. The 2010 Regulation then eliminated SNAP recipients' entitlement to replacement benefits for certain pre-receipt losses, including losses due to skimming.

In 1996, Congress required state agencies to complete the transition to EBT and directed Defendants to promulgate updated rules governing the replacement of benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104–193, § 825, 110 Stat. 2105, 2324 (1996), codified at 7 U.S.C. § 2016(h)(7). Specifically, in 1996, Congress required that Defendants' rules governing the replacement of benefits be "similar to" the

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of that unit's total mail issuance dollar amount for the quarter. For low-volume units (those under \$300,000 total quarterly mail issuance), the liability incurred will be for the amount by which mail losses exceed \$1500 each quarter.").

<sup>6</sup> 47 Fed. Reg. 50,681, 50,682 (1982) (explaining that "tolerance" levels were established "to give [s]tate agencies a significant and realistic incentive to reduce losses, while taking care not to discourage mail issuance use where it is proving cost-effective and appropriate"); CHEN-0000038–39, 44, 51 (noting the substantial role of the federal government and USPS in mail issuance losses and encouraging collaboration in addressing losses).

<sup>7</sup> In the 1991 proposed rule and 1992 final rule, Defendants reiterated that states were strictly liable for issuance losses subject to federal reimbursement and again specified that the federal government was responsible for "[m]onthly mail issuance losses up to the tolerance limit approved by FNS." CHEN-00000154, 181.

rules in effect under the paper coupon system—*i.e.* the rules that permitted reimbursement at any time prior to receipt.<sup>8</sup>

## II. Plaintiffs

Plaintiffs are New Yorkers whose SNAP benefits were stolen through skimming. Because the 2010 Regulation and the 2022 Policy prohibit replacement of skimmed benefits, all six Plaintiffs, who already struggled to feed their families, became even more food insecure. *See* Chen Decl. ¶ 6; Watson Decl. ¶ 6; S.O. Decl. ¶ 7; Cribbs Decl. ¶ 5; Broome Decl. ¶ 5; Lee Decl. ¶ 6. Defendants do not contest Plaintiffs’ standing to pursue the relief sought in this action. Defs.’ Resp. to 56.1 Stmt. at 3 (ECF No. 87).

## ARGUMENT

### I. The Court May Consider Materials Outside The Administrative Record.

Defendants’ argument that “the Court should not permit plaintiffs to substitute a ‘new record’” misses the mark. *See* Defs.’ Opp’n 11. Plaintiffs do not seek to supplement the Record. Nor do they argue that Defendants failed to produce materials that they considered before promulgating the challenged rules. Rather, Plaintiffs seek to rely on certain materials *outside the Record*, which is appropriate because the evidence consists of (i) materials that Defendants failed to consider when they promulgated challenged agency actions, (ii) documents supporting Plaintiffs’ standing, and (iii) background materials confirming that Defendants adopted the challenged policy. *See* Pls.’ Mem., 2 n. 1.<sup>9</sup> Such use of materials outside the record is supported

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<sup>8</sup> At the same time, Congress clarified that while needs-tested-benefits programs like SNAP were not included in the specific consumer protections of the Electronic Funds Transfer Act (“EFTA”), enacted in 1978 and codified at 15 U.S.C. § 1693, *et seq.*, the decision would not “affect[] or alter[] the protections otherwise applicable with respect to benefits.” § 1693b(d)(2)(D). That is to say, Congress intended that the liability and benefit replacement scheme for SNAP remain in place.

<sup>9</sup> Plaintiffs’ Rule 56.1 Statement is likewise proper. *See* Pls.’ Mem. 2 n. 1. Although such statements are not required in APA cases, nothing in the federal or local rules prohibits their inclusion. *See* Local Civ. R. 56.1(a).

by case law. *See In re 21st Birthday Denials of Special Immigrant Juv. Status Applications by USCIS*, 2023 WL 3949736, at \*3 n.7 (E.D.N.Y. Feb. 10, 2023); *New York v. Scalia*, 490 F. Supp. 3d 748, 767 (S.D.N.Y. 2020); *Atanackovic v. Duke*, 399 F. Supp. 3d 79, 90 (W.D.N.Y. 2019); *Glara Fashion, Inc. v. Holder*, 2012 WL 352309, at \*1 n.1 (S.D.N.Y. Feb. 3, 2012). Moreover, all these materials are judicially noticeable. *See* Pls.’ Req. for Jud. Notice, dated December 18, 2024 (ECF No. 76). Defendants did not respond to Plaintiffs’ Request for Judicial Notice of these materials and therefore “consent[ed]” to its granting. *Cardenas v. Region 9 IV-D*, 2023 WL 9002726, at \*1 (C.D. Cal. Dec. 28, 2023).

Defendants do not distinguish Plaintiffs’ authorities on the extra-record materials. Defs.’ Opp’n 9–10. Instead, they cite the requirements of a different line of authority regarding record supplementation, which they concede Plaintiffs do not seek. Defs.’ Opp’n 10 (citing *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 15–16 (2d Cir. 1997) (allowing the “consideration of extra-record evidence” but prohibiting the addition of evidence to the agency-compiled record); and *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739–40 (10th Cir. 1993) (refusing to “supplement” the administrative record because of the presumption of administrative regularity).

The distinction between record supplementation and extra-record evidence has long been recognized by courts. “Supplementing the administrative record in an APA case means adding material to the volume of documents the agency considered, while admitting extra-record evidence means adding material outside of or in addition to the administrative record that was not necessarily considered by the agency.” *Safari Club Int’l v. Jewell*, 111 F. Supp. 3d 1, 4 (D.D.C.

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Here, where the issues at stake require an assessment of facts outside of the Record (including facts regarding Plaintiffs and their skimmed benefits, and evidence Defendants failed to consider), such a statement is warranted. Consideration of the Rule 56.1 statements in this matter poses no harm to either party and instead may be “helpful” to the Court in deciding the questions at issue and in “understand[ing] whether Defendants dispute any of the [] material facts.” *See* Order, dated March 18, 2025, ECF No. 86. Plaintiffs’ Rule 56.1 Statement and Defendants’ Rule 56.1 Counterstatement should accordingly be considered.

2015); *see also Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012) (distinguishing between materials “considered by the agency decision-makers but that are not in the record as filed” and “extra-record evidence”). Because Plaintiffs do not seek to expand the administrative record but rather cite to judicially noticeable extra-record materials that fall within the number of recognized exceptions, Plaintiffs’ reliance on these materials is therefore permitted and the Court may properly consider them.

## **II. The 2010 Regulation Is Contrary to Law and Should Be Set Aside.**

The APA provides that reviewing courts shall “hold unlawful and set aside agency action” that is “not in accordance with law.” 5 U.S.C. § 706(2)(A). Where an agency action contradicts the “unambiguously expressed intent of Congress” or otherwise goes beyond “the authority granted to it by statute,” it is contrary to law and must be set aside. *See Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 107–08 (2d Cir. 2018); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 55 (2d Cir. 2003). Here, Defendants’ 2010 Regulation is contrary to law because it defies the congressional requirement to promulgate a regulation governing benefit replacement that is “similar to” the replacement scheme for paper coupons. Specifically, by prohibiting the replacement of skimmed benefits, Defendants have altered the replacement regime to deprive SNAP recipients of entitlements they previously enjoyed. This result does not pass muster under the APA.

### **A. A “Similar” Replacement Regime Would Permit The Replacement of Skimmed Benefits.**

A similar replacement rule for EBT would allow for the replacement of skimmed benefits because they are lost prior to receipt just as paper coupons were once lost in the mail.

Prior to the transition to EBT, the replacement rules governing paper coupons permitted the replacement of benefits lost prior to receipt, a fact Defendants concede. Defs.’ Opp’n 1–2, 17

(“The regulations governing the paper coupon system permitted the replacement of benefits only where coupons were lost in the mail prior to receipt.”). This rule, which has been consistent since the early days of the SNAP program, places responsibility for loss on the party in the best position to protect against it—*i.e.* the party with control over the benefits at the time of the loss. CHEN-00000038–39, 44 (recognizing in the 1981 final rule governing paper coupons that “households have little control over the nondelivery of mail” and thus shall not be liable for such losses while losses “after receipt ... are subject to greater control by the household”); *see also Hettleman v. Bergland*, 642 F.2d 63, 66–67 (4th Cir. 1981) (“plac[ing] responsibility for loss with the custodian of the coupons (who is most able to guard against loss)”).

Skimmed EBT benefits are lost prior to receipt and therefore a replacement rule similar to the prior regime would allow for their reimbursement with federal funds. *See* Pls.’ Mem. 14–15. When skimming occurs, recipients have no ability to protect against their loss. *Id.* There is nothing they can do to prevent such benefits from being skimmed from the state-administered application prior to recipients’ ability to access the benefits. Defendants, while claiming that the replacement regime for mail issuance losses, “does not apply to skimmed benefits,” do not explain why they believe that skimming occurs after receipt. Instead, Defendants simply take issue with the statutory requirement, 7 U.S.C. § 2016(h)(7), and argue that skimmed benefits should not be considered pre-receipt losses because doing so would “allow[] for the use of federal funds to replace *all* lost or stolen benefits.” Defs.’ Opp’n 21. That simply does not follow. As Congress and the Secretary have done in the past, financial responsibility for replacing skimmed benefits may be shared between the federal and state governments to varying degrees. In any case, even if accepted as true, Defendants have failed to point to any evidence that Congress intended innocent SNAP recipients to be denied replacement simply because it would mean most stolen or lost benefits

would be replaced. By contrast, the evidence available in the Record indicates that Congress wanted individual recipients to be immune from pre-receipt losses over which they had no control. CHEN-00000038–39, 44, 50–51; *see also Hettleman*, 642 F.2d at 66–67. Moreover, Defendants do not cite a single authority that would allow them to override the clear congressional mandate with their own views on SNAP policy. Defendants’ argument therefore fails.

Defendants’ attempts to rebut the similarity between the two regimes by pointing to the treatment of EBT cards are also unavailing. *See* Defs.’ Opp’n 21. Defendants fail to capture the fundamental distinction between the level of control recipients have over the benefits transmitted electronically and the physical EBT cards. While SNAP recipients undoubtedly exercise control over the physical cards, there is nothing recipients can do to safeguard the benefits themselves from skimming, a fact Defendants do not contest. Rather, only the government can act to prevent skimming, for example, by authorizing the use of chips in EBT cards. Pls.’ Mem. 4–5, 15.

A similar rule governing the replacement of skimmed benefits would therefore require that such benefits be reimbursed using federal funds (with some proportion potentially funded by the states). Pls.’ Mem. 13 (“[S]imilar” means “alike in substance or essentials” or having a “common *raison d’etre*” or “same purpose.”).<sup>10</sup> Nevertheless, despite the explicit command of Congress to issue a “similar” regulation, 7 U.S.C. § 2016(h)(7), Defendants inexplicably eliminated SNAP recipients’ entitlement to the replacement of benefits stolen prior to receipt—an allocation of responsibility which has never been part of the statutory framework. Such result is contrary to the

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<sup>10</sup> Defendants do not contest Plaintiffs’ definition of “similar” or Plaintiffs’ assertion that a “similar” replacement rule would allow for the replacement of benefits stolen prior to receipt. Defendants accordingly concede these points. *Taylor v. City of New York*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003).

aims of the SNAP program and to Congress’s explicit requirement and accordingly must be set aside.<sup>11</sup>

B. Defendants’ Argument About Strict Liability for Losses Is Unavailing.

Defendants claim that provisions assigning states a proportion of liability for issuance losses “preclude[] the use of federal funds to replace skimmed benefits.” Defs.’ Opp’n 2. However, such provisions are irrelevant for two reasons: *First*, whether state or federal agencies are the ultimate payor of replacement costs is a separate issue from whether a category of losses (*i.e.* losses due to skimming) are eligible for replacement under the statutory scheme. *Second*, “strict liability” of the states is a misnomer. In fact, states were only liable for a small portion of pre-receipt losses, with the federal government assuming the bulk of financial responsibility.<sup>12</sup> Accordingly, Defendants’ strict liability arguments do nothing to undermine Plaintiffs’ contentions that a “similar” rule would allow for the replacement of skimmed benefits using federal funds.

1. *“Strict Liability” Does Not Bear Upon Recipients’ Rights to Replacement.*

Defendants largely predicate their position on provisions in the statute and associated regulations governing the allocation of financial responsibility between the state and federal governments. *See* Defs.’ Opp’n 17–21 (citing 7 U.S.C. § 2016(e)). But the provisions Defendants cite say nothing about SNAP participants’ right to replacement benefits under the paper coupon regime nor what a “similar” regime would look like under the EBT system—the key issues in this

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<sup>11</sup> Here, the fact that certain elements of the replacement regime were maintained after the transition to EBT does not change the plain truth that Defendants impermissibly altered the rules governing pre-receipt replacement and removed protection from individual SNAP recipients. *See* Defs.’ Opp’n 21 (arguing that because the current rules permit the replacement of benefits that were lost or stolen after the individual reported their EBT card missing then the replacement regime is “essentially” the same as under the paper coupon system).

<sup>12</sup> Under the paper coupon system, “losses” (other than the de minimis value of the coupons themselves) were only sustained if the government issued replacement benefits for those benefits lost or stolen pre-receipt. *See Arkansas v. Block*, 825 F.2d 1254, 1255 (8th Cir. 1987) (explaining that when benefits were lost and then replaced “the federal government pays for both the original and the replacement coupons”).

litigation. This is unsurprising given that the rules governing “State Issuance Liability,” 7 U.S.C. § 2016(e), and “Replacement of Benefits,” 7 U.S.C. § 2016(h)(7), appear in two different provisions of the statute and the regulations promulgated pursuant to those provisions are set forth in different parts of the Code of Federal Regulations. What is more, although formal rules governing the allocation of liability for mail issuance losses were not added until the 1980s, recipients whose benefits were lost or stolen in the mail have been entitled to replacement since at least the 1960s. *See Tyson v. Norton*, 390 F. Supp. 545, 570–71 (D. Conn. 1975), *aff’d in part, vacated in part on other grounds sub nom. Tyson v. Maher*, 523 F.2d 972 (2d Cir. 1975) (noting that benefits lost in the mail were replaced under FNS (FS) Instruction 734-2(VI)(C)(1969), which required that states implement an “emergency program” to cover “situations wherein an ATP card is lost, stolen, [or] not mailed through administrative error”). The fact that recipients whose benefits were lost in the mail were entitled to replacement prior to the promulgation of specific regulations governing mail issuance losses once again indicates that the two provisions are not meant to inform the meaning of one another. Defendants do not point to a single authority suggesting otherwise. Defendants’ attempt to read in limits that are nowhere to be found in the statute or regulation should be rejected.

The question before this Court is whether Defendants’ rules governing the replacement of benefits under the EBT system are “similar to” the rules governing the replacement of benefits under the paper coupon system. 7 U.S.C. § 2016(h)(7). Defendants conspicuously avoid addressing that issue head on, focusing instead on the question of who would pay if those replacement benefits were provided. That puts the cart before the horse. Whether the state or federal government ultimately pays for such replacements is immaterial to that issue because nothing in the “strict

liability” provisions Defendants cite bears upon *individual SNAP recipients’ entitlement to replacement benefits lost or stolen prior to receipt.*

2. *Regardless, Even if Considered, Defendants’ Arguments Related to State Liability Are Based on a Flawed Premise.*

Even if this Court were to consider provisions surrounding state liability for losses, such provisions still do not “preclude[] the use of federal funds to replace skimmed benefits” as Defendants inaccurately claim. Defs.’ Opp’n 2, 19. Although under the paper coupon system states were “strictly liable to the Secretary [of Agriculture] for any financial losses involved in the acceptance, storage and issuance of benefits,” 7 U.S.C. § 2016(e), this “strict liability” was offset by corresponding payments to the states from the federal government. *Infra*, at 13–14. Specifically, under the paper coupon regime, federal agencies always covered, at minimum, 50% of issuance losses per statutory design. *See, e.g.*, CHEN-00000031; *infra*, at 13–14. Moreover, when it came to mail issuance losses—the analog to skimming losses—federal agencies paid the bulk of replacement costs, penalizing states only if their losses were so extreme that they exceeded USDA-FNS’s “tolerance limit.” *Infra*, at 15–16. The states had zero financial responsibility for mail issuance losses if their mail losses were less than 0.5% of the dollar value of all benefits sent by mail in that state (typically measured at a county level). 47 Fed. Reg. 50,681, 50,682 (1982). As such, any contention that state liability provisions exempt the federal government from any liability for losses is simply wrong.

i. *The Federal Government Was Primarily Liable for Issuance Losses Under The Paper Coupon Regime.*

The federal budget is and has always been the primary source of funding for the SNAP program. *See, e.g.*, CHEN-00000007, 34.<sup>13</sup> Over time, limited carveouts were added which made

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<sup>13</sup> *See also Stewart v. Butz*, 356 F. Supp. 1345, 1349–52 (W.D. Ky. 1973), *aff’d*, 491 F.2d 165 (6th Cir. 1974)

states liable to the Secretary of Agriculture for certain administrative costs related to acceptance, storage, and issuance of paper coupons—areas of the program over which states had day-to-day control. CHEN-00000023, 61. Defendants claim these provisions exempt the federal government from any liability for the replacement of skimmed benefits because they “preclude[] the use of federal funds to replace skimmed benefits.” Defs.’ Opp’n 2, 17–19. However, Defendants’ arguments are based on yet another fundamental flaw: state issuance liability provisions did not assign states sole responsibility for such losses, as Defendants claim. *Id.*

Instead, the federal government reimbursed states for at least 50% of such “administrative costs.” *See* CHEN-00000031 (provision of the Food and Agriculture Act of 1977 authorizing the federal agency to reimburse states for “50 per centum of all administrative costs” which were defined to include losses related to “acceptance, storage, and issuance” of paper coupons); CHEN-00000037 (provision of Defendants’ 1981 regulation (46 Fed. Reg. 8935) noting that “since 1974, USDA has paid half of the states’ issuance costs”); *Hearing on the Food Stamp Program Before the Subcomm. on Domestic Mktg., Consumer Rel. and Nutrition, 97th Cong. 97–98 (1981)*, at 93 (explaining that under the 1980s amendments, states with low error rates would be “eligible for Federal assistance covering 65 percent of their administrative costs instead of the standard 50 percent”); *see also* Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66, Title I, § 1011(j), 109 Stat. 710 (1995), codified at 7 U.S.C. § 2025(a) (providing that “50 per centum of all administrative costs” including costs related to “issuance” of coupons (now benefits) would be

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(holding that “the *federal government*, not the state, was[] liable for the deprivation of the right to receive food stamps” and explaining that “[t]he purpose and policy of the Food Stamp Act ... is to provide *federal funds* to assist poor families to purchase a nutritionally adequate diet”).

paid by the federal government, a statute that remains in effect in essentially the same form to this day).<sup>14</sup>

Most importantly, when it came to mail issuance losses, the federal government went beyond reimbursing states and instead expressly assumed primary liability for benefits lost in the mail. Under this system, federal agencies absorbed 100% of mail issuance losses until the total losses in a given reporting unit exceeded a preset “tolerance level.” Under this “tolerance” framework, states bore a portion of liability only if total mail issuance losses by dollar value exceeded 0.5% of the dollar value of all mail issuances, measured quarterly by unit (and in most instances by county).<sup>15</sup> CHEN-00000154, 181; *Gallegos v. Lyng*, 891 F.2d 788, 791–93 (10th Cir. 1989) (explaining the tolerance framework and recognizing that “[t]he federal government bears the bulk of the liability for [mail issuance] losses”).<sup>16</sup> Under that regime, states would only pay for mail losses if they reached what the agency deemed to be excessive levels, at which point states would cover additional losses as an incentive to determine why mail theft was so rampant in a particular reporting unit. *See* CHEN-00000044, 50–51 (emphasizing the role played by the federal

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<sup>14</sup> Defendants’ argument that strict liability provisions bar the use of federal funds to replace skimmed benefits because “any replacement issuance would require a state to issue more benefits in a single month to a household than it was authorized to issue,” Defs.’ Opp’n 18–19, likewise falls flat. This circular argument presupposes that skimmed benefits are stolen after receipt and that any replacement issuances would surpass the statutory allotment a household is authorized to receive in any given month. However, as explained, *supra*, at 8–10, skimming occurs prior to receipt, and as such does not implicate Defendants so-called over-issuance problem. Moreover, even if considered after-receipt, Defendants argument cannot be correct because replacement issuances are routinely permitted after receipt in cases of household misfortunes, a fact Defendants admit. Defs.’ Opp’n 7. These provisions are simply setting a formula for monthly allotments based on household income and accordingly are inconsequential to the current question.

<sup>15</sup> For example, if a state issued \$1000 worth of coupons via the mail in a given reporting unit and \$5 worth of coupons were stolen, then the federal government would cover all \$5 in losses. However, if \$5.01 was stolen, the state would cover the addition \$0.01. As a practical matter, this system meant that the federal government covered the bulk of mail issuance losses. *See Gallegos*, 891 F.2d at 791–93.

<sup>16</sup> For example, in 1982, Defendants reported that the application of the 0.5% tolerance level “placed a liability on only about one fourth [] of the project areas using mail issuance,” and reported that “the most recent loss rate” was “.86 percent,” meaning that states covered only the .36% over the .5% tolerance level. 47 Fed. Reg. 50,681, 50,682 (1982).

government, specifically USPS, in protecting against mail issuance losses, which underpinned the rationale for primary federal liability, while requiring states and USPS to work together to combat mail theft); *Gallegos*, 891 F.2d at 791–93 (“The rule encourages states to use the cost-effective method of mail issuance, while at the same time encouraging them to reduce mail losses and improve their efficiency by making them liable for all excess losses.”); 47 Fed. Reg. 50,681, 50,682 (1982) (explaining that “tolerance levels” were established “to give State agencies a significant and realistic incentive to reduce losses, while taking care not to discourage mail issuance use where it is proving cost-effective and appropriate”).<sup>17</sup>

In 1996 and 2008, when Congress required Defendants to promulgate “similar” replacement rules, it intended this replacement scheme remain the same.<sup>18</sup> Thus, a “similar” regulation governing EBT cards would require that the federal government remain primarily liable for losses incurred prior to receipt, while leaving some room for state liability for losses in proportion to their control over benefits at any given time. Here, Plaintiffs argue that skimmed benefits are lost prior to receipt and are the modern analog to benefits lost in the mail. *See* Pls.’ Mem. 14–15. Skimming losses occur before recipients can access their benefits, which directly parallels mail transfer losses under the paper coupon regime. As explained *supra*, at 13–15, such

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<sup>17</sup> In this case, a similar rule would make the federal government primarily liable for skimmed benefits, but could shift excess costs over a certain threshold to states. Similar to the paper coupon scheme, such a rule would encourage states to reduce EBT losses by, for example, issuing chip cards or cracking down on POS tampering. However, as with the paper coupon system, the rule would not unfairly burden states for a process over which they have only limited control due to their obligation to follow federal rules and regulations governing SNAP.

<sup>18</sup> The fact that in 1996 Congress chose not to include SNAP benefits (along with other means-tested benefits) under the umbrella of the EFTA does not undermine this reality. *See* Defs.’ Opp’n 6. In declining to extend the broad consumer protections of the EFTA to SNAP beneficiaries, Congress made clear that such decision was not intended to in any way “affect[] or alter[] the protections otherwise applicable with respect to benefits.” 15 U.S.C. § 1693b(d)(2)(D). That is, Congress intended that replacement protections under the paper coupon regime be kept “similar” during the transition to EBT, 7 U.S.C. § 2016(h)(7), thus maintaining a scheme which would reimburse pre-receipt losses like those due to skimming.

pre-receipt losses have always been borne primarily by the federal government. *Gallegos*, 891 F.2d at 791–93; CHEN-00000044, 51.

Thus, Defendants’ strict liability arguments do not contradict, or even address, Plaintiffs’ claims that a “similar” regime would permit the replacement of skimmed benefits using federal funds.

ii. The 2023 Appropriations Act Does Not Change This Analysis.

The 2023 Appropriations Act does not change this analysis because it does not address, modify, or even mention the requirement of similarity.

Rather than interpreting the plain meaning of the statute at issue, 7 U.S.C. § 2016(h)(7), Defendants seek an alternative understanding in the 2023 Appropriations Act that authorized the temporary replacement of skimmed benefits with federal funds. Specifically, they point to a provision stating that “the replacements of benefits [] shall not be regarded as losses” for which “State agencies shall be strictly liable.” Defs.’ Opp’n 18–19; CHEN-00000023.<sup>19</sup> Defendants argue that by explicitly carving out temporary replacements from “losses,” Congress “understood that replacement of skimmed benefits would otherwise be prohibited by § 2016(e).” Defs.’ Opp’n 19.

Plaintiffs are mistaken—there is nothing in the 2023 Appropriations Act that in any way alters the congressional requirement that Defendants promulgate a regulation governing benefit replacement that was “similar” to the rules governing paper coupons, which would have permitted

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<sup>19</sup> Defendants argue that were it not for the exception in the 2023 Appropriations Act, skimmed benefits would fall into the category of benefit losses for which states are “strictly liable”—*i.e.* benefits lost during the “issuance” phase. Issuance losses necessarily occur prior to receipt, as coupons are considered successfully “issued” once in the recipients’ possession. CHEN-00000006-07, 22–23, 41. Defendants concede that losses incurred prior to receipt were subject to replacement under the paper coupon regime and that a similar rule would likewise allow the replacement of benefits stolen before receipt. Defs.’ Opp’n 1–2, 17. Defendants therefore accept that skimmed benefits are stolen during issuance, that is, before receipt, and therefore would be subject to replacement under a similar rule.

replacement of skimmed benefits. If Congress had wanted to make such a change, it could have, and should have done so explicitly. *See United States v. Fausto*, 484 U.S. 439, 453 (1988) (“[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.”). Nor can the inclusion of this provision be read as an implied repeal of Congress’s earlier pronouncements. An implied repeal should not be found unless there is an “irreconcilable conflict between the two federal statutes at issue.” A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 185, 327 (2012) (explaining the presumption against implied repeal and noting that because “legislators are often—despite the presumption to the contrary—unfamiliar with enactments of their predecessors. They unwittingly contradict them.”) (citing *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 142 (2001)). Here no such conflict exists. This provision may be read harmoniously with earlier statutes and regulations which permit reimbursement of benefits stolen prior to receipt and require that the federal government bear primary responsibility for such loss.

Instead, the provision Defendants cite shows only that the regular cost sharing arrangement for issuance losses does not apply to the temporary reimbursements authorized by the 2023 Appropriations Act. As explained *supra*, at 13–14, states and the federal government share liability for general issuance losses, while, under the paper coupon regime, the federal government bore primary liability for mail issuance losses. Here, by distinguishing temporary replacements from other issuance losses, Congress intended only to clarify the federal governments’ unitary responsibility for replacing skimmed benefits. Were this provision not included in the Act, it, at most, could imply that state and federal governments should share costs related to temporary replacements. However, it certainly would not mean that federal funds would be entirely barred,

as Defendants claim. This provision accordingly does nothing to undermine the traditional allocation of liability under the paper coupon system.

### **III. The 2010 Regulation Is Arbitrary and Capricious and Should Be Set Aside.**

The APA states that reviewing courts shall “hold unlawful and set aside agency action” found to be “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706 (2)(a). The 2010 Regulation is arbitrary and capricious because (1) Defendants did not evaluate whether it was “similar” to the prior replacement regime as required by Congress, (2) Defendants failed to consider the problem of skimming, (3) Defendants did not provide a reasoned explanation for its promulgation, and (4) it is illogical on its own terms.

#### **A. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Did Not Address Similarity at All.**

The 2010 Regulation is arbitrary and capricious because Defendants did not consider whether the new replacement rule was similar to the preexisting one, as they were specifically required to do by Congress. *See Cigar Ass’n of Am. v. U.S. Food & Drug Admin.*, 964 F.3d 56, 61 (D.C. Cir. 2020); *see also* Pls.’ Mem. 17–18. There is nothing in the Record to suggest that Defendants considered similarity, and Defendants do not argue otherwise. Defs.’ Opp’n 20–21. Defendants’ argument that the 2010 Regulation is “similar” to prior regulations because “[i]t follows from § 2016(e)’s prohibition on the use of federal funds to replace skimmed benefits” is nothing more than a post-hoc rationalization which does not remedy the deficient process. Defs.’ Opp’n 20; *see Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Defendants’ failure to consider this issue renders the 2010 Regulation arbitrary and capricious such that this Court should set it aside.

B. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Failed to Consider an Important Aspect of the Problem—The Widespread Problem of Skimming.

An agency action is “arbitrary and capricious where the agency ... ‘entirely failed to consider an important aspect of the problem.’” *New York v. U.S. Dep’t of Health and Human Servs.*, 414 F. Supp. 3d 475, 554 (S.D.N.Y. 2019); *Christ the King Manor, Inc. v. Sec’y U.S. Dept. of Health and Hum. Servs.*, 730 F.3d 291, 314 (3d Cir. 2013) (HHS decision to approve Medicare case amendments held arbitrary and capricious where the agency failed to “ensure that payments would still be consistent with quality of care and adequate access[.]”).

The problem of skimming was widely known at the time Defendants promulgated the 2010 regulation. *See* Pls.’ Mem. 5. However, nothing in the Record indicates that the agency considered this “important aspect” when promulgating the rule. Defendants themselves concede that the evidence Plaintiffs cite supports “the general proposition that skimming was a known issue at or around the time the USDA promulgated the 2010 Regulation.” Defs.’ Opp’n 23.

There is no requirement that the “problem is presented during the decisionmaking process” for the agency to have failed to consider it. *Id.* at 22. Defendants cite no cases stipulating this supposed requirement. *See id.* Such a requirement would be illogical: agencies are not free to ignore important problems within their expertise just because they were not raised by the public during the notice and comment process. Indeed, one of the explicit carveouts courts have created to permit the use of extra-record evidence is when it supports an argument that the agency failed to consider an important aspect of the problem. For example, in *In re 21st Birthday Denials*, the court held that it was “proper[ to] consider[.]” extra-record evidence regarding the “hour of the plaintiffs’ births” because the agency failed to consider this “‘important aspect of the problem’” in determining whether the applicants were 21 years old when their application was filed. 2023

WL 3949736, at \*3 n.7; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2015 WL 423090, at \*5 (D. Or. Feb. 2, 2015) (permitting extra-record material “to the extent ... necessary to determine whether the agency failed to consider certain factors”).

If the government’s obligation to consider evidence was always limited to the administrative record, extra-record evidence would never be relevant to APA claims. As one court pointed out, “[b]y its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record.” *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1280 (D. Colo. 2010).

Defendants’ position is particularly puzzling given the nature of the subject at issue. Plaintiffs do not argue that Defendants ignored some hidden or irrelevant problem. Rather, they argue that Defendants should have taken into account the risk of skimming, which was widely known and reported on by other federal agencies at the time and had a clear bearing on the subject matter they were regulating. *Supra*, at 19.<sup>20</sup> Accepting Defendants’ argument would essentially allow the federal government to stick its head in the sand and ignore publicly known risks, as long as they were not specifically presented to the agency. That is not the law.

C. The 2010 Regulation Is Arbitrary and Capricious Because Defendants Did Not Provide a Reasoned Explanation for Its Promulgation.

Even if Defendants had analyzed whether the 2010 Regulation was similar as instructed by Congress or considered the pervasive problem of skimming, they were still required to both acknowledge and provide a rationale for changing the prior policy concerning replacement of stolen benefits. *See New York v. U.S. Dep’t of Lab.*, 477 F. Supp. 3d 1, 13 (S.D.N.Y. 2020)

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<sup>20</sup> As explained *supra*, at 7, Defendants did not oppose Plaintiffs’ Request for Judicial Notice of the materials demonstrating the pervasive nature of the problem, and thus conceded the issue.

(“[I]nterpretations ‘arrived at with no explanation,’ like interpretations ‘picked out of a hat,’ are unacceptable, even if they ‘might otherwise be deemed reasonable on some unstated ground.’”). Defendants failed to do so. This “unexplained inconsistency” renders the 2010 Regulation arbitrary and capricious. *U.S. Dep’t of Health and Human Servs.*, 414 F. Supp. 3d at 547. Defendants do not respond to this argument in their opposition and so it is waived. *See Taylor*, 269 F. Supp. 2d at 75 (granting summary judgment on claims that the opposing party failed to respond to, because “courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way”).

D. The 2010 Regulation Is Arbitrary and Capricious Because It Is Illogical, Since It Denies Protection to The Exact Population That Is Supposed to Benefit from the SNAP Program, Which Is Inconsistent with The Statutory Scheme.

An agency action is arbitrary and capricious if it is “illogical on its own terms.” *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm’n*, 106 F.4th 1113, 1118 (D.C. Cir. 2024); *see also Mineta*, 340 F.3d at 53.

The 2010 Regulation is illogical because it denies protection to the exact population that is supposed to benefit from the SNAP program, and is therefore inconsistent with the statutory scheme. As explained *supra*, at 13–16, primary financial responsibility for administering the SNAP program and, in turn, for financing replacements for benefits lost in the mail, always remained with the federal government under the paper coupon system. *See Gallegos*, 891 F.2d at 791–93; *Butz*, 356 F. Supp. at 1349–52. Most importantly, since the program’s inception in 1964, Congress never once eliminated SNAP recipients’ entitlement to replacement benefits for pre-receipt losses. Congress specifically intended that this replacement regime be kept consistent during the transition from paper coupons to EBT cards.

Where, as here, an agency action defies congressional intent (*i.e.* the goal of the SNAP program to protect low-income individuals and to reimburse losses prior to receipt), this inherent illogic is a sufficient basis to set aside the action as arbitrary and capricious. *See Familias Unidas por la Justicia, AFL-CIO v. U.S. Dep’t of Lab.*, 2024 WL 3276419, at \*6 (W.D. Wash. July 2, 2024) (citations omitted) (noting that “[c]onstrutions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected”) and finding that the agency’s “failure to consider the effect of [the] rule given its statutory mandate and stated goal of protecting domestic workers appears arbitrary and capricious”); *see also Butz*, 356 F. Supp. at 1349–52 (invalidating a USDA-FNS regulation which “wrongfully withheld” benefits from recipients as contrary to the purposes of the Food Stamp Act and noting that the court “simply do[es] not see the justice of allowing a poor food stamp recipient to be the loser caught in the midst of an administrative tangle between the federal and state governments”).

**IV. The 2022 Policy Is Contrary to Law and Arbitrary and Capricious for The Same Reasons as The 2010 Regulation, and Should Be Set Aside.**

**A. Plaintiffs’ Complaint Put Defendants on Notice of Plaintiffs’ Claims Concerning 2022 Policy.**

Defendants next argue that Plaintiffs never alleged that their “policies” violated the APA in their Complaint. Defs.’ Opp’n 13. That is manifestly untrue. For one thing, Plaintiffs’ Complaint made repeated references to Defendants’ arbitrary and capricious policy. *See, e.g.*, Compl. ¶¶ 6, 59–68, 106, 114, 116. These references include specific allegations that by adopting “*policies* ... that do not authorize States to reimburse victims of skimming,” Defendants acted contrary to statutory command and so in violation of the APA. *Id.* ¶¶ 114, 116 (emphasis added); ¶ 65 (“The USDA-FNS *policy* is contrary to the command of Congress[.]”) (emphasis added). For another, Defendants fully appreciated that this was Plaintiffs’ position because, in their Motion to Dismiss, Defendants acknowledge Plaintiffs’ argument that the USDA’s policy precluding replacement was

unlawful. This is evidenced by references to Plaintiffs' assertion that "USDA's policy concerning the replacement of skimmed funds 'is consistent with its unlawful regulation'" and their assertion that "the policy guidance USDA issued in January 2023 concerning the Appropriations Act does not 'change the regulation 7 C.F.R. § 274.6, which limits States' ability to replace benefits' skimmed prior to October 2022 'using federal funds.'" Defs.' Mot. Dismiss (ECF No. 31) at 5. They cannot now claim that Plaintiffs "never address[], or even hint[] at" the policy in their Complaint. Defs.' Opp'n 14.

Moreover, Rule 8(a) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. *Phillips v. Girdich*, 408 F.3d 124, 127 (2d Cir. 2005). To comply with Rule 8(a), plaintiffs need not provide anything more than the "bare minimum of facts" to put the defendant on sufficient notice to file an answer. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 304 (S.D.N.Y. 2006); *see also In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 323 (S.D.N.Y. 2003). If a party contends that a pleading nonetheless is "so vague or ambiguous that [it] cannot reasonably be required to prepare a response," the party is not left without a remedy, and "may move for a more definite statement before responding to the pleading," which Defendants did not file. Fed. R. Civ. P. 12(e). Plaintiffs' statements were not "vague or ambiguous" as Defendants were able to respond and never "move[d] for a more definite statement" before filing their motion to dismiss or answer. *Id.* Therefore, Plaintiffs have put Defendants on sufficient notice regarding the 2022 Policy.

B. OTDA and HRA are Defendants' Agents and Their Statements Prove The Existence of The USDA's Policy of Non-Replacement.

Because OTDA and HRA are agents of Defendants for purposes of SNAP, the memoranda and documents they issued by are evidence of federal policy against replacement. *See* 18 N.Y.C.R.R. § 387.0(a).

“OTDA administers SNAP as *‘the agent’* of the federal government, consistent with all federal regulations.” *Matter of Leggio v. Devine*, 34 N.Y.3d 448, 458 (2020) (emphasis added); *see also Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 385 (S.D.N.Y. 2000) (“Food stamp regulations require the State to enter into a legal agreement with the USDA in which the State undertakes to administer the food stamp program in accordance with the statute, monitor compliance with federal law, and ensure that action is taken to correct deficiencies.”). State administrators of social services, like HRA and OTDA, through their role as agents of USDA share “the duty to comply with federal statutory requirements.” *Reynolds*, 118 F. Supp. 2d at 385. Through this shared duty and because OTDA and HRA acted as Defendants’ agents in refusing to replace Plaintiffs’ stolen benefits, their acts were Defendants’ acts for purposes of APA review. OTDA and HRA have no ability to disregard federal mandates and were therefore obliged to publicly declare their inability to replace skimmed benefits in compliance with the policy Defendants themselves set.

Defendants attempt to distance themselves from the clear policy statements in the memoranda and documents issued by their agents on the grounds that the agency relationship “does not mean that [OTDA and HRA] are authorized to formulate or announce those rules, policies, or directives,” Defs.’ Opp’n 22, and attempt to paint OTDA and HRA as independent entities. *Id.* at 16 (referring to an OTDA memorandum explaining Defendants’ position on skimming as simply an “OTDA document”). This argument misses the mark. Indeed, the documents at issue specifically acknowledge that “[USDA-FNS] prohibits replacing stolen SNAP benefits using federal funds.” Ex. E at 3; *see* Ex. O at 1. In short, Defendants cannot deny that OTDA and HRA, as USDA-FNS’s day-to-day representatives, issued statements to the public which made clear Defendants’ policy against replacing skimmed benefits.

C. Defendants' 2022 Policy Is Reviewable Agency Action

Defendants' 2022 Policy is subject to judicial review under the APA. Judicial review of an agency action is appropriate where, as here, the action “marks the consummation of the agency’s decisionmaking process” (*i.e.* is not an interim, interlocutory decision); and is an action from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). Although Defendants acknowledge that this is the governing test, Defs.’ Opp’n 15, they do not seriously engage with either element.

Instead, Defendants attempt to evade review by dismissing the documents as those “issued by state and local agencies.” Defs.’ Opp’n 16.<sup>21</sup> That is irrelevant because both HRA and OTDA were acting as Defendants’ agents in issuing the documents which themselves referenced federal policy on the issue. *See* Ex. E at 3; Ex. O at 1. Moreover, Defendants make no argument that USDA-FNS in any way disagreed with the statements made by their agents HRA and OTDA or that such statements were issued without proper authorization. Even assuming that such statements were not directly authorized by Defendants—and they were—Defendants’ failure to act to contradict the HRA and OTDA guidance in any way is in itself reviewable agency action. *See Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (“administrative inaction has the same impact on the rights of the parties as an express denial of relief, judicial review is not precluded”); *All. To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (holding that EPA’s inaction, in the form of failing to veto

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<sup>21</sup> Defendants argue that the documents comprising the 2022 Policy “do not say anything new” and are “merely” consistent with the 2010 Regulation. Defs.’ Opp’n 15–16. To the contrary, while the 2010 Regulation does not implement a “similar” replacement regime that would permit replacement of skimmed benefits, the memoranda and documents that comprise the 2022 Policy for the first time affirmatively state that Defendants prohibit the use of federal funds to replace skimmed benefits. *See, e.g.*, Ex. E at 3. It accordingly “marks the consummation of the agency’s decisionmaking process.” *Bennett*, 520 U.S. at 177–78.

permit, is final “agency action” under the APA “notwithstanding the fact that the agency ‘did’ nothing”).

What is more, Defendants cannot and do not contest that USDA-FNS systematically refused to replace benefits stolen due to skimming, and that USDA-FNS still does not replace skimmed benefits to this day.<sup>22</sup> Defs.’ Answer (ECF No. 50) ¶¶ 4, 5. This practical impact is the crucial, determinative factor in assessing whether an agency action is appropriate for judicial review. *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 165 (E.D.N.Y. 2018) (emphasizing that it is the “practical effect of the [agency’s] action, not the informal packaging in which it was presented,” that is the “determining factor”). In this case, denying judicial review simply because certain statements were made by USDA’s agents rather than by USDA directly would provide an illogical and unjust loophole, allowing Defendants to take actions affecting large swaths of the population while simultaneously insulating their decisions from necessary oversight and the checks enshrined in the APA. This warped result should not be permitted. Instead, the 2022 Policy should be reviewed and stand or fall on its merits.

D. The 2022 Policy Is Contrary to Law.

As shown *supra*, at 8, a final agency action must be set aside when it does not accord with the statutory mandate. Here, Defendants’ 2022 Policy does not abide by the requirement in 7 U.S.C. § 2016(h) that the replacement rules governing EBT be similar to those in effect for paper coupons. Thus, Defendant’s 2022 Policy prohibiting the use of federal funds to replace skimmed benefits must be set aside as contrary to law under the APA. *See* Pls.’ Mem. 23.

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<sup>22</sup> Plaintiffs acknowledge that USDA-FNS did permit the use of federal funds to replace skimmed benefits during the limited terms set out under the 2023 Appropriations Act which expired on December 20, 2024.

E. The 2022 Policy Is Arbitrary and Capricious.

Similar to the 2010 Regulation described *supra*, at 19–23, Defendants’ 2022 Policy is arbitrary and capricious because (1) Defendants did not consider whether the EBT replacement rules are similar to the replacement of paper coupons; and (2) the policy is unreasonable/illogical. *See* Pls.’ Mem. 23–24.

V. **Permanent Injunction Is an Appropriate Remedy.**

A. Defendants Fail to Address Plaintiffs’ Entitlement to a Permanent Injunction.

Plaintiffs have already established the required elements for a permanent injunction. Pls.’ Mem. 24–25. Defendants, however, do not grapple with this test. *See* Defs.’ Opp’n 24–25. Nor do Defendants argue that an injunction demanding monetary reimbursement is improper. *See id.* 24–26.<sup>23</sup>

Instead, Defendants ignore any analysis of the elements for an injunction and cite *Guertin* to argue that the court should “vacate ... and remand to the agency” an arbitrary and capricious action, instead of issuing an injunction. *Id.* at 24. However, the court in *Guertin* says the principle of vacating and remanding APA cases is not absolute. *Guertin v. United States*, 743 F.3d 382, 388–89 (2d Cir. 2014). Indeed, in that very case, the Second Circuit declined to remand, finding that the agency must reimburse the plaintiffs “because there is compelling evidence in the record—a record that would not change if remanded to the agency—that *Guertin* is entitled to be reimbursed.” *Id.*

Defendants also rely on language from *Monsanto* saying that an injunction is “a drastic and extraordinary remedy.” Defs.’ Opp’n 25. However, nothing in *Monsanto* suggests that permanent

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<sup>23</sup> And for good reason, such remedies are routinely given where appropriate. *See, e.g., Rodriguez v. Carson*, 401 F. Supp. 3d 465, 467–71 (S.D.N.Y. 2019) (enjoining agency to disburse funds allocated to HUD following an APA suit) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988)).

injunctions are barred in APA cases, which is why the court engaged in the analysis of the individual elements of an injunction in *Monsanto*. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158–60 (2010).

Defendants also argue that vacatur and remand is appropriate because it would allow the agency to conduct “additional investigation” and promulgate a new regulation. Defs.’ Opp’n 25. But Defendants’ brief already explains what the agency’s position is—benefits lost through skimming will not be replaced. *Id.* at 7.

Lastly, there can be no suggestion that replacement of skimmed benefits is administratively impracticable for the simple reason that it was done under the 2023 Appropriations Act. Pls.’ Mem. 9–10. It is clear that, when given the directive, the USDA can administer the replacement of stolen SNAP benefits.

**B. Both Injunctive and Declaratory Relief Are Necessary and Appropriate.**

The nature of an injunction is precisely why it is needed here—injunctive relief can compel an agency to promulgate new regulations when an agency might otherwise refuse to comply. See *Armstrong v. Exec. Off. of the President, Off. of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (“[T]he Supreme Court has observed: ‘[E]ven though a declaratory judgment has ‘the force and effect of a final judgment,’ . . . it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.’”) (citations omitted); see also *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 676 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v. New York*, 588 U.S. 752 (2019) (injunction is “necessary to make . . . vacatur effective”).<sup>24</sup>

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<sup>24</sup> Additionally, given current well-founded concerns about agencies under the current administration defying court orders, the need for injunctive relief permitting Plaintiffs to seek forceful forms of compulsion is even more apparent. See *Abrego Garcia v. Noem*, 2025 WL 1135112, at \*2 (4th Cir. Apr. 17, 2025) (affirming a district

Further, the unique circumstances constituting Plaintiffs’ irreparable injury and available remedies makes this precisely the type of situation requiring extraordinary relief. The positive economic and health benefits of SNAP have been well-documented and the negative impact of losing those benefits has been proven. *See* Stephanie Ettinger de Cuba *et al.*, *Loss Of SNAP Is Associated With Food Insecurity And Poor Health In Working Families With Young Children*, 38 HEALTH AFFAIRS 765 (2019); Ashley L. Munger *et al.*, *The Role of the Supplemental Nutrition Assistance Program in the Relationship Between Food Insecurity and Probability of Maternal Depression*, 11 J. HUNGER & ENV’T NUTRITION 147 (2016); R. William Evans *et al.*, *Investigating the Poverty-Reducing Effects of SNAP on Non-nutritional Family Outcomes: A Scoping Review*, 28 MATERNAL & CHILD HEALTH J. 438 (2024). Compare this to cases in which permanent injunctions have been granted, even while citing the “drastic and extraordinary” language from *Monsanto*, when only profit losses have been suffered. *See, e.g., f’real Foods, LLC v. Hamilton Beach Brands, Inc.*, 2020 WL 4015481, at \*4 (D. Del. July 16, 2020) (granting a permanent injunction when market share and business opportunities were lost); *Columbia Gas Transmission, LLC v. Heaster*, 2021 WL 126204, at \*6–7 (N.D. W. Va. Jan. 12, 2021) (granting a permanent injunction when property was made inaccessible).

In any event, Defendants do not cite a single case refuting the proposition that Plaintiffs’ inability to seek financial losses from the government under the APA warrants the injunction. *See* Defs.’ Opp’n 24–26. Even in the absence of the drastic consequences related to food insecurity,

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court’s requirement of daily updates from a government agency it found to be delaying in implementing a judicial order on the status of the implementation of that order and noting that “[t]oo often today [it] has not been the case” that “[t]he respect that courts must accord the Executive [is] reciprocated by the Executive’s respect for the courts.”); *see also, e.g.,* Adam Liptak, *In Showdowns With The Courts, Trump Is Increasingly Combative*, N.Y. TIMES, Apr. 15, 2025, <https://www.nytimes.com/2025/04/15/us/politics/trump-defy-courts.html> (“[The] administration’s compliance with court orders ... has now arrived at the cusp of outright defiance.”).

poverty and depression that by themselves result in irreparable harm to SNAP recipients, the APA sovereign immunity is a sufficient basis for injunction here. *See* Pls.’ Mem. 24.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for summary judgment and deny Defendants’ cross-motion for summary judgment, and issue an order (1) declaring that the 2010 Regulation is unlawful, arbitrary and capricious in violation of the APA and setting such Regulation aside to the extent it prohibits replacement of skimmed benefits with federal funds; (2) declaring that the 2022 Policy is unlawful, arbitrary and capricious in violation of the APA and setting such Policy aside to the extent it prohibits replacement of skimmed benefits with federal funds; (3) permanently enjoining Defendants from refusing to replace (or allowing states to replace) SNAP benefits and P-EBT benefits stolen by skimming; (4) commanding Defendants to authorize the replacement of stolen benefits and promulgate a regulation and/or interim rule consistent with federal law; and (4) granting such further and additional relief as necessary.

Dated: New York, New York  
May 1, 2025

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### **Certificate of Compliance**

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 8627 words.