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.

TOM VILSACK, in his official capacity as Secretary of the U.S. Department of Agriculture (USDA), and DR. TAMEKA OWENS, in her official capacity as Acting Administrator of the USDA Food and Nutrition Service,

Defendants.

23-cv-1440-VEC

Oral Argument Requested

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF DEFINITIONS AND ABBREVIATIONS

Term	Definition
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 *et seq.*
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
EBT Card	Electronic Benefits Transfer Card
EMV	A global standard for credit cards that uses computer chips and chip readers to authenticate (and secure) chip-card transactions
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 *et seq.*)
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

Term	Definition
POS	Point of Sale
P-EBT	Pandemic Electronic Benefits Transfer
Record	Certified administrative record, produced by Defendants on September 4, 2024 (ECF No. 51)
SFARS Recipient Report	Records provided by OTDA reflecting data residing on its Specialized Fraud and Abuse Reporting System about the issuance and use of SNAP benefits by each Plaintiff, submitted as Exhibit BB
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 support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

Plaintiffs are low-income New Yorkers whose SNAP benefits were stolen through "skimming," a form of electronic theft. Plaintiffs could not have prevented the theft and did not control the benefits when the skimming occurred. As a result, they were left without means to feed themselves and their families. Plaintiffs' benefits are not eligible for replacement with federal funds because the 2010 Regulation, codified at 7 C.F.R. § 274.6, and the 2022 Policy promulgated by Defendants do not allow it. Defendants' rule and policy violate the APA and therefore should be declared unlawful, arbitrary and capricious, and set aside.

First, the 2010 Regulation is contrary to law. Congress twice directed that the rules governing replacement of EBT benefits should be "similar" to those that governed replacement of paper-based coupons. *See* 7 U.S.C. § 2016(h)(7). To comply, Defendants were required to promulgate a regulation that was similar to the one previously in effect, which allowed replacement of paper coupons stolen or lost in the mail. A "similar" rule would not have barred the replacement of skimmed benefits, which is what the 2010 Regulation and 2022 Policy do.

Second, the 2010 Regulation is arbitrary and capricious. Despite the congressional mandate, Defendants did not consider whether the new replacement rules were similar to the rule governing replacement of paper coupons. Nor did they assess the vulnerability of EBT cards to skimming, a crime that was already on the rise in the early 2000s. They also failed to provide any rationale for the resulting change in their replacement regime. Additionally, Defendants' regulation is illogical because it denies protection to the exact population it is supposed to protect.

Even if the 2010 Regulation is not interpreted as prohibiting the replacement of skimmed

benefits, Defendants' subsequent action certainly should be. In or around October 2022 Defendants adopted a policy explicitly prohibiting the replacement of skimmed SNAP benefits. This too violates the APA because (i) such policy is contrary to law because it is not similar to the preexisting rule governing replacement of paper coupons; (ii) it is arbitrary and capricious because Defendants did not consider the similarity requirement; and (iii) because the rule is plainly illogical. For these reasons and more, this Motion should be granted.

STATEMENT OF FACTS[1]

I. Overview of the SNAP Program

In 1964, Congress established SNAP—then known as the Food Stamp Program—with the goal of permitting low-income households to obtain a more nutritious diet by increasing their purchasing power. *See* Food Stamp Act of 1964, § 2; ¶ 1.[2] SNAP is federally funded but administered by State agencies. 7 U.S.C. § 2020(a)(1). To implement SNAP, Defendants promulgate regulations which apply to all State agencies administering SNAP. 7 U.S.C. §§ 2013(c), 2020(e)(6)(A); ¶ 2. State agencies are also required to apply any and all instructions, guidance, and written directions issued by Defendants even if they are not reflected in formal regulations. *See* 87 Fed. Reg. 35,853, 35,855 (June 14, 2022). Defendants are not involved in decisions about individual SNAP participants' benefits. *See* 18 N.Y.C.R.R. § 387.2.

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[1] In this Motion Plaintiffs rely on the Record and a number of additional documents of which this Court may take judicial notice. *See* Plaintiffs' Request for Judicial Notice, dated December 18, 2024. These documents are: (i) materials that Defendants failed to consider when they promulgated challenged agency actions, *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) (considering extra-record materials because the "agency ignored an important aspect of the problem"); (ii) documents supporting Plaintiffs' standing, *New York v. Scalia*, 490 F. Supp. 3d 748, 767 (S.D.N.Y. 2020); and (iii) background materials confirming that Defendants adopted the challenged policy, *Atanackovic v. Duke*, 399 F. Supp. 3d 79, 90 (W.D.N.Y. 2019) (permitting evidence to determine if there was an agency policy). Plaintiffs set forth material facts drawn from these extra-Record materials in their accompanying Rule 56.1 Statement. Plaintiffs believe that such statement is especially helpful given that this action requires review beyond the administrative record. *Cf. Glara Fashion, Inc. v. Holder*, 2012 WL 352309, at *1 n.1 (S.D.N.Y. Feb. 3, 2012) (explaining that Rule 56.1 statement was not required because the review was limited to the administrative record).

[2] Citations to "¶ __" refer to Plaintiffs' Rule 56.1 Statement of Undisputed Facts.

In New York, the State agency designated to administer SNAP is OTDA, which is "the agent of the [USDA] for the purposes of participation in [SNAP]." *Id.* § 387.0(a). Local departments of social services undertake the majority of the day-to-day administration of SNAP at the county level. Ex. A[3] (*Benefit Eligibility Assessment Process*, N.Y. STATE OFF. OF THE STATE COMPTROLLER (2014)) at 4; Ex. B (*SNAP Source Book*, N.Y. STATE OFF. OF TEMP. & DISABILITY ASSISTANCE (2011)) at 3-1; ¶ 3.

During the COVID-19 pandemic, Congress authorized supplemental assistance for households with children who would have otherwise received free or reduced price school meals in the form of P-EBT benefits. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 1101, 134 Stat. 178, 179 (2020). P-EBT benefits are indistinguishable from SNAP benefits for benefit issuance and redemption purposes. 85 Fed. Reg. 70,043, 70,044–45 (Nov. 4, 2020).

II. Use of EBT Cards to Purchase Food with SNAP in New York State

SNAP participants in New York use an EBT card issued by OTDA to purchase food from authorized retailers. The benefits are "issued from and stored in a central databank" and SNAP participants can receive the benefits only by "electronically access[ing them] . . . at the point of sale." 7 U.S.C. § 2016(h)(11)(A)(iii). At the POS, participants swipe their EBT card, enter their PIN, and then complete their purchase. Ex. C (*Electronic Benefits Transfer (EBT) Card*, N.Y. OFF. OF TEMP. & DISABILITY ASSISTANCE (2024)) at 2; ¶ 6.

When the participant swipes her card, account information stored on the magnetic stripe interfaces with a central database which enables the availability of funds to be verified, the participant's balance to be debited, and the appropriate amount to be credited to the retailer's bank account. *See* 7 C.F.R. §§ 274.8(a)(3), 274.8(b)(7); ¶ 7. SNAP participants have access to a government-

[3] Citations to "Ex. __" refer to exhibits to the Declaration of Maria Slobodchikova in Support of Plaintiffs' Motion for Summary Judgment, made December 18, 2024.

administered SNAP account with a certain balance at any given moment available for use with a merchant, but they do not have control of the benefits themselves. *See* 7 C.F.R. § 274.7(d); ¶ 8. SNAP benefits cannot be withdrawn, downloaded, printed out, or deposited in the participant's personal bank account.

III. EBT Cards are Susceptible to Skimming.

Skimming is a form of electronic theft. It occurs when perpetrators place a skimming apparatus on an ATM or POS device. Ex. D (*Skimming*, FED. BUREAU OF INVESTIGATION (2024)) at 1; ¶ 9. Skimming devices are extremely hard to detect—for both the customer and the owner/lessor of the ATM and POS system—and have become increasingly more sophisticated. Ex. D at 1; Ex. T (Gordon Snow, Statement Before the House Financial Services Committee (Sept. 14, 2011)) at 3; ¶ 10.

Typically, these devices take the form of physical overlay apparatuses with Bluetooth technology and are designed to look exactly like the underlying system. For example, in a retail store, thieves often install a false, Bluetooth-enabled cover designed to look exactly like a debit card reader over real debit card readers. Ex. E (General Information Message, Valerie Figueroa, OFF. OF TEMP. & DISABILITY ASSISTANCE, Skimming & Phishing (Oct. 27, 2022)) at 2; ¶ 11. Once perpetrators have installed the device, they are able to steal and then remotely transmit card/PIN information to an offsite location. Perpetrators use the data to create a duplicate version of the card which then enables remote access to the compromised account. Ex. E at 2; ¶ 12.

Since skimming devices simply transmit information and otherwise allow legitimate EBT transactions to proceed unimpeded, targeted retailers and victims are typically unaware that theft has occurred until their next attempted purchase or account balance review—after their account has already been compromised. Ex. E. Although cards with chips (or EMV) are less vulnerable to skimming, *see* Ex. D at 2, as of December 2024, Defendants do not require EMV technology on

the EBT cards.[4] Ex. F (*Addressing Stolen SNAP Benefits, Q&A*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. (2024)) at 4; ¶ 15.

Theft through skimming was well-documented and widely reported before 2010, when the regulation was adopted. *See, e.g.*, Ex. L (*Debit Card Skimming Group Arrested and Charged with Fraud and Identity Theft,* FED. BUREAU OF INVESTIGATION, MIA. DIV. (May 1, 2009)) at 1; Ex. Z (*Two Defendants Plead Guilty in ATM Skimming Scheme,* FED. BUREAU OF INVESTIGATION (Nov. 9, 2009)) at 1; Ex. V (*Hearing Before the Subcomm. on Emerging Threats, Cybersecurity, and Sci. and Tech. of the H. Comm. on Homeland Sec.*, 111th Cong. (2009)) at 2 ("Hackers installed malicious code on servers to every one of the grocery stores in the Hannaford chain. The malware intercepted the data stored on the magnetic stripe of payment cards as customers used them at the checkout counter."); Ex. CC (Cong. Rsch. Serv., The EMV Chip Card Transition: Background, Status, and Issues for Congress (2016)) at 4, 6, n.25 ("Between 2004 and 2010, fraud committed on U.S.-issued bank credit cards rose 70% . . . POS intrusions and the ensuing card fraud are facilitated by . . . the continued use of magnetic stripe cards that carry unencrypted data."); Ex. T at 3 ("ATM skimming is . . . a prevalent global cyber crime."); Ex. I (Sue Chan, *Is Your Credit Card Being Skimmed?* CBS NEWS (Dec. 6, 2002)); Ex. J (Laura Italiano, *Shock Scam Rips off ATM Users*, NY POST (Dec. 3, 2003)); Ex. K (*ATM Skimming 101*, ABC NEWS (Apr. 26, 2009)); ¶¶ 17-18. By 2010, the technology available to skimmers had become more advanced. *See* Ex. T at 3; Ex. V at 9–10; Ex. M (Ashley Feinberg, *The Evolution of ATM Skimmers*, GIZMODO (Aug. 27, 2014)) at 3–5; ¶¶ 17-18.

[4] Two states have introduced the EMV technology, but it is not yet operational. Ex. G (*Attention: California and Oklahoma SNAP EBT Retailers*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. (2024)) at 1. There is also a bill currently before the U.S. Senate which would require all EBT cards to include the technology. Ex. H (Elizabeth Chuck, *New Bill Would Require SNAP EBT Cards to Have Microchips and Other Safeguards to Combat Skimming*, NBC NEWS (May 7, 2024)) at 4.

IV. Pre-EBT Rules on Replacement of Stolen SNAP Benefits

Before the advent of EBT cards, participants received their benefits in the form of paper coupons. Food Stamp Act of 1964, § 6. Some states mailed these paper coupons directly to participants. Ex. N (Issuance and Use of Food Coupons, 43 Fed. Reg. 47,927, 47,928 (1978)) at 2. Others mailed "Authorization-to-Participate" documents, which participants could exchange for the paper coupons at a post office, bank, or other authorized location. *Id*. It was for State agencies to decide how the coupons were to be delivered. *Id.*

In the 1980s, Defendants' regulations permitted replacement of paper coupons stolen or lost *prior* to their receipt in the mail 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. *Id.* Defendants' rationale for treating these two situations differently hinged on the level of control participants exercised over the benefits before and after receipt and the resulting potential for fraudulent replacement requests once participants controlled the benefits. Defendants recognized that "households have little control over the nondelivery of mail." CHEN-00000038-39.[5] But they emphasized that losses "after receipt . . . are subject to greater control by the household," *id*., and noted that "a recipient should be responsible for coupons once the recipient has the coupons." CHEN-00000044, 46. Consistent with this emphasis on personal responsibility and control, the regulations did make some provision for the replacement of coupons that had already been received, but only where they had been "destroyed by a fire, flood, tornado or other devastating event beyond the control of the household." *Id*. These rules remained in place until 2010, when Defendants replaced them with rules governing EBT benefits. *See* Ex. AA (7 C.F.R. § 274.6 (1989)).

[5] Citations to documents with Bates stamps "CHEN-00000XX" refer to documents in the Record (ECF No. 51).

In 1996, Congress required that State agencies complete the transition to the EBT system in accordance with federally established standards. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 825, 110 Stat. 2105, 2324 (1996), codified at 7 U.S.C. § 2016(h)(7). At the same time, Congress ensured that EBT cardholders would be entitled to protections previously enjoyed by coupon holders. *Id.* The statute provides:

> Regulations issued by the Secretary regarding the replacement of benefits and liability for replacement of benefits under an electronic benefit transfer system shall be similar to the regulations in effect for a paper-based supplemental nutrition assistance issuance system.

The "replacement of benefits" provision that was "in effect" when Congress issued this command was 7 C.F.R. § 274.6 (1989), described above, which authorized the replacement of paper coupons if they were stolen from the mail prior to the SNAP participants' "receipt" of the coupons. In 2008, Congress amended the EBT-related provisions of the 1996 Act and reiterated the mandate that rules regarding replacement of EBT benefits be "similar" to those "in effect" for paper coupons. Food and Nutrition Act of 2008, Pub. L. No. 88-525, 78 Stat. 703, § 7(h)(7). The 2008 Act also added provisions governing the replacement of benefit *cards*, emphasizing that "in implementing [these provisions], a State agency shall act to protect homeless persons, persons with disabilities, victims of crime, and other vulnerable persons who lose [EBT] cards but are not intentionally committing fraud." *Id.* § 7(h)(8)(c).

V. Defendants Promulgate Rule on Replacement of EBT Benefits.

On April 12, 2010, Defendants promulgated a new set of regulations "to account for the replacement of the paper coupon issuance system with the [EBT] system as the nationwide method of distributing benefits to program recipients." 75 Fed. Reg. 18,377 (Apr. 12, 2010). The 2010 Regulation, which remains in effect today, provides for the replacement of benefits when "the household reports that food purchased with [SNAP] benefits was destroyed in a household

misfortune," 7 C.F.R. § 274.6(a)(1), or when the household informs the agency that their EBT card has been lost or stolen, 7 C.F.R. § 274.6(b)(2). However, in contrast to the prior version of the regulation, 7 C.F.R. § 274.6 (1989), which provided for the replacement of paper-based coupons stolen from the mail prior to receipt and beyond the recipient's control, the 2010 Regulation does not authorize the use of federal funds to replace benefits stolen or lost in similar circumstances.

Neither the proposed rule nor the adopting release explains why Defendants decided to limit eligibility for replacement benefits nor why they eliminated participants' right to replacement benefits that were stolen when they were not in recipients' control. These documents also do not contain any analysis of whether the 2010 Regulation is similar to the rule governing replacement of paper coupons, nor the potential harm to vulnerable households who lose subsistence benefits through electronic theft. Indeed, there is not a single document in the Record suggesting that Defendants even considered the similarity requirement in promulgating the 2010 Regulation, let alone explaining why Defendants removed protections for stolen SNAP benefits in situations beyond participants' control.

VI. Defendants Formulate a Non-Replacement Policy in 2022.

In 2022, following a surge in skimming incidents targeting SNAP participants, Defendants adopted a policy expressly prohibiting the use of federal SNAP funds to replace skimmed benefits. This policy is evidenced by several memoranda and other documents issued by Defendants, OTDA, and HRA, over the course of 2022 and early 2023, that acknowledged the harm that skimming causes to SNAP participants, but nonetheless made clear that skimmed benefits could *not* be replaced using federal funds. *E.g.,* Ex. O (Policy Bulletin #22-93-ELI, N.Y.C. HUM. RES. ADMIN. (Dec. 19, 2022)) at 1; Ex. R (Policy Memo, Cynthia Long (Oct. 31, 2022)) at 1–2; ¶ 20.

Defendants "encourage[ed] SNAP participants to take actions that may help prevent card skimming," but made no provision for the replacement of skimmed benefits and instructed participants to "contact [their] local SNAP office" if they believed they had been targeted. Ex. Q (*SNAP EBT Card Skimming Scam Alert*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION (Oct. 19, 2022)) at 2; ¶ 21. Similarly, Defendants' policy memorandum of October 31, 2022 listed various fraud prevention measures but did not discuss replacement. Ex. R at 1–2; ¶ 23. At virtually the same time, State agencies issued various directives informing the public that Defendants' regulations prohibited them from replacing skimmed benefits using federal funds. On October 27, 2022, for instance, OTDA explained to local SNAP districts that "[Defendants] prohibit[] replacing stolen SNAP benefits using federal funds" even where a reported case of skimming is "confirmed." Ex. E at 3; ¶ 22. OTDA also instructed victims to report skimming to their local department of social services. Ex. E at 3. Like OTDA, HRA used identical language in a December 19, 2022 policy bulletin stating that Defendants' regulations "prohibit[] replacing stolen SNAP benefits using federal funds," and that "stolen/skimmed SNAP benefits cannot be replaced even if a reported case of skimming is confirmed." Ex. O at 1; ¶ 24. In short, Defendants instructed victims of SNAP skimming to reach out to the responsible State agencies, who are obligated to comply with Defendants' rules, regulations, instructions, policy guidance and directives, 7 C.F.R. §§ 272.2(a)(2), (b)—and who in turn—acting as Defendants' agents (*see* 18 N.Y.C.R.R. § 387.0(a))—informed SNAP participants that Defendants prohibited the replacement of skimmed benefits.

At the end of 2022, Congress passed the 2023 Appropriations Act, which directed the USDA to require states "to replace benefits that are determined by the State agency to have been stolen through card skimming . . . or similar fraudulent methods," but limited the requirement to benefits stolen between October 1, 2022, and September 30, 2024 (subsequently extended to

December 20, 2024, after which point there will be no reimbursement at all), and capped replacement to two months' worth of benefits and only two replacements per year. *Id*. § 501(b)(2); ¶ 25.[6] On January 31, 2023, Defendants issued a memorandum confirming their refusal to replace benefits outside the narrow parameters of the new law. Ex. P (Policy Memo, Tim English, (Jan. 31, 2023)) at 1–2. The memorandum directed states to submit plans to "process household claims of stolen benefits," but only to the extent required by the 2023 Appropriations Act. *Id*. at 1; ¶ 26. The Record produced in this action does not contain any documents relating to the decision-making process surrounding the 2022 Policy.

VII. Plaintiffs

Plaintiffs represent but a handful of New Yorkers who are SNAP participants whose benefits were stolen through skimming. Because Defendants' rules do not allow replacement of skimmed benefits, all five Plaintiffs, who already struggled to afford food to feed their family, became even more food insecure and were forced to rely on donations from family members, food charities, or simply go without. *See* Chen Decl. ¶ 6; Watson Decl. ¶ 6; S.O. Decl. ¶ 7; Cribbs Decl. ¶ 5; Broome Decl. ¶ 5; Lee Decl. ¶ 6.

Ms. Chen is a single parent and the sole source of financial support to four minor children who earns $21-22,000 per year as a server in a restaurant. ¶ 29. On June 25-26, 2022, $3,887.85 worth of SNAP benefits were stolen from her account. Chen Decl. ¶¶ 2–3; Ex. BB (SFARS Recipient Report) at CHEN-USDA_00000048, rows 7–15; ¶ 33. Ms. Watson's only source of income is her Social Security Disability benefits, which she also uses to support her adult daughter and minor granddaughter. ¶ 37. On July 15, 2022, $528.67 worth of SNAP benefits were stolen from her account. Watson Decl. ¶ 3; Ex. BB at CHEN-USDA_00000164, rows 7–10; ¶ 39. S.O. is

[6] The USDA has to date reimbursed approximately 65,000 claims from New York residents, for a total of approximately $31 million. Ex. S (*SNAP Replacement of Stolen Benefits Dashboard* (2024)) at 2; ¶ 27.

a survivor of domestic violence and the sole caretaker to a young son. S.O. Decl. ¶ 2; ¶ 43. She currently lives in a domestic violence shelter and at the time of the skimming was working as a grocery store clerk part time. S.O. Decl. ¶ 2; ¶ 43. On March 13, 2022, $279.86 worth of benefits were stolen from her account. Ex. BB at CHEN-USDA_00000126, rows 33–34; ¶ 44. Ms. Cribbs recently relocated to a senior residence after the death of her 96-year-old sister. Her only source of income is SSI. Cribbs Decl. ¶ 1; ¶ 48. On August 26, 2022, $400 worth of SNAP benefits were stolen from her account. Cribbs Decl. ¶ 3; Ex. BB at CHEN-USDA_00000100, rows 15–18; ¶ 50. Ms. Broome is a mother to six young children, two of whom have disabilities. Broome Decl. ¶ 1; ¶¶ 54-55. On November 18, 2022, $1,989.52 worth of SNAP benefits were stolen from her account. Broome Decl. at ¶ 3; Ex. BB at CHEN-USDA_00000018, rows 11–12; ¶ 56. Ms. Lee is a widow whose only source of income is SSI. Lee Decl. ¶ 1; ¶ 60. On August 16, 2022, $297.36 worth of SNAP benefits were stolen from her account. Lee Decl. ¶ 3; Ex. BB at CHEN-USDA_00000114, row 17; ¶ 61. None of the Plaintiffs were eligible to have all their skimmed benefits replaced with federal SNAP funds because the 2010 Regulation and/or the 2022 Policy do not allow it, and they lost more than two months of benefits or were skimmed prior to October 2022 and thus were not covered by the 2023 Appropriations Act.[7] *Id.*; *see* Answer ¶¶ 61, 64.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kirkland v. Cablevision Sys.*, 760 F.3d 223, 224 (2d Cir. 2014). The proper inquiry is whether there are any material factual issues that can only be resolved at trial because they may reasonably be resolved in favor of either party. *See*

[7] Ms. Broome received full reimbursement for her skimmed benefits, but she was not eligible for the full amount under the 2023 Appropriations Act because she was skimmed more than two months of benefits. *See* Ex. BB at CHEN-USDA_00000018.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Parties agree that this case is appropriate for summary judgment. *See* ECF No. 54.

ARGUMENT

Defendants' 2010 Regulation and the 2022 Policy violate the APA because, contrary to the statutory requirement, they do not provide for replacement of skimmed SNAP benefits. They are also arbitrary and capricious because Defendants did not consider either whether the EBT replacement rules are similar to the rule governing replacement of paper coupons or whether their rules respond in a rational way to the pervasive problem of skimming. Similarly, Defendants' actions violate the APA because Defendants failed to provide any rationale for the resulting change in their replacement regime.

I. The 2010 Regulation Violates the APA.

The 2010 Regulation violates the APA because it ignores the congressional mandate and prohibits replacement of skimmed SNAP benefits. It is also arbitrary and capricious, and therefore should be set aside.

A. The 2010 Regulation is Contrary to Law.

The APA states that courts shall "hold unlawful and set aside agency action" found to be "not in accordance with law." 5 U.S.C. § 706 (2)(a). Courts have interpreted "not in accordance with law" to include agencies' actions that contradict the "unambiguously expressed intent of Congress" or otherwise go beyond "the authority granted to it by statute." *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).

Defendants' 2010 Regulation does exactly what the APA prohibits. In 1996, and then later in 2008, as part of the transition from paper-based food stamps, Congress stated that rules for the replacement of EBT benefits should be "similar" to those that governed replacement of paper-

based SNAP benefits. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 825(a)(i)(3)(7); Food and Nutrition Act of 2008, § 7(h)(7). To comply, Defendants were required to promulgate a regulation that was similar to the one in effect which allowed replacement of paper coupons stolen or lost while in the mail. They did not do so, and thus they acted "contrary to the 'unambiguously expressed intent of Congress.'" *Mineta*, 340 F.3d at 55.

To determine the meaning of the Congressional "similarity" requirement, this Court should exercise its independent judgment and use "all relevant interpretive tools." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266, 2273 (2024). Such interpretation should begin with the plain meaning of the statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text."); *Lee v. Bankers Tr. Co*., 166 F.3d 540, 544 (2d Cir.1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation . . ."); *El Omari v. Int'l Police Org.*, 35 F.4th 83, 88 (2d Cir. 2022) (relying on "contemporary dictionary definitions" to determine the plain meaning). The plain meaning of "similar" indicates that Congress intended that the new replacement rule be "alike in substance or essentials" to the former rule and that both rules have a "common raison d'etre," "same purpose" and provide the same standards of relief. *See* Ex. U (MERRIAM WEBSTER DICTIONARY (2024)); *see also United States v. Stimac*, 40 F.4th 876, 881 (8th Cir. 2022) (interpreting "similar" as "having characteristics in common" and "alike in substance or essentials"); *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (holding that statutes that are similar—that have common raison d'etre or same purpose—should be interpreted similarly). A replacement rule for EBT benefits that is similar to the rule governing replacement of paper coupons, thus, should have the "same purpose" and "be alike in substance or essentials" to the earlier rule.

The 2010 Regulation, codified at 7 C.F.R. § 274.6, fails to authorize, and thus effectively

prohibits, replacement of skimmed benefits with federal funds and is not similar to the rule governing replacement of paper coupons because it lacks the following essential features.

Unlike the former rule, the 2010 Regulation does not protect SNAP recipients who lost their benefits when they had little to no control over them. The regulation in place prior to the transition to EBT cards permitted states to replace paper coupons that were "not received in the mail, were stolen from the mail, were destroyed in a household misfortune, or were improperly manufactured or mutilated." 7 C.F.R. § 274.6(a)(1)(ii) (1989). As explained above, the underlying rationale for this rule was to protect SNAP participants who lost their benefits when they had little to no control over them. *See, e.g.*, CHEN-00000038 ("households have little control over the nondelivery of mail"); CHEN-00000044 (acknowledging that recipients' responsibility for their coupons depends on whether they "ha[ve] the coupons" in their possession).

The 2010 Regulation does not rely on this same principle. It does not allow replacement of skimmed benefits even though EBT card holders, like SNAP recipients waiting for their paper coupons to be delivered by mail, have no control over the benefits at the time the skimming occurs. EBT benefits are "issued from and stored in a central databank," and participants can receive the benefits only by "electronically access[ing them] . . . at the [POS]." 7 U.S.C. § 2016(h)(11)(A)(iii)(II); Ex. C. at 2. EBT benefits cannot be withdrawn, downloaded, or deposited in the participant's personal bank account. ¶ 8. Rather, the benefits must remain in theft-vulnerable government-controlled accounts until they are used.

Importantly, for both paper coupons and EBT cards, the government, not the recipients, controls the method of disbursement of benefits, and thus the government alone could implement protections to prevent theft. For paper coupons, states controlled the issuance and delivery of the benefits and were responsible for ensuring the security of participants' benefits. *See* Ex. N. at 2

(allowing State agencies to deliver coupons by "direct coupon mailout" and imposing on states responsibilities for distributing coupons). For EBT benefits, participants can check to see when benefits are credited to their account, however, the method of disbursement onto their EBT cards, as well as the EBT cards themselves, are controlled by the government. Defendants alone—not SNAP recipients—can implement protections to prevent theft from the EBT system. Specifically, Defendants could have utilized chip technology, which is widely understood to reduce the risk of card skimming, but chose not to.[8] *Supra*, p. 4, *see* Ex. V at 3 ("Magnetic stripe-based technology is outmoded and inherently less secure when compared to smart cards."); *see also* Ex. W (Jessica Fu, *How Scammers are Stealing Food Stamps From Struggling Americans*, N.Y. TIMES (May 4, 2024)) at 3; Ex. X (Mahsa Saeidi, *Thousands of New Yorkers Targeted in SNAP Card-Skimming Scam*, CBS NEWS (June 14, 2024)) at 2; ¶ 14.

Moreover, unlike the earlier rule, the 2010 Regulation does not protect members of a vulnerable population highly dependent on the benefits which have been stolen. As explained above, among the victims of skimming are single parents like Ms. Chen, parents of children with disabilities, like Ms. Broome, survivors of domestic abuse, like S.O., and widows living in senior care facilities, like Ms. Lee. *Supra*, pp. 10–11. They are exactly the population the SNAP Program intends to protect but under the 2010 Regulation they are left without any recourse. *See, e.g.*, CHEN-00000013 ("[T]he policy of Congress" is "to *safeguard the health and well-being* of the Nation's population by raising levels of nutrition among low-income households." (emphasis added)); *see also* 7 U.S.C. § 2014(c); 7 C.F.R. § 273.9(a); Ex. Y (*SNAP Eligibility*, U.S. DEP'T OF

[8] In 2024 OTDA introduced a limited protective feature for EBT cards, which allowed SNAP recipients to lock their cards from being accessed and block all out-of-state transactions. OTDA admitted that "[t]he locking feature cannot prevent card information from being skimmed if a household's card is used on a compromised device." General Information System Message, Valerie Figueroa, Deputy Comm'r Emp. and Income Support Programs, Off. of Temp. and Disability Assistance, New Common Benefit Identification Card (CBIC) Card Lock Feature, 1 (Feb. 21, 2024), https://otda.ny.gov/policy/gis/2024/24DC005.pdf (last visited Dec. 18, 2024).

AGRIC. FOOD & NUTRITION SERV. (2024)) at 1–2. By contrast, they would have been protected under the earlier rule were their paper coupons stolen in similar circumstances prior to 2010.

Accordingly, the 2010 Regulation prohibiting replacement of skimmed benefits with federal funds does not serve the same purpose or have the essential characteristics of the rule allowing replacement of coupons stolen or lost while in the mail and thus is not similar to it. Instead, it drastically reduces the circumstances in which benefits can be replaced: if food had been lost in a household misfortune, § 274.6(a)(1), or where additional benefits were stolen after the theft of the benefits card itself had been reported to the agency, § 274.6(b)(2). This reduction in the availability of benefit replacement cannot be squared with the clear directive of 7 U.S.C. § 2016(h)(7), which required that replacement rules be "similar to" the prior scheme. Because this action is contrary to the statute, it violates the APA.

As such, the 2010 Regulation, to the extent it does not allow replacement of skimmed benefits with federal funds, should be declared unlawful and set aside. *See New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 537, 580 (S.D.N.Y. 2019) (concluding that "by using a regulation to override Title VII's longstanding framework" "HHS has acted contrary to law" and ordering that the regulation be set aside).

B. The 2010 Regulation is Arbitrary and Capricious.

The APA states that reviewing courts shall "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706 (2)(a). Defendants' 2010 Regulation is arbitrary and capricious because Defendants did not consider (1) whether the EBT replacement rules are similar to the rule governing replacement of paper coupons, (2) the pervasive problem of skimming, and because (3) the 2010 Regulation is illogical on its own terms.

1. Defendants failed to consider whether the 2010 Regulation was similar to the regime governing paper coupons or provide an explanation for the new rule.

The 2010 Regulation is arbitrary and capricious because Defendants did not consider the factor Congress required them to evaluate—whether the new replacement rule was similar to the preexisting one. The 2010 Regulation is also arbitrary and capricious because Defendants failed to provide any rationale for veering from the then-existing benefits replacement regime.

"When Congress requires an agency to consider something" courts "ask whether the agency has reached an 'express and considered conclusion' pursuant to the statutory mandate." *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 964 F.3d 56, 61 (D.C. Cir. 2020). "[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.'" *New York v. U. S. Dep't of Lab.*, 477 F. Supp. 3d 1, 13 (S.D.N.Y. 2020). An agency's failure to weigh the factors Congress intended it to consider renders the action arbitrary and capricious. *See Cigar Ass'n of Am.,* 964 F.3d at 61, 64–5 (FDA rule arbitrary and capricious where the agency ignored the statutory mandate to consider the rule's effect on the number of smokers) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

As explained above, Congress required that the 2010 Regulation be similar to the rule governing replacement of paper coupon. 7 U.S.C. § 2016(h)(7). At the very least, such mandate requires Defendants to analyze whether the rules are similar. However, nothing in the Record suggests that Defendants even considered similarity, let alone explains how their decision satisfied Congress' mandate. Defendants' failure to do so renders the 2010 Regulation arbitrary and capricious. The Court should therefore set it aside. *See, e.g., United States Dep't of Lab.*, 477 F. Supp. 3d at 13, 18 (setting aside DOL rule where the agency provided only a "circular", "barebones

explanation"); *Cigar Ass'n of Am.*, 964 F.3d at 61, 64–5 (striking FDA rule where the agency ignored the factors Congress required it to consider).

Even if Defendants had considered whether the 2010 Regulation was similar as instructed by the statute, Defendants still have the additional obligation to both acknowledge and provide a rationale for changing the prior policy concerning replacement of stolen benefits.

As explained above, the 2010 Regulation limited the circumstances in which benefits can be replaced and excluded the replacement of skimmed benefits, which are, by definition, stolen while outside of SNAP recipients' control. When an agency departs from a prior policy, it is required to "display awareness that it is changing position" and provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515–16 (2009); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 85 (2d Cir. 2020) (requiring that the agency show that there were "good reasons for the new policy" at the time it was chosen). As the Record reveals, however, Defendants, failed to provide *any* explanation for their decision to prohibit the replacement of skimmed SNAP benefits. Such an "[u]nexplained inconsistency" renders the action arbitrary and capricious. *New York v. U.S. Dep't of Health and Human Servs.*, 414 F. Supp. 3d 475, 547 (S.D.N.Y. 2019).

2. Defendants failed to consider the pervasive problem of skimming.

The 2010 Regulation is likewise arbitrary and capricious because Defendants failed to consider the pervasive problem of skimming when promulgating the final rule.

An agency action is "arbitrary and capricious where the agency . . . entirely failed to consider an important aspect of the problem." *Dep't of Health and Human Servs.*, 414 F. Supp. 3d at 554 (*citing State Farm*, 463 U.S. at 43); *Christ the King Manor, Inc. v. Secretary U.S. Dept. of Health and Hum. Servs.*, 730 F.3d 291, 314 (3d Cir. 2013) (HHS decision to approve Medicare

amendments held arbitrary and capricious where the agency failed to "ensure that payments would still be consistent with quality of care and adequate access").

At the time Defendants promulgated the 2010 Regulation, skimming was already well-known, widely reported, and considered a significant threat to EBT and similar credit/debit card users. *Supra*, p. 5; Ex. V at 2–3; *see also* Ex. CC at 4 ("Between 2004 and 2010, fraud committed on U.S.-issued bank credit cards rose 70%."); ¶¶ 17-18. Defendants should have considered the impact of this surge in cybercrime when promulgating the replacement rule.

Nevertheless, despite the dramatic rise in skimming in the years preceding the 2010 Regulation, nothing in the Record reflects that Defendants even considered the possibility that participants' benefits could be skimmed through no fault of their own. By the time Defendants promulgated their regulation in 2010, the idea that EBT cards were secure from theft absent participants' own negligence was plainly wrong. *See* CHEN-00000130 (noting, in 1992, that "an EBT card without a PIN is unusable. . . . EBT systems can adequately safeguard against fraudulent and/or duplicate issuances."). However, Defendants inexplicably ignored the possibility that SNAP benefits could be skimmed despite participants' best efforts. Defendants' failure to account for this "important aspect of the problem" thus renders the 2010 Regulation's replacement rules arbitrary and capricious and requires that they be set aside. *Dep't of Health and Human Servs.*, 414 F. Supp. 3d at 554.

3. Defendants' replacement rule is illogical.

Finally, Defendants' regulation is arbitrary and capricious because it denies protection to the exact population that is supposed to benefit from the SNAP Program and is therefore "illogical on its own terms." *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n*, 106 F.4th 1113, 1118 (D.C. Cir. 2024) (quoting *Am. Fed'n of Gov't Emps., Loc. 2924 v. Fed. Lab. Rels. Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006)).

To survive judicial review, an agency action must be the result of "a reasoned path from the facts and considerations before the [agency] to the decision" and "must come with '[such] relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Fed. Lab. Rels. Auth.*, 470 F.3d at 380. If the action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it is arbitrary and capricious. *Mineta*, 340 F.3d at 53.

The replacement rule in the 2010 Regulation does not satisfy this standard. As explained above, the SNAP Program's purpose is "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households." 7 U.S.C. § 2014(c). Moreover, in 2008, Congress expressed concern for the protection of "homeless persons, persons with disabilities, victims of crime, and other vulnerable persons who lose electronic benefit transfer cards but are not intentionally committing fraud." Food and Nutrition Act of 2008, § 7(h)(8)(c). Such a concern applies even more forcefully to recipients who faithfully safeguard their physical cards, yet lose benefits due to electronic theft that is utterly beyond their power to prevent. Defendants, however, did not and cannot provide a single reason for depriving this vulnerable group of the benefits to which they are entitled.

Moreover, the challenged rule rests on an inaccurate assumption that EBT benefits would be immune from theft so long as the participant has their EBT card in their possession. *See* CHEN-00000130; *see supra*, p. 19. As the prevalence of skimming before and after 2010 makes clear, *see supra*, p. 5, this assumption was and is incorrect. Take, for example, 73-year-old breast-cancer survivor Gertrude Cribbs. Despite checking her balance only two days earlier, regularly changing her PIN number, and never sharing her account information with anyone else, Ms. Cribbs was skimmed of her benefits *twice*. Both times she and her elderly sister were left food insecure and

without any means of obtaining replacement benefits. Cribbs Decl. ¶¶ 1, 3, 6; ¶¶ 48, 50–53. This distorted result is directly at odds with the purposes of the SNAP Program.

As such, the 2010 Regulation is plainly not a result of agency expertise or reasoned decision making but rather represents an arbitrary decision to exclude the exact population that is supposed to be protected by the SNAP Program. *See Mineta*, 340 F.3d at 53.

II. The 2022 Policy Violates the APA.

Even if the Court determines that the *omission* of skimming reimbursement from the 2010 Regulation does not comprise final agency *action* such that the APA does not apply, the Court can render summary judgment based on Defendants' independent violation of the APA in adopting the 2022 Policy which expressly denies replacement of skimmed SNAP benefits. Defendants' 2022 Policy is contrary to law, arbitrary and capricious, and should be set aside.

A. The 2022 Policy is Reviewable Final Agency Action.

In 2022, following a surge in skimming incidents, Defendants adopted a policy prohibiting the use of federal SNAP funds to replace benefits stolen by skimming. This policy is reflected in several memoranda and other documents issued by Defendants, OTDA, and HRA, which made clear that skimmed benefits could not be replaced using federal funds. Instead, Defendants instructed victims of skimming to reach out to the responsible State agencies in their location—who are obliged to comply with Defendants' rules, regulations, instructions, policy guidance and directives, 7 C.F.R. §§ 272.2(a)(2), (b)—and who in turn informed SNAP participants that, pursuant to Defendants' policies, no federal funds could be used to reimburse skimmed benefits under federal law. *See supra*, p. 9; Ex. O at 1; Ex. E at 3; ¶¶ 20–24. Defendants admitted that such a rule exists. Answer ¶¶ 61, 64.

Defendants' 2022 Policy is a reviewable "final agency action" under the APA. To constitute such action, two requirements must be met: "First, the action must mark the

consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations and quotation marks omitted); *see R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 375–76 (S.D.N.Y. 2019) (applying the same analysis at the motion for summary judgment stage). The challenged action need not be an agency's "final word on the matter for it to be 'final' for the purposes of judicial review." *Salazar v. King*, 822 F.3d 61, 83–84 (2d Cir. 2016). The "possibility of further proceedings in the agency" is not preclusive either, "so long as judicial review at the time [will not] disrupt the administrative process." *Sharkey v. Quarantillo*, 541 F.3d 75, 88–89 (2d Cir. 2008) (internal quotations omitted). Nor does the agency have to issue "a formal or official statement." *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 165 (E.D.N.Y. 2018). Rather, it is the "practical effect of the [agency's] action, not the informal packaging in which it was presented," that is the "determining factor." *Id.*; *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior,* 397 F. Supp. 3d 430, 446–47 (S.D.N.Y. 2019) (Caproni, J.) (holding that an agency's interpretative statement was final agency action for the purposes of judicial review); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000) (holding that "policy statements" may be considered rules for purposes of judicial review and determining that the agency's "settled position" which "officials in the field are bound to apply" was final agency action).

The 2022 Policy readily satisfies these requirements. As to the first prong, there is nothing tentative or interlocutory about Defendants' decision not to replace skimmed benefits. Defendants unequivocally state that they "prohibit[] replacing stolen SNAP benefits using federal funds" even where a reported case of skimming is "confirmed." Ex. E at 3; *see also* Ex. P at 2; ¶ 22. As to the

second prong, there can be no serious question that the 2022 Policy produced "legal consequences" that "directly affect[ed]" Plaintiffs. *Salazar*, 822 F.3d at 82.

B. The 2022 Policy is Contrary to Law.

As shown *supra*, pp. 12–16, a final agency action must be set aside when it does not accord with the statutory mandate. Here, Defendants' 2022 Policy, like their 2010 Regulation, does not abide by the requirement in 7 U.S.C. § 2016(h) that any new replacement rule be "similar to" the replacement rule for paper coupons. *See supra*, pp. 8–10, 12–16. Thus, Defendants' Policy prohibiting the use of federal funds to replace skimmed benefits must also be set aside as contrary to law under the APA. *See Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d at 537, 580 (concluding that "HHS has acted contrary to law" and ordering that the regulation be set aside); *Mineta*, 340 F.3d at 55 (vacating a rule that is contrary to "intent of Congress").

C. The 2022 Policy is Arbitrary and Capricious.

Defendants' 2022 Policy is also arbitrary and capricious because (1) Defendants did not consider whether the EBT replacement rules are similar to the replacement of paper coupons; and (2) because the policy is unreasonable/illogical. As with the 2010 Regulation, nothing in the 2022 Policy or Record shows that Defendants considered the statutory mandate to promulgate replacement rules "similar to" those in effect for paper coupons. *See supra*, pp. 8–10. Moreover, the 2022 Policy fails to provide any explanation for precluding skimming victims from seeking replacement benefits. *Supra*, pp. 8–10. Likewise, Defendants' 2022 Policy fails to recognize that skimming occurs through no fault of the participants, in situations over which they have little to no control. Defendants thus exclude an entire group of SNAP participants who would have otherwise been entitled to replacement benefits under the rules in effect for paper coupons. *See supra*, pp. 8–10. This failure to consider the required factors and advance any explanation for the policy render the 2022 Policy arbitrary and capricious under the APA. *See supra*, pp. 16–21; *State*

Farm, 463 U.S. at 43; *see Planned Parenthood v. U.S. Dep't of Health & Hum. Servs.*, 337 F. Supp. 3d 308, 341–43 (S.D.N.Y. 2018) (permanently enjoining the rule where agency failed to provide "adequate reason[s]" to flout the "statutory requirement").

III. Scope of Relief

Permanent relief in this case must be broad enough to fully protect the parties before the Court. The standard remedy for an APA violation is vacatur. *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 488 (S.D.N.Y. 2020) ("Vacatur" is appropriate when "an agency acts contrary to law, or agency action is found to be arbitrary and capricious"). Defendants' action prohibiting replacement of skimmed benefits should be vacated.

In addition, given Defendants' decades-long disregard of the statutory command, Defendants should be permanently enjoined from refusing to replace (or allowing states to replace) skimmed benefits and commanded to authorize such replacement, including of Plaintiffs' benefits that were not replaced under the 2023 Appropriations Act. Courts grant permanent injunctions when (1) plaintiffs have suffered an irreparable injury, (2) remedies available at law are inadequate, (3) the balance of hardships is in favor of the plaintiff, and (4) the public interest would not be disserved by a permanent injunction. *Planned Parenthood*, 337 F. Supp. 3d at 342.

These requirements are readily satisfied here. For one, the APA waives sovereign immunity only for "relief other than money damages," 5 U.S.C. § 702, and Plaintiffs cannot recover their financial losses. For that reason alone, in APA cases, monetary loss suffices to show an irreparable harm. *See United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (Pecuniary losses suffice to show "irreparable" harm "because a suit . . . to recover the damages. . . would be barred"); *Regeneron Pharms., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 510 F. Supp. 3d 29, 39 (S.D.N.Y. 2020) (financial losses suffice because the APA waived sovereign immunity only for relief other than monetary damages); *Rodriguez v. Carson*, 401 F. Supp. 3d 465, 467–68 (S.D.N.Y.

2019) (injunctive relief resulting in recovery of money permitted if it was "the very thing to which [plaintiff] was entitled"). For another, the last two factors also favor Plaintiffs because "there is generally no public interest in the perpetuation of unlawful agency action." *Planned Parenthood*, 337 F. Supp. 3d at 343 (merging the last two factors in an injunction against the government).

Importantly, an injunction is necessary because vacatur and declaratory judgment will not result in any practical change here. *See 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"). Without an injunction, State agencies which administer SNAP will not be able to replace skimmed benefits with federal funds. Additionally, the protections under the 2023 Appropriations Act expire on December 20, 2024, two days after this filing. After that point, Plaintiffs, or any members of the putative class, when they are likely skimmed again, will have no recourse.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' 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.

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