

**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
CINDY LONG, in her official capacity as
Administrator of the USDA Food and Nutrition
Service,

Defendants.

23-cv-1440-VEC

Oral Argument Requested

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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Plaintiffs respectfully submit this memorandum of law in opposition to the May 22, 2023 Motion to Dismiss the Complaint (ECF 31) under Fed. R. Civ. P. 12(b)(6) filed by Defendants Tom Vilsack, in his official capacity as Secretary of the U.S. Department of Agriculture (“USDA”), and Cindy Long, in her official capacity as Administrator of the USDA Food and Nutrition Service (“FNS”) (the “Motion”).

PRELIMINARY STATEMENT

Plaintiffs are just a few of the thousands of New Yorkers whose Supplemental Nutrition Assistance Program (“SNAP”) benefits were stolen prior to receipt through “skimming,” a form of electronic theft, and were left without the means to feed themselves and their families. Plaintiffs bring this action under the Administrative Procedure Act to obtain relief for Defendants’ wrongful refusal to replace their stolen SNAP benefits. Defendants’ refusal is wrongful because, as alleged in the Complaint, when the government migrated from a paper-coupon based system to an electronic system for providing SNAP benefits, Congress made clear that Defendants were required to promulgate regulations “similar” to those previously in effect. Defendants did not do so. While the regulations previously in effect provided for the replacement of benefits lost or stolen prior to receipt, the new regulations never expressly addressed this issue and thus were not “similar” at all. Indeed, Defendants never issued any public statement on the matter until 2022, after being alerted to the skimming problem, at which point they made clear that skimmed benefits could not be replaced with federal funds.

Defendants do not deny that Plaintiffs were SNAP participants who were legally entitled to their benefits, that the benefits in question were stolen from them, or that they sought relief promptly after being told that their stolen benefits would not be replaced. Nevertheless, they move to dismiss the Complaint as “untimely,” arguing that, whether brought as an as-applied, facial, or procedural challenge, the statute of limitations expired in 2016, six years after the regulation in

question—7 C.F.R. § 274.6—was first promulgated. Each of those arguments is incorrect, unsupported in law, and should be rejected.

First, the limitation period for as-applied challenges does not bar Plaintiffs’ claim. No APA cause of action “accrues” until (i) Defendants take “final” federal action and (ii) Plaintiff is injured or aggrieved thereby. Here, Plaintiffs were not injured until 2022, when Plaintiffs were informed their stolen benefits would not be replaced. What is more, the final federal action at issue here was not the promulgation of § 274.6 in 2010, as Defendants incorrectly contend, but rather the anti-replacement policy they first articulated in 2022. While Defendants pretend that the publication of that policy was not “federal” action because it was published by State authorities, (i) it is clear that the State authorities were acting as Defendants’ agents when they issued their policy statements and refused to replace Plaintiffs’ stolen benefits, (ii) Defendants never took issue with the State authorities’ public statements describing the no-replacement policy, although the State agents are required to follow all federal laws, rules and policies of Defendants, and (iii) Defendants themselves published their own anti-replacement policy statement in early 2023 which was consistent with what their agents had already articulated months before.

Second, the limitation period for facial challenges likewise does not bar Plaintiffs’ claim. A facial challenge involves a challenge to a regulation as a whole and asserts that there is no set of circumstances in which its application is proper. Plaintiffs make no such claim here. They do not challenge several aspects of § 274.6 or seek the kind of relief a facial challenge necessarily involves, such as a declaration of invalidity. Their claim, rather, is that § 274.6 does not address the issue of replacement of stolen benefits prior to receipt, despite Congress’ directive otherwise. Indeed, to the extent Plaintiffs challenge regulatory action at all, they challenge Defendants’ failure to act, which the law properly recognizes may be challenged at any time.

Third, the limitation period for “procedural” challenges does not bar Plaintiffs’ claim either. While the Complaint does allege that Defendants utilized an expedited mechanism for promulgating § 274.6, it does not challenge the use of that mechanism or otherwise allege that the procedure Defendants followed was flawed or improper in any way.

For these reasons and more, the Motion should be denied.

BACKGROUND¹

Plaintiffs hereby incorporate by reference the factual background as set forth in the Complaint. (ECF 1.) Plaintiffs highlight here only certain facts pertinent to their Opposition to Defendant’s Motion.

A. 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, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. § 2011 *et seq.*). In 2008, the Food Stamp Program was renamed SNAP, and the federal Food Stamp Act was renamed the Food and Nutrition Act of 2008 (“SNAP Act”). Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 4001–02, 122 Stat. 1651, 1853 (2008).

¹ “In reviewing a Rule 12(b)(6) motion, the court may consider” (among other things) documents “‘incorporated in [the Complaint] by reference,’” documents “‘integral’ to the [Complaint] and relied upon in it, even if not attached or incorporated by reference,” documents or information contained in [D]efendant[s]’ motion papers if [P]laintiff[s] ha[ve] knowledge or possession of the material and relied on it in framing the [Complaint],” and “facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.” *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 352 n.1 (S.D.N.Y. 2008) (internal quotation and citation omitted). Courts may also take judicial notice of records of administrative bodies. *See Richardson v. N.Y.C. Bd. of Educ.*, 711 F. App’x 11, 14 (2d Cir. 2017) (summary order) (taking judicial notice of documents that “are all public documents, promulgated by or binding on a government agency, and not subject to reasonable dispute”); *Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (proper to take judicial notice of regulations); *Porrizzo v. Bumble Bee Foods, LLC*, 822 F. Supp. 2d 406, 411 (S.D.N.Y. 2011) (taking judicial notice of materials available on FDA website).

SNAP is federally funded but administered by State agencies. Compl. ¶ 18. Regulations promulgated by the USDA-FNS implement the SNAP Act, *id.* ¶ 25, and are applicable to all State agencies administering SNAP, *see* 7 U.S.C. §§ 2013(c), 2020(e)(6)(A), 2202-2, 6951(c)(1); 7 C.F.R. § 2.57(a)(1)(i), with participating States required to conclude a Federal-State Agreement with USDA as a condition of their participation, 7 C.F.R. § 272.2(a)(2). Under the Federal-State Agreement, participating State agencies must agree to “[a]dminister the [SNAP] program in accordance with” USDA-FNS regulations. 7 C.F.R. § 272.2(b). Additionally, in a 2022 amendment to the regulation governing the Federal-State Agreement, FNS explained that “[d]epartmental instructions, policy guidance, and written directions derive from statutory and regulatory authority and clarify existing legal requirements” and that it was “unnecessary” to include explicit references to such materials in the Federal-State Agreement because they already form part of the statutory and regulatory framework States agree to adhere to when they sign the Federal-State Agreement. Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35,855 (June 14, 2022) (to be codified at 7 C.F.R. pt. 272). State agencies are thus required to apply any and all instructions, guidance, and written directions issued by FNS even if they are not reflected in formal regulations. *See id.*

Under USDA-FNS regulations, administering State agencies are broadly responsible for “[i]ssuance, control, and accountability of SNAP benefits and EBT cards” and “[d]eveloping and maintaining complaint procedures,” 7 C.F.R. § 271.4(a), including procedures for restoring lost benefits in accordance with USDA-FNS regulations, 7 C.F.R. § 273.17. If a participant disagrees with the State agency’s determination on lost benefits, State agencies are required to provide the participant with a “fair hearing” within 90 days of the determination. 7 C.F.R. § 273.17(c)(2); *see also* 7 C.F.R. § 273.15 (enumerating requirements for fair hearings).

In New York, the agency designated to administer SNAP is the Office of Temporary and Disability Assistance (“OTDA”). 18 N.Y.C.R.R. § 387.0(a) (“[T]he [OTDA] . . . is the agent of the [USDA] for the purposes of participation in [SNAP].”); *see also* Ex. I² at 2-2 (N.Y. State Off. of Temp. and Disability Assistance, Supplemental Nutrition Assistance Program Source Book (2011) (excerpts)). The New York City Human Resources Administration (“HRA”), a local department of social services, undertakes the majority of the day-to-day administration of SNAP in New York City under delegated authority from OTDA, such as processing applications for benefits, making eligibility determinations, and fielding requests for replacement of lost or stolen benefits. *See* Ex. B at 1 (N.Y. State Off. of the State Comptroller, Benefit Eligibility Assessment Process: NYC Human Resources Administration NYS Office of Temporary and Disability Assistance (2014)). SNAP participants outside of New York City are served by their county’s local department of social services. *See* Ex. I at 3-1 (“In order to assist needy families and individuals to obtain [SNAP] [b]enefits, each local district shall fulfill its responsibilities to administer [SNAP]”); Ex. K (*Local Departments of Social Services*, OTDA). Defendants are not involved in any decisions or communications regarding individual SNAP participant benefits. *See* 18 N.Y.C.R.R. § 387.2 (requiring social services districts to “certify eligible households,” “undertake the timely and accurate issuance of benefits to certified households,” “inform all food stamp applicants and recipients of their program rights and responsibilities” and “afford every applicant and participating household an opportunity for a fair hearing”). Fair hearings protesting denials by HRA of requests for replacement of lost or stolen SNAP benefits are conducted before an administrative law judge from the OTDA’s Office of Administrative Hearings. Ex. H (*Fair*

² Citations to “Ex.” refer to exhibits to the declaration of Mary Eaton, dated July 5, 2023, filed simultaneously herewith.

Hearings, OTDA); *see also* 18 N.Y.C.R.R. § 358-2.9 (establishing that New York State’s “fair hearings” procedures apply to SNAP participants); 18 N.Y.C.R.R. § 358-2.30 (establishing the Office of Administrative Hearings as the body within OTDA responsible for conducting fair hearings). Decisions reached in fair hearings are binding and, while they may be subject to judicial review, N.Y. Soc. Serv. Law § 22(9); *see also* 7 C.F.R. § 273.15(q)(2)–(3), they cannot be appealed to the USDA or FNS, *see* 7 C.F.R. § 11.1 (excluding FNS from list of agencies over whose programs USDA’s National Appeals Division has authority).

B. Defendants’ SNAP Regulations.

Under the original Food Stamp Program, participants received their benefits via paper coupons. Compl. ¶ 30. In 1996, Congress replaced this system with Electronic Benefit Transfer (EBT) cards that SNAP participants use to access their benefits. 7 U.S.C. § 2016(h); *see* Pub. L. No. 104-193, § 825, 110 Stat. 2105, 2324 (1996). In doing so, Congress instructed USDA to ensure that EBT cardholders would be entitled to the same replacement of benefits rules formerly protecting paper coupon holders. *See* Pub. L. No. 104-193, § 825, 110 Stat. 2105, 2325 (1996). Codified at 7 U.S.C. § 2016(h)(7), the provision states:

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 regulations in effect for a paper-based supplemental nutrition assistance issuance system.

The replacement of benefits regulation in effect when Congress issued its command was 7 C.F.R. § 274.6 (1989) (former regulation), which authorized replacement of paper coupons sent by mail if the theft occurred prior to the SNAP participants’ “receipt” of the coupons. Ex. A (7 C.F.R. § 274.6 (1989) (former regulation)); *see also* Compl. ¶ 32.

Defendants’ new regulation, promulgated in 2010, provides for the replacement of benefits where “the household reports that food purchased with [SNAP] benefits was destroyed in a

household misfortune,” 7 C.F.R. § 274.6(a)(1), or where the household informs the agency that their EBT card has been lost or stolen, 7 C.F.R. § 274.6(b)(2). But unlike its predecessor, the current version of § 274.6 does not expressly authorize the use of federal funds to replace benefits stolen or lost before receipt. Indeed, it does not speak to the issue of pre-receipt stolen benefits at all. *See id.* Neither the proposed rule nor the adopting release explained why the USDA did not address this issue. Compl. ¶ 43.³

Were Defendants’ regulations “similar to” the pre-EBT regulations governing replacement of benefits, as Congress required in 7 U.S.C. § 2016(h)(7), they would authorize States to replace SNAP benefits stolen by electronic means, because in such circumstances the benefits are stolen prior to the participants’ receipt of such benefits. Compl. ¶ 66. Receipt occurs at the point in time that the participant successfully uses the EBT card to purchase food. *Id.* ¶ 67. Given that electronic theft deprives participants of the ability to complete a successful purchase by depleting the value of benefits left for the participants to use, benefits stolen electronically—like paper coupons stolen from the mail—are stolen prior to the participants’ receipt of those benefits. The current regulations, however, do not expressly authorize such replacement, and are therefore not “similar to” the prior version of the regulations as required by 7 U.S.C. § 2016(h)(7). *Id.* Until 2022, Defendants issued no rule, regulation, memo, directive, guidance or other public statement explaining whether federal funds were available to replace SNAP benefits stolen via skimming.

C. Skimming and the Federal and State Response.

Skimming is a form of electronic theft which occurs when perpetrators install a Bluetooth-enabled, card-reading device at a point-of-sale in a retail store to capture a consumer’s

³ Another regulation allows state agencies to make “adjustments” to participants’ SNAP benefits, but only if benefits are “erroneously posted” or if there is a “system error.” 7 CFR § 274.2(g)(2). Section 274.2(g)(2), like § 274.6, does not address the use of federal funds to replace benefits stolen from SNAP participants before receipt through no fault of their own.

credit or debit card number, account information and personal identification number (PIN) and transmit it to an off-site location. Compl. ¶ 2. 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. *Id.* ¶¶ 58–60.

In 2022, following a surge in skimming incidents targeting SNAP participants, Defendants adopted a policy prohibiting the use of federal SNAP funds to replace benefits stolen by skimming. *See* Compl. ¶ 68. This policy is reflected in several memos and other documents issued by Defendants, OTDA, and HRA, over the course of 2022 and early 2023, which acknowledged the harm that skimming causes to SNAP participants and suggested preventative measures, but made clear that skimmed benefits could not be replaced using federal funds. *Id.* ¶¶ 58–69. Rather, Defendants instructed victims of SNAP skimming to reach out to the responsible State agencies in their location—who again 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 no federal funds could be used to reimburse skimmed benefits under federal law. *See* Compl. ¶¶ 61–63, 68, 74, 80–81, 86, 91, 97.

For example, on October 19, 2022, Defendants issued a “SNAP EBT Card Skimming Scam Alert” (the “Scam Alert”) which “encourag[ed] SNAP participants to take actions that may help prevent card skimming,” but set forth no provision for replacement of skimmed benefits and instructed participants to “contact [their] local SNAP office” if they believed they had been targeted. *Ex. C (SNAP EBT Card Skimming Scam Alert 10/19/2022, USDA (Oct. 19, 2022))*. Similarly, on October 31, 2022, Defendants issued a policy memo to all State agencies

administering SNAP listing various available fraud prevention measures but containing no discussion of replacement of skimmed benefits. Ex. E (Policy Memo from Cynthia Long, Adm’r of Food & Nutrition Services, & Ann Flagg, Dir. of the Office of Family Assistance, SNAP and TANF Electronic Benefit Transfer (EBT) Card Skimming Prevention—Tools and Resources (Oct. 31, 2022)).

At virtually the same time, State agencies issued various directives informing SNAP participants that Defendants’ regulations prohibited them from replacing skimmed benefits using federal funds. On October 27, 2022, for instance, the OTDA issued a “General Information System (GIS) Message” to local SNAP districts explaining that “[t]he United States Department of Agriculture, Food and Nutrition Service (USDA-FNS) prohibits replacing stolen SNAP benefits using federal funds” even where a reported case of skimming is “confirmed.” Ex. D at 3 (General Information System Message from Valerie Figueroa, Deputy Comm’r Emp. and Income Support Programs, OTDA, Skimming & Phishing: EBT Scams Currently Impacting Recipient Households (Oct. 27, 2022)). The OTDA also instructed victims of skimming to report skimming to their local department of social services. Ex. J (*EBT Scam Alert*, OTDA). Like the 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. F (Policy Bulletin #22-93-ELI: Food Emergency Grant for Victims of Skimming, Office of Policy, Procedures, and Training, NYC HRA, Dep’t of Social Services (Dec. 19, 2022)). In short, Defendants instructed victims of SNAP skimming to reach out to State agencies, who in turn—acting as Defendants’ agents—informing them that Defendants’ regulations prohibited the replacement of their skimmed benefits using federal funds.

On January 31, 2023, Defendants issued a memo confirming what had clearly become Defendants' policy with respect to replacement of the skimmed benefits. Ex. G (Policy Memo from Tim English, Acting Assoc. Adm'r of Supplemental Nutrition Assistance Program, Replacement of SNAP Benefits in the Consolidated Appropriations Act of 2023 (Jan. 31, 2023)) (the "Replacement Policy Memo"). Defendants issued this memo as required by the Consolidated Appropriations Act, 2023, 2023 Appropriations Act, H.R. 2617, 117th Cong. § 501(b) (2023) (the "2023 Appropriations Act"), which directs the USDA to require States "to replace benefits that are determined by the State agency to have been stolen through card skimming, card cloning, or similar fraudulent methods," but limits the requirement to benefits stolen after October 1, 2022, and caps replacement to two months' worth of benefits and only two replacements per year, *id.* § 501(b)(2). *See* Compl. ¶¶ 46–52. In the Replacement Policy Memo, USDA directed States to submit plans to "address how state agencies will process household claims of stolen benefits," but only to the extent required by the 2023 Appropriations Act. *Id.* The memo is the first known public statement issued by Defendants on the use of federal funds to replace SNAP benefits stolen prior to receipt since the EBT system was implemented, and confirmed that federal funds could not be used for such purpose, contrary to the requirements of 7 U.S.C. § 2016(h)(7).

D. Plaintiffs File Suit Shortly After Being Denied Replacement of Their Skimmed Benefits.

Named Plaintiffs represent only a few of the more than 10,000 documented instances of residents of New York state who, through no fault of their own, were the victims of SNAP benefits skimming in 2022. *See* Compl. ¶¶ 71–98. Each of the named Plaintiffs became victims of SNAP skimming at some time between March 2022 and November 2022. *See id.* When named Plaintiffs promptly reported the theft of their SNAP benefits to the HRA (which was their local district of social services), the HRA, acting as Defendants' agent, informed Plaintiffs that their benefits could

not be replaced. *See id.*⁴ Plaintiffs subsequently filed this suit in February 2023, alleging claims that Defendants have acted arbitrarily and capriciously and contrary to law in violation of Section 706(2) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, and seeking (among other things), declaratory and injunctive relief. *See* Compl. ¶¶ 111–17.

ARGUMENT

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must “accep[t] all factual allegations in the complaint as true and dra[w] all reasonable inferences in the plaintiff’s favor.” *Grant v. Cnty. of Erie*, 542 Fed. App’x 21, 23 (2d Cir. 2013). “When there are well-pleaded factual allegations” that “plausibly give rise to an entitlement to relief,” a court “should assume their veracity” and deny a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

I. Plaintiffs’ Action Was Timely Commenced.

The APA does not itself prescribe a limitation period for claims brought under its provisions. *See* 5 U.S.C. § 551 *et seq.* As a result, APA claims are subject to the six-year “catchall” statute of limitations for federal claims set forth in 28 U.S.C. § 2401(a). *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009). Under that provision, the six-year limitation period starts to run when “the right of action first accrues.” 28 U.S.C. § 2401(a). In this Circuit, a federal right of action “first accrues” “when the plaintiff knows or has reason to know of the harm that he seeks to redress.” *Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001); *see also Matura v. U.S.*, 98-cv-4716-DC, 1999 WL 144498, at *1 (S.D.N.Y. Mar. 17, 1999) (same); *Heimeshoff v. Hartford*

⁴ Plaintiff Mei Ieng Lee (a 77-year-old widow who speaks Cantonese) contacted the police, but was unable to report the theft to HRA due to a language barrier and a lack instructions she could comprehend. *See* Compl. ¶ 101.

Life & Accident Ins. Co., 571 U.S. 99, 105 (2013) (“a statute of limitations begins to run . . . when the plaintiff can file suit and obtain relief”) (quotations omitted).

Under the APA, a claim does not “accrue” for limitation purposes until there is “final agency action,” 5 U.S.C. § 704, and the “plaintiff knows or has reason to know that he has suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute and the zone of interests that statute protects.” *DeSuze v. Ammon*, 990 F.3d 264, 270 (2d Cir. 2021) (internal citations omitted); *see also Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647, 654 (2d Cir. 1998) (APA claim alleging forfeiture of property accrued “when [plaintiff] discovered or had reason to discover that his property had been forfeited without sufficient notice”). The “injury” requirement makes perfect sense because, as the court explained in *Herr v. U.S. Forest Service*, 803 F.3d 809, 818–19 (6th Cir. 2015), no challenge to agency action under the APA is possible unless the plaintiff “must know or have reason to know that the challenged agency action caused them to suffer a “legal wrong” or “adversely affected or aggrieved” them.” *Id.* (quoting 5 U.S.C. § 702). Any other construction would bar a party from bringing suit before they even became aggrieved.⁵ *Id.*; *see also Dir., Off. of Workers’ Comp. Programs, Dep’t of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) (no claim under APA unless plaintiff “is injured in fact by the agency action”); *Milecrest Corp. v. United States*, 264 F. Supp. 3d 1353, 1375 (Ct. Int’l Trade 2017) (“[A]

⁵ *Herr* also correctly noted that, while some courts “have suggested that an APA claim first accrues on the date of the final agency action,” those “cases all involved settings in which the right of action happened to accrue at the same time that final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured.” 803 F.3d at 819–20. That is not the case, the court held, where “the party does not suffer any injury until after the agency’s final action.” *Id.*; *see also* John Kendrick, *(Un)limiting Administrative Review: Wind River, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157, 175–76 (2017) (“The most common reason why courts adopt *Wind River*’s approach is a misunderstanding of the relationship between claim accrual and “final agency action” under the APA. . . . [T]hough both events can and often do happen at the same time, they are not invariably tied together. An agency’s final action might not actually injure a party until many years later.”).

cause of action under the APA accrues when there is final agency action and injury-in-fact”) (citing *Herr*, 803 F.3d at 819–20).

Plaintiffs easily meet that standard. As alleged in the Complaint, beginning around March 2022, Plaintiffs had their SNAP benefits stolen from them when their EBT cards were skimmed and Plaintiffs learned of the theft when they subsequently attempted to use their cards. Compl. ¶¶ 71–76 (Haiyan Chen, June 2022); *id.* ¶¶ 77–81 (Kenya Watson, July 2022), *id.* ¶¶ 83–86 (S.O., March 2022); *id.* ¶¶ 88–91 (Gertrude Cribbs, August 2022); *id.* ¶¶ 94–98 (Hana Broome, November 2022); *id.* ¶¶ 99–103 (Mei Ieng Lee, August 2022). Plaintiffs then reported that they had been the victims of skimming and, despite their incontestable lack of fault, were informed that their stolen benefits would not be replaced. *See id.* ¶¶ 71–103. Plaintiffs’ right of action could therefore not have accrued until Plaintiffs were told in 2022 that their stolen benefits would not be replaced.

Accordingly, this case is no different from *Sai Kwan Wong*, where the plaintiff brought an action in 2007 challenging a Department of Health and Human Services (“HHS”) rule regarding Medicaid entitlement first promulgated in 1994. 571 F.3d at 247. The HHS rule was administered at the state level by New York’s State Department of Health, and at the local level by the HRA, both of which were required by federal law to comply with the HHS rule in order to receive federal Medicaid funding (similar to Defendants’ SNAP regulations in this case). *Id.* at 250–51. Plaintiff brought two challenges, one of which was a substantive challenge alleging that the rule was contrary to the statutory provisions of the Medicaid Act. *Id.* at 250. As to that claim, despite the fact that the HHS rule in question was issued *thirteen* years before the plaintiff filed suit, the Court observed that it was “undisputed[ly]” timely, *id.* at 263 n.15. That was because the plaintiff’s claim could not have accrued before he was injured in 2006—*i.e.*, when HRA, acting in accordance

with HHS requirements, refused to discount the plaintiff's special needs trust income from his Medicaid entitlement. *See id.* at 253–54.

Plaintiffs' APA claim was therefore commenced well within the six-year time limitation imposed by 28 U.S.C. § 2401(a) and is not time-barred.

II. Defendants' Time-Bar Arguments Are Meritless.

Defendants do not dispute that Plaintiffs' injuries occurred less than a year before filing suit. They do not contest that Plaintiffs were the victims of fraud, that they never received the SNAP benefits that were unlawfully skimmed, and that they did not learn their SNAP entitlements had been unlawfully skimmed until 2022. Nor do Defendants take issue with the facts that, upon discovering the theft, Plaintiffs did exactly what Defendants told all skimming victims to do—*i.e.*, report the matter to their local SNAP office. Nevertheless, Defendants insist that the action is untimely because Plaintiffs' cause of action supposedly accrued in 2010, when the new version of 7 C.F.R. § 274.6 was promulgated. Defs.' Br. at 7. Each of Defendants' three time-bar theories lacks merit, however, and should be swiftly rejected.

A. The Statute of Limitations for “As-Applied” APA Challenges Does Not Bar Plaintiffs' Claim.

Defendants concede that, where a challenger “contests the substance of an agency decision,” they may do so “later than six years following the decision by filing a complaint for review of the adverse *application of the decision to the particular challenger.*” Defs.' Br. at 9 (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)). Nevertheless, Defendants argue that Plaintiffs cannot “avail themselves” of the statute of limitations applicable to such “as-applied challenges” because Defendants supposedly themselves never “took final action applying the challenged regulation” to Plaintiffs. *Id.* According to Defendants, the only “final action” here was taken by New York City HRA—not Defendants—

who told Plaintiffs their stolen benefits could not be replaced. *Id.* And since the last federal action allegedly occurred in 2010 when § 274.6 was promulgated, the action is time-barred. *Id.* That argument is wrong for at least two fundamental reasons.

- i. Plaintiffs were not injured until HRA (acting as Defendants' agent) denied their requests for replacement benefits.

Defendants cite no authority for the proposition that the limitation period began to run in 2010 simply because denials of Plaintiffs' requests for replacement did not come "direct[ly]" from USDA/FNS, Defs.' Br. at 9, and for good reason. As Defendants themselves acknowledge, "the SNAP program is administered by the states." *Id.* It is well-settled that "[f]ood 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." *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 385 (S.D.N.Y. 2000) (citing 7 C.F.R. §§ 272.2, 275.5, 275.16, 275.18, 275.19). It is equally well-settled that, in performing those requirements, "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* 18 N.Y.C.R.R. § 387.0(a) (OTDA "is the agent of the [USDA] for the purposes of participation in [SNAP]"). Similarly, "local social services district[s], including the City of New York," and thus HRA, are considered "agent[s] of the State" for administration of the public welfare programs such as SNAP, *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 436 (S.D.N.Y. 2006) (emphasis added), and share "the duty to comply with federal statutory requirements," *Reynolds*, 118 F. Supp. 2d at 385. And because OTDA/HRA acted as Defendants' *agent* in refusing to replace Plaintiffs' stolen benefits, their acts were Defendants'

acts for limitation purposes.⁶ As such, this suit is not time-barred because it was brought within six years of “adverse application of the decision to the particular challenger” by Defendants through their agents.⁷

Any other conclusion would be contrary to settled legal principles and lead to unjust results. As with many joint federal/State social services programs, the federal government established the SNAP the program, funds it, and sets program parameters, while the States bear responsibility for program administration. *See, e.g., M.K.B.*, 445 F. Supp. 2d at 404 (“federal law establishes certain food stamp, health care, and public assistance programs [such as SNAP, Medicaid, and Temporary Assistance for Needy Families] that are federally-funded, in whole or in part, but are state administered”).⁸ The States have no ability to disregard federal mandates; as noted above (*supra* at p. 4), their duty is to apply federal law to particular claimants just as Defendants would have had they not delegated that duty to the States. OTDA and HRA thus had no discretion in the matter, and were obliged to deny Plaintiffs’ request for replacement of their skimmed SNAP benefits because Defendants had already made it clear that federal funds could not be used for that purpose.⁹ If Defendants’ argument were correct, in other words, Defendants could easily evade the as-applied limitation period applicable to any joint program administered by the States because

⁶ Further, it is nonsensical for Defendants to assert that Plaintiffs should have “petitioned USDA for replacement benefits” and let the agency deny. Defs.’ Br. at 9. Both federal and New York State regulations establish that Plaintiffs may only appeal denials of their benefits to OTDA, not USDA, *see supra* pp. 5–6, and Defendants themselves acknowledge “[t]hat petitioning USDA might not have been feasible or successful because the SNAP program is administered by the states,” Defs.’ Br. at 9 n.7.

⁷ Indeed, the only decision by the Court of Appeals for the Second Circuit involving a similar statutory scheme reached the merits of the plaintiff’s claim notwithstanding the facts that the regulation at issue was promulgated more than a decade before the plaintiff brought suit but was applied by a state agency acting as agent for a federal agency. *See Sai Kwan Wong*, 571 F.3d at 247.

⁸ The “States may directly administer these programs or may delegate the administration to agencies of local government, subject to state supervision. *See* 42 U.S.C. § 1396a(a)(5); 42 U.S.C. § 602(a)(4); 7 U.S.C. § 2012(n)(1).” *M.K.B.*, 445 F. Supp. 2d at 404.

⁹ For the same reasons, although Plaintiffs could have sought review of their denials via the fair hearing process, any such attempt would have been futile given Defendants’ position as to the governing law.

it is the States who bear responsibility, as agent, for applying federal law to particular challengers. Nothing in law or logic supports that result.¹⁰

- ii. Final federal action did not occur until 2022, when Defendants’ policy against replacing skimmed benefits was first made public.

Moreover, the Complaint plausibly alleges that “final agency action” here occurred in 2022—not 2010—when Defendants publicly stated for the first time that federal funds could not be used to replace SNAP benefits lost due to skimming. As alleged in the Complaint, in and around the fall of 2022, Defendants issued a number of statements (either directly or through their agents) making clear that—despite § 2016(h)(7) of the SNAP Act—the USDA/FNS would not allow federal funds to be used to replace SNAP benefits stolen prior to receipt. Compl. ¶¶ 63, 64, 114. For example, Defendants’ Scam Alert encouraged SNAP participants to take steps that “may help prevent card skimming,” and directed those who believed they were the victims of skimming to contact their “local SNAP office.” *Id.* ¶ 63. The local SNAP offices—which are obliged to follow federal law—in turn issued statements which directly and unequivocally stated that Defendants “prohibit[] replacing stolen SNAP benefits using federal funds,” and that accordingly “stolen/skimmed SNAP benefits cannot be replaced even if a reported case of skimming is confirmed.” *See* Ex. D; Ex. F.¹¹

¹⁰ Should the Court conclude that the statute of limitations on Plaintiffs’ claim began to run in 2010, Plaintiffs respectfully submit that the limitation period was equitably tolled until Plaintiffs were denied replacement of their skimmed benefits. Equitable tolling of the statute of limitations period is permitted where the plaintiff “could not have been aware of” his or her cause of action, *Kendrick v. Sullivan*, 784 F. Supp. 94, 105 (S.D.N.Y. 1992). Here, Plaintiffs could not have known they had a cause of action before their benefits were skimmed and their requests for replacement denied in late 2022 because nothing in the public record clearly indicated that Defendants had any such policy: § 274.6 itself was silent on the issue and Defendants made no public statement on the matter until the fall of 2022 when (acting through their agents) they declared that federal funds could not be used for such purpose. *See supra* at pp. 6–10. Equitable tolling is therefore appropriate here. *See, e.g., Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 106 (2d Cir. 2018) (equitable tolling appropriate where plaintiff cannot be “adversely affected” by the relevant regulation during the limitation period).

¹¹ To the extent Defendants dispute that the policy alleged by Plaintiffs exists and/or the time of its adoption, the allegations in the Complaint must be accepted as true at the motion to dismiss stage. *See Amadei v. Nielsen*, 348 F.

Defendants’ policy statements qualify as “final agency action” under the APA. To constitute final agency action under § 704, 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). The challenged agency action need not be its “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 § 704 require the agency to issue “a formal or official statement.” *Amadei*, 348 F. Supp. 3d at 165. 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.*; *see also Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 397 F. Supp. 3d 430, 446 (S.D.N.Y. 2019) (Caproni, J.) (describing the final agency inquiry as fundamentally “pragmatic”).

Defendants’ policy statements readily satisfy these requirements. As to the first prong, there is nothing tentative or interlocutory about these policy memos and other documents. They unequivocally state that “[t]he United States Department of Agriculture, Food and Nutrition Service (USDA-FNS) prohibits replacing stolen SNAP benefits using federal funds” even where

Supp. 3d 145, 165 (E.D.N.Y. 2018) (instructing courts to draw all reasonable inferences in plaintiffs’ favor supporting the existence of an official policy at the motion to dismiss stage); *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1208 (S.D. Cal. 2019) (defendants’ arguments that agency statements outside of those alleged in complaint “defeat or undermine” existence of alleged policy are “merits challenge [] inappropriate at [motion to dismiss] stage”); *see also Ray v. Weit*, 708 F. App’x 719, 722 (2d Cir. 2017) (summary order) (“[A] factual dispute . . . could not have been resolved on a motion to dismiss under Rule 12(b)(6).”).

a reported case of skimming is “confirmed.” Ex. D; Ex. F.¹² As to the second prong, there can be no serious question that Defendants’ conduct produced “legal consequences” that “directly affect[ed]” Plaintiffs. *Salazar*, 822 F.3d at 82. Plaintiffs were unable to obtain replacement benefits as a result of Defendants’ policy and were forced to turn to other measures to feed themselves and their families. *See id.* at 82–83 (“[L]egal consequences flow from the DOE’s decision not to suspend the collection of the loans of the putative class members.”).¹³ The action is therefore timely because six years have not passed since Defendants enacted the policy prohibiting use of federal funds to replace skimmed benefits.

B. The Statute of Limitations for “Facial” APA Challenges Does Not Bar Plaintiffs’ Claim.

Defendants also claim that, in a “facial” challenge under the APA, “the statute of limitations begins to run at the time the challenged agency action become final.” Defs.’ Br. at 7. Here, they say, the “only agency action alleged” in the Complaint is the “promulgation of the challenged regulation in 2010.” *Id.* And since the “gravamen of plaintiffs’ challenge” is supposedly that § 274.6 “is improper on its face,” the limitation period therefore began to run in 2010, upon promulgation, and expired several years ago. *Id.* Defendants’ “facial challenge” arguments likewise fail.¹⁴

¹² Similarly, the Replacement Policy Memo “definitive[ly]” and “unambiguously proclaim[ed],” *Natural Resources Defense Council, Inc.*, 397 F. Supp. 3d at 447, that the States could only “replace certain benefits stolen Oct. 1, 2022, through Sept. 30, 2024, using federal funds.” Ex. G.

¹³ *Accord Aquavella v. Richardson*, 437 F.2d 397, 403–04 (2d Cir. 1971) (concluding that the suspension of Medicare payments was final agency action); *Amadei*, 348 F. Supp. 3d at 166 (policy produced “significant legal consequences” because plaintiffs were stopped and searched as a result of this policy). The fact that the denial to replace skimmed benefits was issued by the OTDA and its agents is irrelevant: Defendants’ policy was “given practical, binding effect which resulted in tangible legal consequences for the plaintiffs” since they were deprived of the SNAP benefits to which they were entitled. *De La Mota v. U.S. Dep’t of Educ.*, 02-cv-4276-LAP, 2003 WL 21919774, at *8 (S.D.N.Y. Aug. 12, 2003) (finding that the DOE’s policy concerning loan cancellation benefits caused legal consequences where law schools in reliance on this policy terminated plaintiffs’ benefits).

¹⁴ Defendants’ assertion that the only agency action alleged in the Complaint is the promulgation of § 274.6. in 2010 is manifestly incorrect for the reasons stated above. *See supra* Argument Point II.A.ii.

i. Plaintiffs do not bring a facial challenge to the Regulation.

First, this is not a facial challenge to the regulation promulgated in 2010. A facial challenge asserts that a regulation is invalid on its face and that “no set of circumstances exists under which [the regulation] would be valid.” *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *see also Ass’n of Priv. Colleges & Univs. v. Duncan*, 870 F. Supp. 2d 133, 149 (D.D.C. 2012) (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)). That is not what Plaintiffs allege here. As the Complaint makes clear, Plaintiffs allege that § 274.6 is deficient insofar as it does not expressly authorize replacement of Plaintiffs’ SNAP benefits stolen prior to receipt, as required under § 2016(h) of the SNAP Act. Plaintiffs do not challenge any other aspect of the regulation, which also covers replacement of lost or stolen EBT cards and food destroyed as a result of a household misfortune § 274.6, and Plaintiffs do not seek to strike or enjoin enforcement of § 274.6. Compl. at pp. 27–28. As such, none of the cases Defendants cite in support of its “facial challenge” argument are relevant here.¹⁵

ii. Defendants’ failure to comply with the statutory mandate constitutes reviewable inaction.

Second, the “gravamen” of Plaintiffs’ Complaint is not only Defendants’ actions in promulgating an incomplete regulation in 2010. It is Defendants’ continued and prolonged failure to comply with § 2016(h), which required them to promulgate rules allowing replacement of

¹⁵ *See, e.g., N.D. Retail Ass’n. v. Bd. of Governors of the Fed. Rsrv Sys.*, 55 F.4th 634, 641 (8th Cir. 2022) (facial challenge “seek[ing] to invalidate the text of [the challenged regulation] in all applications”); *Outdoor Amusement Bus. Ass’n v. Dep’t of Homeland Sec.*, 983 F.3d 671, 681–82 (4th Cir. 2020) (“facial” claim “seeking to enjoin [agency rules] as improperly issued”); *Citizens Alert Regarding the Env’t v. EPA*, 102 F. App’x 167, 168–69 (D.C. Cir. 2004) (facial challenge to EPA approval of state environmental review process alleging violation of EPA’s own regulations); *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) (facial challenge claiming that National Park Service regulations exceeded statutory authority). Additionally, both *Wind River*, and *Natural Resources Defense Council, Inc. v. Fox* cited by Defendants, Defs.’ Br. 8, recognize that non-facial challenges under the APA may accrue after the final agency action. *See Wind River*, 946 F.2d at 715 (while a “policy-based facial challenge to the government’s decision . . . must be brought within six years of the decision,” the limitation period on other challenges may begin running after the agency decision); *Fox*, 909 F. Supp. at 161 (noting that “there may be some Administrative Procedure Act claims that would fall outside th[e] rule” on facial challenges).

skimmed EBT benefits similar to the rule governing replacement of stolen paper coupons before receipt. That failure also constitutes a final agency action under § 704.

“An agency must conclude matters presented to it within a reasonable time.” *U.S. Gypsum Co. v. Muszynski*, 161 F. Supp. 2d 289, 292 (S.D.N.Y. 2001) (citing 5 U.S.C. § 555(b)). Accordingly, when “administrative inaction has the same impact on the rights of the parties as an express denial of relief, judicial review is not precluded.” *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1531 (D.C. Cir. 1990); *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 permit, is final “agency action” under the APA notwithstanding the fact that the agency “did” nothing); *Norton Constr. Co. v. U.S. Army Corps of Engineers*, 03-cv-02257, 2006 WL 3526789, at *6–7 (N.D. Ohio Dec. 6, 2006) (allowing Section 706(2) claim to proceed where plaintiffs challenged “the merits of the decision not to act”).¹⁶

This kind of inaction in the face of a duty to act is actionable at any time. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 33–34 (D.C. Cir. 2013) (concluding in the context of Section 706(1) that by failing to act the EPA continuously violates its obligation); *Pit River Tribe v. Bureau of Land Mgmt.*, 512 F. Supp. 3d 1055, 1065 (E.D. Cal. 2021) (finding that action under Section 706(1) was timely because it sought relief for BLM’s failure to meet its ongoing duty). Were it otherwise, an agency would be able to evade the duties the Congress imposed on them simply by doing nothing. That, quite appropriately, is not the law. *See Fox*, 909 F. Supp. at 159 (holding that a citizen suit to enforce EPA’s failure to perform nondiscretionary duty is not subject to any statute of limitations).

¹⁶ The APA itself includes “failure to act” in its definition of “agency action.” 5 U.S.C. § 551(13).

Here, Defendants were directed by Congress in 1996 to promulgate regulations regarding the replacement of benefits under the EBT system that “shall be similar to regulations in effect for a paper-based supplemental nutrition assistance issuance system.” 7 U.S.C. § 2016(h). Some fourteen years later, in 2010, Defendants finally got around to promulgating a new version of § 274.6, but it is not at all “similar” to the version that preceded it because it contains no provision for the replacement of benefits stolen prior to receipt. 7 C.F.R. § 274.6. Indeed, it does not speak to stolen benefits at all. *Id.* In 2022, another 12 years later, after Defendants “recently received several reports of SNAP fraud” through “card skimming,” they issued the Scam Alert, but it did not address the Congressional mandate either. Ex. C. Instead, the Scam Alert merely encouraged SNAP participants to take steps that “may help prevent card skimming,” and directed those who believed they were the victims of skimming to contact their “local SNAP office.” *Id.*; *see also* Compl. ¶ 63. Defendants’ prolonged failure to comply with § 2016(h)—which has never been repealed—thus justifies judicial intervention now.

C. The Statute of Limitations for “Procedural” APA Challenges Does Not Bar Plaintiffs’ Claim.

Finally, Defendants argue that Plaintiffs “cannot circumvent the statute of limitations” by characterizing their APA claim as a “procedural challenge” because, like a facial challenge, the statute of limitations begins to run upon promulgation, which occurred in 2010. Defs.’ Br. at 8. While the Complaint references the fact that the USDA did not explain why it limited availability of replacement benefits at the time § 274.6 was published in the Federal Register, Compl. ¶ 43, that reference does not render this a “procedural challenge.” Indeed, even a cursory review of the Complaint reveals that Plaintiffs make no claim that the procedure Defendants followed in promulgating § 274.6 was improper in any way. *Cf. Sai Kwan Wong*, 571 F.3d at 263 (“procedural challenge” to regulation involved alleged violation of “the notice and comment requirements of

the [APA] 5 U.S.C. § 553”). Accordingly, whether or not a procedural APA claim accrues upon promulgation is neither here nor there because Plaintiffs assert no such challenge.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendant's Motion to dismiss and grant Plaintiffs such other and further relief as the Court deems just and proper.

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