25-2732

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

MARY EATON
MARIA SLOBODCHIKOVA
GRACE BRODY
ELIZABETH LEWIS
FRESHFIELDS US LLP
3 World Trade Center
175 Greenwich Street, 51st Floor
New York, New York 10007
(212) 277-4000

JUDITH GOLDINER
EDWARD JOSEPHSON
THE LEGAL AID SOCIETY
Civil Law Reform Unit
49 Thomas Street
New York, New York 10013
(212) 298-5221

Attorneys for Plaintiffs-Appellants

(For Continuation of Appearances See Inside Cover)

CP COUNSEL PRESS (800) 4-APPEAL • (389513)

– v. –

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

Defendants-Appellees.

SUSAN WELBER
THE LEGAL AID SOCIETY
Government Benefits Unit
Bronx Neighborhood Office –
Civil Practice
260 East 161st Street, 8th Floor
Bronx, New York 10451
(929) 228-4539

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules and Regulations

Other Authorities

PRELIMINARY STATEMENT

Plaintiff-Appellant Haiyan Chen and five other low-income Supplemental Nutrition Assistance Program ("SNAP") recipients (together, "Appellants") filed this lawsuit after their SNAP benefits were stolen via electronic skimming, through no fault of their own, and in circumstances entirely outside of their control. Prior to 2010, when paper food stamps were still in use, benefits stolen in parallel circumstances would have been replaced with federal funds. But Defendants-Appellees—the U.S. Department of Agriculture and USDA Food and Nutrition Service (the "USDA")—refused to issue replacement benefits, leaving Appellants without adequate means to feed themselves and their families.

At its core, this case involves the USDA's unreasoned and unexplained decision to strip SNAP participants of replacement protections they have relied upon for decades. The USDA's actions leave the nearly 3 million SNAP recipients in New York vulnerable to electronic benefit theft and food insecurity. "For low-income Americans, SNAP is a vital bulwark against hunger and food insecurity." *Rhode Island State Council of Churches v. Rollins*, 158 F.4th 304, 307 (1st Cir. 2025). "Access to food is, of course, a basic human need [and] food security is a critical factor in health and well-being, the ability to stay in stable housing, and children's physical and educational development." *Id.* The USDA seeks to justify its decision on the basis that under 7 C.F.R. § 274.6 (the "2010 Regulation"), the

federal government has no duty to issue stolen replacement benefits even in circumstances where (as here) there is no dispute that (i) Appellants' benefits were in fact stolen, (ii) the stolen benefits reside in a government account that Appellants do not control, (iii) that Appellants did not engage in fraud or fail to exercise due care. The USDA is wrong. Both the 2010 Regulation and the policy the USDA thereafter adopted (the "2022 Policy") are unlawful in multiple respects under the Administrative Procedure Act (the "APA"). 5 U.S.C. § 706(2)(a).

The 2010 Regulation and 2022 Policy are contrary to law because they are inconsistent with 7 U.S.C. § 2016(h)(7). In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which mandated a transition away from paper food stamps to electronic delivery of benefits accessed through Electronic Benefits Transfer ("EBT"). Pub. L. No. 104-193, § 825, 110 Stat. 2105, 2324 (1996), codified at 7 U.S.C. § 2016(h)(7). At the same time, it ordered the Secretary of Agriculture to promulgate regulations providing that the replacement regime for lost or stolen EBT benefits remain "similar" to the regime governing paper coupons previously in place. *Id.*

The principal hallmark of the prior replacement regime was the tenet of custodial responsibility: liability for loss rested with whichever actor had control over the benefits at the time of the theft, not on those who had yet to receive them. Despite Congress's clear mandate, the 2010 Regulation prohibits the replacement

of stolen benefits using federal funds even where those benefits were in the government's control at the time of the theft and were lost through no fault of program participants. By discarding the fundamental "custodial" logic of the prior system, the 2010 Regulation and the 2022 Policy are not "similar" to the prior rules and thus contrary to law under the APA.

The USDA's rulemaking process also suffered from defects that rendered the 2010 Regulation and 2022 Policy arbitrary and capricious. Although the USDA has considered issues of benefit theft in prior replacement regulations, it failed to consider the security of electronic benefits themselves and their vulnerability to cyberfraud when promulgating the 2010 Regulation. Indeed, the administrative record is utterly silent on this issue despite a 2009 congressional hearing regarding electronic theft and widespread public reporting on electronic skimming at the time and afterwards.

In sum, with no consideration of benefit theft under the EBT system and without providing any reasoned explanation, the USDA chose to remove replacement protections for the most vulnerable Americans, despite Congress's clear instruction to maintain protections "similar" to those guaranteed by the paper coupon replacement rules. The District Court's order upholding USDA's decision, *Chen v. Rollins*, 2025 WL 2476930 (S.D.N.Y. Aug. 28, 2025) (the "Order"), was therefore in error and should be reversed for at least the following three reasons.

First, the District Court misconstrued the similarity requirement imposed by PRWORA. The District Court did not fully consider whether the relevant elements of the 2010 Regulation were "similar" to the replacement rules for paper benefits because it did not assess whether these rules shared a similar purpose ("why") and a similar liability allocation mechanism ("how"). Instead, the District Court applied an overly broad interpretation, deeming the Regulation "similar" because it permits *some* replacement benefits within *some* "limits," and could conceivably "deter fraud" and "encourage program accountability." SPA-14 (Order at 14).[1] Under that standard, however, virtually any replacement rule—regardless of its rationale or effect—would satisfy the statute. As a consequence, the District Court overlooked the critical fact that the 2010 Regulation did not even address the issue of the loss or theft of benefits pre-receipt, which was an integral part of its predecessor rule.

Second, the District Court erred in holding that that the USDA's failure to consider the issue of electronic benefit theft (including skimming) did not render the 2010 Regulation arbitrary and capricious. According to the District Court, it was sufficient that the agency "focus[ed] on the theft of EBT cards and the security

[1] Citations in the form "JA-__" are to the Joint Appendix and citations in the form "SPA-__" are to Appellants' Special Appendix. Citations to documents with Bates stamps "CHEN-00000XX" refer to documents in the administrative record. *See* JA70–512.

of the EBT system." SPA-16 (Order at 16). However, the risks of physical card loss and broad system security are distinct from digital skimming and cyberfraud. By neglecting to address the latter, the USDA "entirely failed to consider an important aspect" of SNAP security and vulnerability to theft. The District Court further erred by not considering USDA's failure to provide an explanation for their decision to prohibit replacement of skimmed benefits. That unexplained departure from the prior, longstanding policy likewise renders the agency action arbitrary and capricious.

Third, the District Court abused its discretion in concluding that Appellants did not adequately plead their challenge to the 2022 Policy. Appellants' complaint (the "Complaint") clearly challenges both the 2010 Regulation and the 2022 Policy and satisfies the liberal pleading standards set forth in Rule 8 of the Federal Rules of Civil Procedure.

Finally, the District Court erred in holding that the 2022 Policy was not final agency action and thus not reviewable under the APA. It is immaterial that some of the memoranda describing the 2022 Policy were published by State agencies since (i) the memoranda themselves specifically attribute the 2022 Policy to the USDA, and (ii) those State agencies were acting as the USDA's agents for the purposes of communicating federal policy to program participants. Additionally, when considered collectively, the documents and memoranda describing the 2022

Policy provide a "definitive statement" on the USDA's prohibition on replacement of skimmed benefits.

The Judgment of the District Court should therefore be reversed.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346(a)(2) and 5 U.S.C. §§ 702, 704. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellants timely filed their notice of appeal on October 27, 2025, within sixty days of the Honorable Judge Valerie Carponi's Memorandum and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment, which constituted a final order that disposed of all parties' claims. *Chen v. Rollins*, 2025 WL 2476930 (S.D.N.Y. Aug. 28, 2025); Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Did the District Court misinterpret the statutory requirement of similarity in PRWORA and the Food and Nutrition Act of 2008, Pub. L. No. 88-525, 78 Stat. 703, § 7(h)(7) (the "Food and Nutrition Act of 2008") and erroneously conclude that the 2010 Regulation was "similar to" the replacement regulations that governed paper-based SNAP benefits?
2. Did the District Court err in holding that the 2010 Regulation was not arbitrary and capricious under the APA despite the USDA's failure to

consider skimming and cyber fraud in promulgating the 2010 Regulation and to provide a reasoned explanation for the decision to prohibit replacement of skimmed benefits?

3. Did the District Court err in excluding extra-record evidence of the USDA's failure to consider the problem of skimming and cyberfraud when promulgating the challenged agency actions?

4. Did the District Court err in holding that the 2022 Policy was not timely pleaded?

5. Did the District Court err in determining that the 2022 Policy was not "final agency action" for the purposes of judicial review under the APA?

STATEMENT OF THE CASE

This appeal arises from Appellants' challenge under the APA to the USDA's final agency actions that preclude replacement of most stolen SNAP benefits despite Congress's directive that any regulation "regarding the replacement of benefits and liability for replacement of benefits under an [EBT] system shall be similar to the regulations in effect for a paper-based food stamp issuance system." SPA-4 (Order at 4); 7 U.S.C. § 2016(h)(7). On August 28, 2025, the Honorable Judge Valerie Caproni issued a Memorandum and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment. SPA-1 (Order at 1).

I. FACTUAL BACKGROUND

A. Overview of the SNAP Program

In 1964, Congress established SNAP—then known as the Food Stamp Program—with the goal of allowing low-income households to obtain a more nutritious diet by increasing their purchasing power. *See* JA-71 (CHEN-00000001). SNAP is a federally-funded and regulated program administered by State agencies which are in turn required to apply any and all instructions, guidance, and written directions issued by the USDA even if not reflected in formal regulations. *See* 87 Fed. Reg. 35,853, 35,855 (June 14, 2022); 7 U.S.C. §§ 2013(c), 2020(e)(6)(A), 2020(a)(1).

In New York, the State agency designated to administer SNAP is the Office of Temporary and Disability Assistance ("OTDA"), which is "the agent of the [USDA] for the purposes of participation in [SNAP]." N.Y. Comp. Codes R. & Regs. tit. 18, § 387.0(a). Local departments of social services undertake the majority of the day-to-day administration of SNAP at the county level, JA-526 (*Benefit Eligibility Assessment Process*, N.Y. State Off. of the State Comptroller (2014)) (hereinafter "Ex. A"); JA-549 (*SNAP Source Book*, N.Y. State Off. of Temp. & Disability Assistance (2011)) (hereinafter "Ex. B"),[2] and are required by

[2] Except as otherwise noted, citations to Exhibits or "Ex. __" refer to exhibits to the declaration of Maria Slobodchikova, dated December 16, 2024, JA-515.

law to communicate USDA directives to program participants. 7 U.S.C. § 2020(e)(1)(A) ("the State agency shall … inform low-income households about the availability, eligibility requirements, application procedures, and benefits of the supplemental nutrition assistance program"); N.Y. Comp. Codes R. & Regs. tit. 18, § 387.2(t) ("each social services district shall … inform all food stamp applicants and recipients of their program rights and responsibilities.").

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

Prior to the advent of EBT cards, eligible households received their benefits in the form of paper coupons. JA-72 (CHEN-00000002). Under the paper regime, coupons (or "Authorization-to-Participate" documents which could be exchanged for coupons) were mailed directly to participants who could then redeem them at retail stores. JA-605–613 (Issuance and Use of Food Coupons, 43 Fed. Reg. 47,927, 47,928 (1978)) (hereinafter "Ex. N").

Under this regime, the USDA's regulations permitted the replacement of benefits stolen or lost in the mail *prior* to their receipt by SNAP participants. JA-611 (Ex. N). By contrast, no replacement was allowed for coupons lost or stolen after receipt unless the loss was due to some "devastating event beyond the control of the household," such as a "fire, flood, [or] tornado." JA-114, 116 (CHEN-00000044, 46).

The USDA's rationale for treating pre- and post-receipt losses differently hinged on the level of control participants exercised over the benefits and the resulting potential for fraudulent replacement requests once participants received and therefore controlled the benefits. The USDA recognized that "households have little control over the nondelivery of mail," while losses "after receipt … are subject to greater control by the household[.]" JA-108 (CHEN-00000038). Given the disparate levels of control after coupons had been delivered, the USDA reasoned that "a recipient should be responsible for coupons once the recipient has the coupons." JA-114 (CHEN-00000044). This distinction between coupons stolen pre- and post-receipt remained consistent throughout the paper coupon regime.

The federal budget is and has always been the primary source of funding for the SNAP program. *See, e.g.*, JA-77 (CHEN-00000007). As relevant here, the federal government expressly assumed primary liability for benefits lost or stolen in the mail. Under this system, federal agencies absorbed 100% of mail issuance losses until the total losses in a given reporting unit exceeded a preset "tolerance level." Under this "tolerance" framework, States bore a portion of liability only if total mail issuance losses by dollar value exceeded 0.5% of the dollar value of all mail issuances, measured quarterly by unit (and in most instances by county). JA-224, 251 (CHEN-00000154, 181); *Gallegos v. Lyng*, 891 F.2d 788, 791–93 (10th Cir. 1989) (explaining the tolerance framework and recognizing that "the federal

government bears the bulk of the liability for [mail issuance] losses."). Under that regime, States would only pay for mail losses if they reached what the agency deemed to be excessive levels, at which point States would cover additional losses as an incentive to determine why mail theft was so rampant in a particular reporting unit. *See* JA-114, 120–21 (CHEN-00000044, 50–51) (emphasizing the role played by the federal government, specifically USPS, in protecting against mail issuance losses, which underpinned the rationale for primary federal liability, while requiring States and USPS to work together to combat mail theft); *Gallegos*, 891 F.2d at 791–93 ("The rule encourages [S]tates to use the cost-effective method of mail issuance, while at the same time encouraging them to reduce mail losses and improve their efficiency by making them liable for all excess losses."); 47 Fed. Reg. 50,681, 50,682 (1982) (explaining that "tolerance levels" were established "to give State agencies a significant and realistic incentive to reduce losses, while taking care not to discourage mail issuance use where it is proving cost-effective and appropriate.").

C. PRWORA and the Transition to EBT

In 1996, Congress required that State agencies complete the transition from paper coupons to the EBT system no later than October 1, 2002 in accordance with federally established standards. JA-282–284 (CHEN-00000212–214); *see also* JA-359 (CHEN-00000289). At the same time, Congress made clear that EBT

cardholders should be entitled to equivalent replacement protections to those previously enjoyed by coupon holders. JA-283 (CHEN-00000213). Specifically, with respect to the replacement of EBT benefits, PRWORA provided that:

> 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.

SPA-26 (7 U.S.C. § 2016(h)(7)) (emphasis added)).

As referenced in PRWORA, the "replacement of benefits" provision "in effect" when Congress passed § 2016(h)(7) was 7 C.F.R. § 274.6 (1989), described above, which centered around a recipients' control of the coupons at the time of the loss and accordingly authorized the replacement of paper coupons if they were stolen from the mail prior to their receipt by SNAP participants. In 2008, Congress amended the EBT-related provisions of the 1996 Act and reiterated the mandate that the still unpromulgated rules regarding replacement of EBT benefits be "similar" to those "in effect" for paper coupons. JA-361 (Food and Nutrition Act of 2008, Pub. L. No. 88-525, 78 Stat. 703, § 7(h)(7), CHEN-00000291). The Food and Nutrition Act of 2008 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." JA-361 (*id.*).

D. The EBT System & Vulnerability to Cybercrime and Skimming

Under the EBT system, 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." SPA-26 (7 U.S.C. § 2016(h)(11)(A)(iii)). At the point of sale, participants swipe their EBT card, enter their PIN, and then complete their purchase. JA-556 (*Electronic Benefits Transfer (EBT) Card*, N.Y. Off. of Temp. & Disability Assistance (2024)) (hereinafter "Ex. C").

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* SPA-75, 77–78 (7 C.F.R. §§ 274.8(a)(3), 274.8(b)(7)). In contrast to the paper coupon system where recipients had access to their benefits upon receipt of their coupons, under the EBT system SNAP participants do not control the benefits prior to completing a purchase. *See* SPA-73 (7 C.F.R. § 274.7(d) (2010)); SPA-26 (7 U.S.C. § 2016(h)(11)(A)(iii)). Although participants are able to view their account balance

at will, they cannot withdraw, download, print out, or deposit benefits in their personal bank account at any time. SPA-73 (7 C.F.R. § 274.7(d) (2010)).

The transition to the EBT system brought with it new forms of electronic benefit theft, including skimming. Skimming occurs when perpetrators place a physical apparatus on an ATM or point of sale device to enable them to steal and then remotely transmit card/PIN information to an offsite location and remotely access the compromised account. JA-563 (*General Information Message, Valerie Figueroa*, Off. of Temp. & Disability Assistance, Skimming & Phishing (Oct. 27, 2022)) (hereinafter "Ex. E"). This process typically involves thieves placing a physical overlay on ATMs or point of sale devices with Bluetooth technology designed to look exactly like the underlying system, making it extremely hard to detect for both the customer and owner/lessor. JA-563 (*id.*); JA-560 (*Skimming*, Fed. Bureau of Investigation (2024)) (hereinafter "Ex. D"); JA-654 (Gordon Snow, Statement Before the House Financial Services Committee (Sept. 14, 2011)) (hereinafter "Ex. T").

Because 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. JA-563 (Ex. E). Although cards with chips are less vulnerable to skimming, *see* JA-

560 (Ex. D), the USDA does not require chip technology on the EBT cards. JA-570 (*Addressing Stolen SNAP Benefits, Q&A,* U.S. Dep't of Agric. Food & Nutrition Serv. (2024)) (hereinafter "Ex. F").[3]

By the early 2000s, and well before the USDA promulgated the challenged Regulation, skimming and other forms of electronic theft was the subject of a congressional hearing. *See, e.g.*, JA-675–676 (*Hearing Before the Subcomm. on Emerging Threats, Cybersecurity, and Sci. and Tech. of the H. Comm. on Homeland Sec.*, 111th Cong. (2009) (hereinafter "Ex. V") ("[I]n recent years, the information age has transformed the landscape in which criminals operate, making available a wide array of new methods that identity thieves can use to access and exploit the personal information of others … [cyber criminals] are continuing to expand and become more sophisticated.")). It was also the subject of other governmental reports and widely addressed in the press. *See* JA-584–586 (Sue Chan, *Is Your Credit Card Being Skimmed?* CBS News (Dec. 6, 2002)) (hereinafter "Ex. I"); JA-585 (*Debit Card Skimming Group Arrested and Charged with Fraud*

[3] Indeed, EBT cards remain vulnerable to skimming, leading the USDA Office of Inspector General earlier this year to predict that the USDA may experience $233 million in fraudulent SNAP activity in fiscal years 2025 and 2026 (for a combined $555 million). *See* USDA Office of the Inspector General, *Review of Food and Nutrition Service Supplemental Nutrition Assistance Program/Electronic Benefits Transfer Hardware*, January 15, 2026, https://usdaoig.oversight.gov/sites/default/files/reports/2026-01/27801-0001-12_FR_FOIA_508_signed.pdf (*hereinafter* OIG SNAP Report).

and Identity Theft, Fed. Bureau of Investigation, Mia. Div. (May 1, 2009)) (hereinafter "Ex. L"); JA-746 (*Two Defendants Plead Guilty in ATM Skimming Scheme,* Fed. Bureau of Investigation (Nov. 9, 2009)) (hereinafter "Ex. Z"); JA-588 (Laura Italiano, *Shock Scam Rips off ATM Users*, NY Post (Dec. 3, 2003)) (hereinafter "Ex. J"); JA-591–592 (*ATM Skimming 101*, ABC News (Apr. 26, 2009)) (hereinafter "Ex. K"); *see also* JA-654 (Gordon Snow, Statement Before the House Financial Services Committee (Sept. 14, 2011)) (hereinafter "Ex. T") ("ATM skimming is … a prevalent global cyber crime."); JA-763, 765 (Cong. Rsch. Serv., The EMV Chip Card Transition: Background, Status, and Issues for Congress (2016)) (hereinafter "Ex. CC") ("Between 2004 and 2010, fraud committed on U.S.-issued bank credit cards rose 70% …. [point of sale] intrusions and the ensuing card fraud are facilitated by … the continued use of magnetic stripe cards that carry unencrypted data.")).

E. The 2010 Regulation and 2022 Policy

Despite the prevalence of skimming and the risk it posed to SNAP beneficiaries, the USDA did not account for skimming or other forms of cyberfraud in formulating the replacement rules to govern the EBT regime. Instead, in 2010 when the USDA promulgated regulations governing the replacement of benefits under the EBT system, it inexplicably chose to do away entirely with the rules linking replacement to a recipients' control over the benefits.

On April 12, 2010, the USDA 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." JA-481 (75 Fed. Reg. 18,377 (Apr. 12, 2010), CHEN-00000411). The 2010 Regulation, which remains in effect to this day, provides for the replacement of benefits when "the household reports that food purchased with [SNAP] benefits was destroyed in a household misfortune," SPA-70 (7 C.F.R. § 274.6(b)(2) (2010)), or when the household informs the agency that their EBT card has been lost or stolen, SPA-71 (7 C.F.R. § 274.6 (2010)). However, in contrast to the prior regulation governing paper coupons, SPA-41–46 (7 C.F.R. § 274.6 (1989)), which provided for the replacement of benefits 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. In other words, whereas the 2010 Regulation prohibits replacement of stolen benefits irrespective of participants' custody or fault, nothing "similar" can be found in the predecessor rule.

Nothing in the proposed rule or adopting release explains why the USDA decided to eliminate the long-held right to replacement of benefits stolen when outside of the recipient's control. Nor do these documents contain any analysis of whether the 2010 Regulation is similar to the rule governing replacement of paper

coupons, as required by PRWORA. Indeed, there is not a single document in the administrative record suggesting that the USDA even considered the similarity requirement in promulgating the 2010 Regulation, let alone documentation explaining why the USDA removed protections for stolen SNAP benefits in situations beyond participants' control.

In 2022, rather than fix this deficiency in the benefit replacement regime, the USDA adopted a policy expressly prohibiting the use of federal SNAP funds to replace skimmed benefits. This policy, evidenced by several memoranda and other documents issued by the USDA, OTDA, and New York City's Human Resources Administration (the "HRA") over the course of 2022 and early 2023, acknowledged the harm that skimming causes to SNAP participants, but nonetheless made clear that skimmed benefits could not be replaced using federal funds. *See, e.g.*, JA-615 (Policy Bulletin #22-93-ELI, N.Y.C. Hum. Res. Admin. (Dec. 19, 2022) at 1) (hereinafter "Ex. O"); JA-641–642 (Policy Memo, Cynthia Long (Oct. 31, 2022) at 1–2) (hereinafter "Ex. R").

In October 2022, in response to a particularly pernicious surge in skimming incidents, *see, e.g.*, JA-637 (*SNAP EBT Card Skimming Scam Alert*, U.S. Dep't of Agric. Food & Nutrition (Oct. 19, 2022)) (hereinafter "Ex. Q"), the USDA issued an alert and policy memorandum urging recipients to take measures to help prevent fraud, including checking their accounts for unauthorized transactions, but made

no provision for the replacement of skimmed benefits. JA-637 (*id.*); JA-641–642 (Ex. R). At virtually the same time, State agencies, who act as the USDA's agents for purposes of administering SNAP, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 387.0(a), issued various directives informing the public that the USDA prohibited them from replacing skimmed benefits using federal funds and directing victims to report the fraud to local agencies. On October 27, 2022, for instance, OTDA explained that "[t]he United States Department of Agriculture, Food and Nutrition Service … prohibits replacing stolen Supplemental Nutrition Assistance Program … benefits using federal funds" even where a "reported case of skimming is confirmed." JA-564 (Ex. E). A few months later, HRA used identical language in a December 19, 2022 policy bulletin. JA-615 (Ex. O).

At the end of 2022, Congress acted to partially address the ongoing skimming crisis by providing for limited benefit replacement through the 2023 Appropriations Act. Consolidated Appropriations Act of 2023, Pub. L. No. 117-238, § 501(b), 136 Stat. 4459 (2022). The 2023 Appropriations Act 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), and capped replacement

to two months' worth of benefits and only two replacements per year.[4] JA-504 (CHEN-00000434). On January 31, 2023, shortly after the 2023 Appropriations Act's passage, the USDA issued a memorandum explicitly confirming its refusal to replace benefits stolen via skimming outside of the Act's narrow parameters. JA-620–626 (Policy Memo, Tim English, (Jan. 31, 2023)) (hereinafter "Ex. P"). The memorandum mandated that State agencies "shall deny replacement issuances in cases in which available evidence indicates that the household's request for replacement is … outside the allowed scope of replacement outlined within section 501(b)(2)" of the 2023 Appropriations Act. JA-623 (Ex. P). As with the 2010 Regulation, the administrative record produced in this action does not contain any documents relating to the decision-making process surrounding the 2022 Policy nor the USDA's directions regarding the non-replacement of stolen benefits during this time. *See* JA-70–512 (CHEN-00000001–441).

II. PROCEDURAL HISTORY

Appellants, a group of New Yorkers whose SNAP benefits were stolen through skimming, filed suit on February 22, 2023, alleging that both the USDA's 2010 Regulation and 2022 Policy were arbitrary, capricious, and contrary to law.

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[4] After the 2023 Appropriations Act's expiration on December 20, 2024, no SNAP recipient could be reimbursed for benefits stolen through electronic theft. This includes an estimated $233 million in benefits USDA projects will be skimmed in fiscal years 2025 and 2026. *See* OIG SNAP Report, *supra* n. 3.

See, e.g., JA-28–29, 36, 37, 38, 45–46 (Complaint, ¶¶ 41–42, 65–66, 69, 114, 116). Appellants accordingly sought reversal of the USDA's unlawful Regulation and Policy prohibiting the replacement of skimmed benefits as well as an injunction requiring the USDA to authorize the replacement of skimmed benefits, including those benefits stolen from Appellants. JA-46 (*id.* ¶ 28).

The parties cross-moved for summary judgment. In support of their Motion for Summary Judgment, Appellants submitted extra-record evidence, including evidence regarding skimming that Appellants alleged the agency entirely failed to consider. *See* Pls.' Mot. for Summ. J. at 2 n.1, ECF No. 66. Specifically, Appellants submitted evidence from news outlets and governmental agencies concerning: (1) the functionality of EBT cards and their susceptibility to cybertheft, *see* JA-555 (Ex. C); and (2) documentation of skimming from around the time the 2010 Regulation was promulgated, *see* JA-675–676 (Ex. V) (2009 Congressional hearing discussing skimming); JA-763, 765 (Ex. CC) (Congressional Report documenting rise of skimming between 2004 and 2010); JA-585 (Ex. L) (2009 FBI report of skimming incident); JA-746 (Ex. Z) (same); JA-584–586 (Ex. I) (2002 CBS News article about skimming); JA-588 (Ex. J) (2003 NY Post article about skimming); JA-591–592 (Ex. K) (2009 ABC News article about skimming).

On August 28, 2025, the District Court issued an opinion and order denying Appellants' Motion for Summary Judgment and granting the USDA's Cross-Motion for Summary Judgment. SPA-1 (Order at 1).

First, the District Court declined to consider the extra-record materials put forth as evidence of the USDA's failure to consider the important issues of cybercrime and skimming when promulgating the 2010 Regulation and 2022 Policy. SPA-9–11 (*id.* at 9–11). While recognizing that other district courts in this Circuit have permitted the consideration of extra-record evidence where the agency "entirely failed to consider an important aspect of the problem," SPA-9 (*id.* at 9), the District Court determined that skimming fell into the "general subject matter" of "theft and the security of EBT cards" which was purportedly considered by the USDA, SPA-9–10 (*id.* at 9–10). The District Court thus declined to consider Appellants' evidence of skimming and other forms of cybercrime, labeling it "one permutation of theft" that the agency was not required to consider. SPA-11 (*id.* at 11).

Second, the District Court held that the 2010 Regulation was neither contrary to law nor arbitrary and capricious in violation of the APA. On contrary to law, the District Court reasoned that the rules governing the replacement of EBT benefits shared "sufficient characteristics in common" with the rules governing the replacement of paper coupons and therefore complied with the congressional

mandate of similarity, "regardless of the dissimilarities that exist." SPA-13, 15 (*id.* at 13, 15). Specifically, the District Court held that the 2010 Regulation, like the rules governing paper coupons, "reflected the goal of permitting replacement of stolen coupons within limits to deter fraud and to encourage 'program accountability'." SPA-14 (*id.* at 14). The District Court also noted that the USDA had previously recognized that its replacement policies could "cause a hardship for those participants whose coupons really are stolen," SPA-14, 15 (*id.* at 14, 15), but failed to acknowledge that the quoted statement relates exclusively to benefits stolen *after receipt*, JA-114 (CHEN-00000044). Finally, the District Court looked to the rules governing the replacement of EBT *cards* (not benefits) and determined that the two regimes were similar because "the 2010 Regulation allows replacement of EBT cards that are 'lost or stolen.'" SPA-14 (Order at 14).

On Appellants' arbitrary and capricious arguments, the District Court recognized that the USDA "ignored skimming" and that "the record is sparse as to the USDA's rationale for adopting the 2010 Regulation" but nevertheless determined that the USDA did not "fail[] to consider an important aspect of the problem." SPA-16 (*id.* at 16). Although the District Court rejected the USDA's argument that "an issue must be presented before, and subsequently ignored by, an agency in order to qualify as an important aspect of the problem," SPA-16 (*id.*), it held that the agency's consideration of "measures to replace stolen EBT cards and

to address data security" of the broader EBT system, were sufficient to cover the "general subject matter" of EBT theft and thus fulfill the USDA's obligations under the APA. SPA-16 (*id.*).

Finally, the District Court held that the 2022 Policy was not timely pleaded. SPA-17 (*id.* at 17). The District Court recognized that the documents comprising the 2022 Policy were cited and referenced in Appellants' Complaint. SPA-17–18 (*id.* at 17–18). But, the District Court found that the Complaint did not specifically "assert[] the existence of a 2022 Policy" as named, or "impl[y] that the documents "constitute a cohesive policy." SPA-19 (*id.* at 19). The District Court therefore found that the Complaint was "[in]sufficient to put Defendants on notice of Plaintiffs' claim that the policy is unlawful." SPA-19 (*id.*).

The District Court further held that, even if considered, the 2022 Policy is not a final agency action reviewable under the APA. SPA-20 (*id.* at 20). The District Court first declined to attribute statements by the USDA's agents for administering SNAP, OTDA and HRA, to the USDA, and then determined that the "remaining statements" were insufficiently "definitive" to constitute final agency action. SPA-20–21 (*id.* at 20–21.). In short, the District Court determined that the arguments related to the 2022 Policy were more symptomatic of an "on-going program" of prohibiting reimbursements, which is not subject to review because the APA "does

not extend to reviewing generalized complaints about agency behavior." SPA-22 (*id.* at 22).

SUMMARY OF ARGUMENT

The 2010 Regulation and the 2022 Policy are contrary to law and arbitrary and capricious in violation of the APA. The District Court's judgment rejecting Appellants' challenge to both the Regulation and the Policy should be reversed for several reasons.

First, the District Court misconstrued PRWORA's similarity requirement by applying an overly broad interpretation of the word "similar." The District Court's interpretation allows virtually any replacement rule to satisfy the statute, regardless of its rationale or effect. Because the District Court never considered whether the material elements of the 2010 replacement rules were similar to the prior regime nor whether the two regimes maintained a similar allocation of burdens, it erroneously concluded that challenged regulation complies with the statutory requirements.7 U.S.C. § 2016(h)(7).

Second, the District Court erred in holding that the 2010 Regulation was not arbitrary and capricious. The District Court first erred in finding that the USDA need not have considered issues of cyberfraud and skimming because it purportedly considered the security of EBT cards and general system security. Electronic benefit theft via skimming or cyberfraud is an important issue that is

distinct from EBT card and system security. The USDA's failure to consider it thus rendered the 2010 Regulation arbitrary and capricious.

The District Court's refusal to admit evidence concerning the prevalence of skimming was also error because it concluded that such evidence was not of an "entirely new general subject matter" from the issues the agency considered—*i.e.*, EBT card and broad system security. However, because skimming is a distinct issue of substantial importance that holding should also be reversed. The District Court additionally erred by discounting the USDA's failure to provide a reasoned explanation for their decision to prohibit replacement of skimmed benefits, which separately rendered the 2010 Regulation arbitrary and capricious.

Third, the District Court abused its discretion in concluding that Appellants did not plead their challenge to the 2022 Policy in their Complaint. Indeed, Appellants adequately complied with the liberal pleading standards of Rule 8 and the USDA was not prejudiced in any way.

Finally, the District Court erred in holding that the 2022 Policy was not final agency action and thus not reviewable under the APA. The memoranda and documents that describe the 2022 Policy clearly ascribe it to the USDA and were published by State actors acting as agents for the USDA consistent with their regulatory duties. *See, e.g.*, JA-564 (Ex. E); JA-615 (Ex. O); N.Y. Comp. Codes R. & Regs. tit. 18, § 387.0(a); 7 U.S.C. § 2020(e)(1)(A). This remains true even if

certain memoranda were published by State agencies, and subsequently confirmed by the USDA in connection with the passage of the 2023 Appropriations Act was enacted. When considered together, as is appropriate, the memoranda also provide a "definitive statement" of the USDA's prohibition on replacing skimmed benefits.

STANDARD OF REVIEW

This Court reviews the District Court's summary judgment ruling, and the administrative record, *de novo*, "without according deference to the decision of the district court." *Town of Southold v. Wheeler*, 48 F.4th 67, 77 (2d Cir. 2022); *see also New Jersey v. Bessent*, 149 F.4th 127, 140 (2d Cir. 2025) ("Where, as here, an APA-based challenge to agency action presents 'a pure question of law'…'[w]e review *de novo* such a grant [of summary judgment].'"); *Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 229 (2d Cir. 2020). This Court likewise should not defer to the agency's interpretation but should instead "exercise [] independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

This Court reviews the District Court's holding that the 2022 Policy was not timely pleaded and the District Court's decision to exclude extra-record evidence for abuse of discretion. *See Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004) (Appellate courts review "dismissals for failure to comply with Rule 8(a)" for "abuse of discretion."); *Qorrolli v. Metro. Dental Assocs*., 124 F.4th 115, 127 (2d

Cir. 2024) (The Second Circuit "review[s] evidentiary rulings for abuse of discretion[.]").

ARGUMENT[5]

I. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE 2010 REGULATION COMPLIES WITH 7 U.S.C. § 2016(h)(7).

In considering Appellants' challenge to the 2010 Regulation, the District Court misconstrued the statutory similarity requirement and as a result erroneously determined that the 2010 Regulation satisfies the statutory standard. Although the District Court acknowledged that the 2010 Regulation "does not provide for replacement of stolen benefits," and that the prior regulation "required State agencies to replace coupons that were stolen from the mail", SPA-5 (Order at 5), it nonetheless held that the two regimes were sufficiently similar despite erasing a

[5] Appellants have standing to bring this lawsuit because (1) they suffered an "injury in fact" through the loss of their SNAP benefits, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); JA-780–798 (Declarations of Haiyan Chen, Kenya Watson, S.O., Gertrude Cribbs, Hana Broome, and Mei Ieng Lee in Support of Pls.' Mot. for Summ. J.); JA-846–1037 (Ex. BB); (2) their injuries are fairly traceable to the USDA's actions prohibiting replacement of skimmed SNAP benefits, *see Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016); and (3) a favorable judicial decision enjoining the USDA from refusing to replace skimmed benefits, as Appellants requested at summary judgment, would redress their injuries. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). The USDA did not challenge Appellants' standing in the District Court proceedings, and the District Court found that Appellants' standing was "adequately alleged in the Complaint." SPA-11 (Order at 11).

category of entitlement to benefit replacement. The District Court's conclusion was in error and requires reversal.

A. The District Court Misconstrued PRWORA's Requirement of a "Similar" Replacement Regime.

The District Court incorrectly construed the similarity requirement set forth in PRWORA and the Food and Nutrition Act of 2008. According to the District Court, to be "similar" the two regimes must share "sufficient characteristics in common" relating to the "substance or essentials" of the two regimes. SPA-13 (Order at 13). Applying that standard, the District Court held that the new regulation is sufficiently "similar" to the prior one because they both sought to keep benefit replacements "within [some] limits" to "deter fraud" and "encourage 'program accountability.'" SPA-14 (*id.* at 14). That was error.

To Appellants' knowledge, this Court has not addressed the meaning of similarity in the context of the APA or SNAP. But courts throughout the country have repeatedly applied a higher bar than applied by the District Court when assessing similarity in other contexts. These cases make clear that the similarity inquiry must look beyond superficial analogs or the mere presence of *some* comparable attributes. Instead, similar regimes must be alike in all "relevant" or "material" aspects and must share both a comparable purpose (the "why") and allocation of burdens (the "how"). *See, e.g.*, *Hu v. City of New York*, 927 F.3d 81, 96 (2d Cir. 2019) (considering similarity in the Equal Protection context); *New*

York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 28 (2022) (considering similarity under the Second Amendment); *United States v. Daniels*, 124 F.4th 967, 973 (5th Cir. 2025) (same); *see also Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (holding that statutes that are similar—that "share a common raison d'etre" or same purpose—should be interpreted similarly).

For example, in the Second Amendment context, the Supreme Court has provided guidance on how to assess whether regulations are "similar" in the wake of "unprecedented societal concerns or dramatic technological changes," much like the technological evolution from paper coupons to the EBT system that prompted the congressional command in this case. *See Bruen*, 597 U.S. at 27. In such circumstances, courts must look to whether the regulations are "relevantly similar." *Id.* For that, courts must evaluate whether the regulations "share a common why and how," in that "they must both (1) address a comparable problem (the 'why') and (2) place a comparable burden on the right holder (the 'how')." *Daniels*, 124 F.4th at 973; *see also Nguyen v. Bonta*, 140 F.4th 1237, 1243–45 (9th Cir. 2025), *United States v. Youngblood*, 740 F. Supp. 3d 1062, 1068 (D. Mont. 2024).

Likewise, in the Equal Protection context, plaintiffs must show that they are "similarly situated" to their chosen comparator. To assess whether an individual is "similarly situated," courts in this Circuit consider whether the two comparators are similarly positioned "*in all material respects*." *Hu*, 927 F.3d at 96 (emphasis

added); *see also Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000).[6] That is, to prevail on an Equal Protection claim based on animus (the less "stringent standard" of similarity for Equal Protection claims in this Circuit), *Hu*, 927 F.3d at 90, the plaintiff must show that the "material," "relevant aspects" of the two comparators remain the same. *Bernstein v. Vill. of Wesley Hills*, 95 F. Supp. 3d 547, 563, 567–71 (S.D.N.Y. 2015), *aff'd*, 644 F. App'x 42 (2d Cir. 2016) (finding that two comparator businesses were dissimilar where, despite some parallels, there were more than "minor differences" between the two). While "[e]xact correlation is neither likely nor necessary," courts in this Circuit recognize that the "cases must be fair congeners." *Id.* at 563 n.18. In essence, similarity mandates that "[a]pples … be compared to apples," and is not satisfied by the comparison of apples to oranges as the District Court did here. *Id.* at 563 n. 18; *see also Davis v. Metro N. Commuter R.R.*, 2022 WL 2223018, at *7 (S.D.N.Y. June 21, 2022) (same).

Under this standard, sharing only some "characteristics in common," like permitting replacement "within limits," does not make the regulations similar. Instead the District Court should have considered whether the replacement rules in the 2010 Regulation share both the "why" and "how" with the regime governing

[6] Other circuits have also defined "similarly situated" as "similarly situated in all material aspects." *Maye v. Klee*, 915 F.3d 1076, 1086 (6th Cir. 2019); *Smith v. URS Corp.*, 803 F.3d 964, 970 (8th Cir. 2015); *Moran v. Selig*, 447 F.3d 748, 756 (9th Cir. 2006).

the replacement of paper coupons—*i.e.*, whether the burden of replacing stolen benefits and the underlying rationale for the allocation of the burden remain the same. Because the District Court misinterpreted PRWORA's similarity requirement, it entirely failed to consider "how" the rules were set up, thus committing reversible error.

B. The District Court Erroneously Concluded that the 2010 Regulation is Similar to the Prior Regime.

The District Court's application of the similarity requirement to the 2010 Regulation was likewise in error.

First, the District Court determined that the 2010 Regulation was "similar" because it was consistent with "[t]he essential characteristics of the coupon-based replacement regime … [that] reflected the goal of permitting replacement of stolen coupons within limits to deter fraud and to encourage 'program accountability.'" SPA-14 (Order at 14). Even assuming that these were the sole goals behind the replacement rules, this rationale does not take into account "how" the goals of the replacement regime are achieved. *See Daniels*, 124 F.4th at 973.

This crucial misstep led the District Court to a series of "goals" that are too general to permit any helpful comparison of regimes. Any "replacement regime" permits replacement "within limits." *See* SPA-14 (Order at 14). Thus, under the District Court's reasoning, virtually any regime would be similar unless it allows benefits to be replaced under any circumstances or under no circumstances at all,

which cannot be the case. If any regime with limited replacement were sufficiently similar to any other, Section 2016(h)(7) would have no meaning.

Under the generalized description adopted by the District Court, the two regimes would be sufficiently "similar" if, for example, the USDA decided to replace only benefits stolen in particular zip codes, or at particular times of day, where theft was particularly high. Both rules would allow replacement "within limits" and both would theoretically deter fraud and encourage program accountability. SPA-14 (*id.*). But neither would be "similar to" the prior rules which allowed for the replacement of benefits stolen prior to receipt based on the principle that low-income, food insecure SNAP beneficiaries, should not be deprived of benefits stolen under circumstances outside of their control.

Nor did the new replacement rules deter fraud or encourage program accountability in a similar way to the old regime. SNAP recipients cannot prevent skimming[7] and denying replacement of skimmed benefits has no effect on the fraudsters themselves. Instead, in confirmed cases of skimming, the only individuals who are punished are innocent SNAP beneficiaries who lose access to essential benefits. Thus, on even the District Court's limited interpretation of the

[7] *See* JA-561–565 (Ex. E) (explaining that because 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).

goals of the statutory replacement regime, the 2010 Regulation still fails to pass muster.

Second, the District Court concluded that the two regimes "share[] sufficient characteristics in common" because the 2010 Regulation "allows replacement of EBT *cards* that are 'lost or stolen.'" SPA-14–15 (Order at 14–15) (emphasis added). However, such a rule does not make the 2010 Regulation "relevantly" similar in "all material respects" because it still excludes an entire category of SNAP recipients who should have been protected according to the rationale of the previous regime. *See*, *e.g.*, *Bruen*, 597 U.S. at 27; *Hu*, 927 F.3d at 96.

Moreover, this argument incorrectly conflates stolen benefits with stolen EBT cards. *See* SPA-14–15 (Order at 14–15) ("The provision allowing replacement of lost or stolen EBT cards is at least similar to the provision allowing replacement of lost or stolen coupons"). Failure to replace EBT cards would mean that SNAP recipients could never again access SNAP benefits, and so non-replacement of cards could not possibly be a feature of any SNAP system. Cards are not benefits, but rather a means of delivering benefits to recipients. Thus, whether or not EBT cards are replaced says nothing about the regime for replacing *benefits*.

The District Court's comparison of EBT card replacement rules in the 2010 Regulation to "another benefits program that permitted replacement of stolen checks but not cash stolen from recipients after they cashed the checks" is likewise

unavailing. *See* SPA-14 (Order at 14). SNAP participants do not control the government accounts where benefit entitlements are stored or the point of sale devices provided by retailers. As explained above, SNAP benefits credited to recipients' accounts do not provide SNAP recipients with immediate access to the benefits. In contrast to cash and paper coupons, SNAP participants do not control their EBT benefits prior to completing a purchase. JA-493 (7 C.F.R. § 274.7(d)); SPA-26 (7 U.S.C. § 2016(h)(11)(A)(iii)) (explaining that EBT benefits are issued and stored in a central databank and electronically accessed by household members at the point of sale). They cannot withdraw, download, print out, or deposit benefits in their personal bank account or in a safe deposit box. SPA-26 (*id.*). And if not used within a certain time period, the benefits are revoked. *Id.* The District Court's reliance on EBT card replacement rules in its similarity analysis should therefore be disregarded.

Third and finally, the District Court determined that the two regimes were similar because the replacement rules were not intended to make the SNAP recipients whole in every circumstance and recognized that there will be "'a hardship' on those from whom coupons were stolen." SPA-15 (Order at 15). In so holding, the District Court failed to recognize that the hardship previously contemplated was far narrower than the hardship imposed by the 2010 Regulation.

Under the prior rules, the USDA recognized that not allowing the replacement of benefits *after* receipt would impose a hardship on SNAP recipients whose benefits were stolen once they were in recipients' possession. JA-114 (CHEN-00000044). However, the USDA determined that such limited hardship was necessary because recipients had possession of the coupons and therefore were in the best position to protect against their loss. JA-114 (*id.*). This "hardship," however, was never imposed on SNAP beneficiaries for the loss of benefits stolen pre-receipt because beneficiaries could never do anything to prevent such loss and therefore, under the consistent rationale of the prior rules, should not bear the hardship of a theft entirely outside of their control. Indeed, the 2010 Regulation's prohibition on replacing stolen benefits where the affected participants neither received them nor were responsible in any way for their theft finds no parallel in the predecessor regulation.

The District Court erred by not considering whether the material, relevant elements of the two replacement regimes were "similar." Although the District Court provided a limited assessment of "why" the replacement rules were enacted, the District Court did not consider "how" such regulations were imposed in determining whether PRWORA's requirement of similarity was fulfilled. This oversight led the District Court to reach the erroneous conclusion that the two replacement regimes were sufficiently similar, despite the erasure of a class of

benefit replacement and an inexplicable departure from the rationale underpinning the prior rules.

The central feature of the rules governing replacement of paper coupons was that responsibility for benefit loss should lie with the party in the best position to protect against it—*i.e.*, the party with control over the benefits at the time of the loss. *See supra* Factual Background, Section I.B; JA-108–109, 114 (CHEN-00000038–39, 44); *see also Hettleman v. Bergland*, 642 F.2d 63, 66–67 (4th Cir. 1981) (The rule governing liability for stolen food stamp benefits "places responsibility for loss with the custodian of the coupons (who is most able to guard against loss)"). Based on this consistent rationale, the USDA historically set a clear line, replacing benefits stolen prior to their receipt by SNAP beneficiaries but refusing to replace benefits lost after receipt, subject only to narrow exceptions (*e.g.*, coupons lost in a household misfortune outside of recipients' control). SPA-41–42 (7 C.F.R. § 274.6(a)(1)(ii) (1989)).

A similar regulation, therefore, would not merely include replacement mechanisms as such, but would also incorporate the "how" of the prior regime by allowing for the replacement of benefits stolen prior to receipt given SNAP recipients' lack of control over such benefits and inability to protect against their loss. In the context of EBT, such a rule would require the USDA to replace benefits

that were stolen by means of cyberfraud, such as skimming, which, by definition, occur when benefits are outside of SNAP recipients' control.

In short, the 2010 Regulation neither tracks the "material," "relevant aspects" of the prior regime, *Hu*, 927 F.3d at 96; *Bernstein*, 95 F. Supp. 3d at 563, 567, nor does it place a "comparable burden" on SNAP recipients, *Daniels*, 124 F.4th at 973. Instead, it is materially and meaningfully different from the prior replacement regime which permitted the replacement of benefits stolen prior to receipt. These dissimilarities are not minor nuances, but rather the elimination of an entire class of benefit replacement that had been previously permitted.

The District Court's opinion should therefore be reversed and the replacement rules in the 2010 Regulation set aside as contrary to law.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE 2010 REGULATION WAS NOT ARBITRARY AND CAPRICIOUS FOR FAILURE TO CONSIDER THE IMPORTANT ISSUES OF CYBERFRAUD AND SKIMMING.

The District Court held that the USDA's failure to consider the issue of electronic benefit theft (including skimming) did not render the 2010 Regulation arbitrary and capricious. According to the District Court, it was sufficient that the agency "focus[ed] on the theft of EBT cards and the security of the EBT system." SPA-16 (Order at 16). This was in error.

A. Skimming and Cyberfraud are Distinct from the Issues that the USDA Considered.

Electronic fraud and theft cannot be equated with theft of EBT cards—these issues are distinct. Theft via skimming and theft via a stolen card may both be theft, but they occur in fundamentally different ways with fundamentally different impacts on the victim. Skimming is not simply "one permutation of theft arising from a gap in security" as the District Court held. SPA-11 (*id.* at 11). When a recipient has their card stolen, they are no longer able to access their benefits. When a recipient has their benefits skimmed, they lose the benefits altogether. In other words, although the agency considered theft of the "cards" that "transfer[] the 'currency,'" it did not consider theft of the "currency" itself (*i.e.*, the benefits on the cards). SPA-14 (*id.* at 14); *see supra* Argument, Section I.B. Thus, theft of electronic benefits such as skimming is not the same "general subject matter" as card theft.

Likewise, what the District Court described as "data security" is very different from the cybertheft and skimming at issue in this case. The District Court referenced a series of the Regulation's subsections regarding "functional and technical EBT system requirements" which, on a superficial glance, reference "benefit and data security." SPA-16 (Order at 16) (citing JA-492 (CHEN-00000422–425)). However, these provisions involve exclusively internal, systemic-level controls tied to the physical elements of the EBT system, *e.g.*, limits

on unsuccessful pin entries, measures to control unused EBT cards or point of sale devices, and retailer authorization and verification. *See* JA-494–496 (CHEN-00000424–426). They do not in any way address the risk of external cyberattacks, including skimming or other forms of cyberfraud that leave SNAP recipients vulnerable to theft under the EBT system.

In any event, to the extent that such provisions could be read to encompass cyberfraud or electronic benefit theft (and they cannot), they remain irrelevant for one simple reason: nothing in these provisions indicates that the agency considered security from electronic theft in the context of *benefit replacement.* Instead, the 2010 Regulation delegated data security issues to the States such that the USDA did not consider the issue themselves. *See* JA-494 (CHEN-00000424) (emphasis added). In PRWORA and the Food and Nutrition Act of 2008, Congress specifically ordered the USDA to formulate "similar" replacement rules to those in place under the paper coupon system. The fact that the USDA promulgated replacement rules but punted consideration of data security (including the potential for benefit theft) to State agencies means that they never considered these issues or how they would impact the appropriate scope of replacement. *See* JA-492–493 (CHEN-00000422–423) (outlining the rules for replacement issuances without consideration of benefit security or the potential for benefit theft).

The District Court thus erred in concluding that the USDA sufficiently considered skimming or any other type of electronic theft because they evaluated "theft of EBT cards and security of the EBT system." SPA-16 (Order at 16).

B. Skimming and Cyberfraud are "Important Aspects" of EBT Security and the Rules for the Replacement of SNAP Benefits.

The issue of the theft of electronic benefits was also "an important aspect of" EBT system security and corresponding benefit replacement rules that the agency was required to consider.[8] The Supreme Court has indicated that an issue is sufficiently important to merit consideration when the agency has previously treated such issue as a relevant factor in prior rulemakings. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 48, 51 (1983) (airbags deemed an important issue that could not be ignored where the agency had previously recognized them as effective in prior rulemakings).

The USDA has repeatedly recognized that benefit theft and security are relevant factors in determining the appropriate scope of the benefit replacement rules. *See, e.g.*, JA-108 (CHEN-00000038 (discussing repeated benefit theft during

[8] As the District Court agreed, it was not necessary for the issue of skimming to have been "presented before, and subsequently ignored by" the USDA for it to qualify as an "important aspect" that the agency should have considered. SPA-16 (Order at 16).

delivery to participants' households and the greater control exercised by households after the receipt of benefits as relevant in determining scope of replacement)); JA-109 (CHEN-00000039 (discussing the replacement rules necessary to reduce benefit loss due to mail theft)); JA-110 (CHEN-00000040 (discussing procedures to qualify for replacement in the event of theft)); *see also* JA-114 (CHEN-00000044); JA-115 (CHEN-00000045); JA-117 (CHEN-00000047); JA-119 (CHEN-00000049). In fact, the mail fraud replacement rules directly responded to the risk of benefit theft as coupons were being delivered to recipients but before they reached their destination. *See, e.g.*, JA-108 (CHEN-00000038); JA-109 (CHEN-00000039). The District Court acknowledged as much. *See* SPA-10 (Order at 10).

The shift to the EBT system did not mean that the threat of pre-receipt theft disappeared or that such issues were no longer essential for the agency to consider. *See supra* Factual Background, Section I.D. Instead, the transition to EBT meant only that the form of such theft would change with the advent of new technology, requiring the USDA to consider and account for how benefit theft would occur under the EBT system and create replacement rules accordingly. *See, e.g.*, JA-283 (CHEN-00000213 (In PRWORA, Congress instructed the USDA to craft regulations "to maximize the security of [the EBT] system using the most recent technology available.")). Given that skimming and other forms of cybertheft were

well-known issues at the time of the 2010 Regulation, they were an entirely "rational" and "important" subject matter for the agency to consider when promulgating benefit replacement rules for the EBT system. *See Michigan*, 576 U.S. at 753; *see also* JA-668 (Ex. V) ("[I]n recent years, the information age has transformed the landscape in which criminals operate, making available a wide array of new methods that identity thieves can use to access and exploit the personal information of others … [cyber criminals] are continuing to expand and become more sophisticated."); JA-763, 765 (Ex. CC) ("Between 2004 and 2010, fraud committed on U.S.-issued bank credit cards rose 70% …. [point of sale] intrusions and the ensuing card fraud are facilitated by … the continued use of magnetic stripe cards that carry unencrypted data."); *supra* Factual Background, Section I.D (listing additional evidence documenting prevalence of skimming at the time of the 2010 Regulation).

Therefore, addressing the security of the SNAP system without considering cyber fraud, a category of new security risks that arose with the transition to the EBT cards and which were widely known at the time, was unreasonable and could not be "reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.").

Because electronic fraud and theft of benefits was an important issue for the overall security of the SNAP system and distinct from the issues that that the agency assessed, the USDA's failure to consider these problems was a "clear error of judgment." *See DHS v. Regents of the Univ. of Calif.*, 591 U.S. 1, 16, 29–30 (2020) (finding the DACA rescission arbitrary and capricious where the agency failed to consider the possibility that forbearance, a "legally distinct" issue, could survive even if the extension of work authorization was deemed unlawful). As a result, the 2010 Regulation is arbitrary and capricious. *See Michigan*, 576 U.S. at 760; *see also State Farm Mut. Auto. Ins. Co*., 463 U.S. at 56–57; *Christ the King Manor, Inc. v. Sec'y U.S. Dept. of Health and Hum. Servs.*, 730 F.3d 291, 314 (3d Cir. 2013) (HHS decision to approve Medicare amendments held arbitrary and capricious where the agency failed to "ensure that payments would still be consistent with quality of care and adequate access").[9] The District Court's opinion

[9] The District Court's reliance on *Nat'l Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 598 F. Supp. 3d 98 (S.D.N.Y. 2022), which the District Court cited, *see* SPA-16–17 (Order at 16–17), is not to the contrary. In that case, plaintiffs argued that the agency had failed to consider the "cumulative exposure of perchlorates," but the court determined that the agency had in fact considered "the food supply's exposure … from multiple perchlorate-containing articles …" *Nat.l Res. Def. Council, Inc.*, 598 F. Supp. 3d at 111–12. Thus, the court held not only that the these "relevant factors" were not a "new general subject matter" but also that the agency had indeed considered the issue. *Id.* at 112. In other words, the issues plaintiffs raised in that case were the exact same factors that the agency considered (*i.e.*, exposure to perchlorates). *See id.* This is not the case here.

should therefore be reversed and the 2010 Regulation set aside as arbitrary and capricious.

C. The District Court's Decision to Exclude Extra-Record Evidence Regarding the USDA's Failure to Consider an Important Aspect of the Problem Should be Reversed for the Same Reasons.

The District Court abused its discretion by excluding extra-record evidence about skimming and other types of cyberfraud that the USDA failed to consider. SPA-9 (Order at 9). Having acknowledged that the extra-record evidence may assist the court in determining whether the agency "entirely failed to consider an important aspect of the problem," the District Court based its decision on "a clearly erroneous factual finding" about the significance of the evidence proffered by Appellants. *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99–100 (2d Cir. 2012); *see, e.g.*, *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); SPA-9–11 (Order at 9–11). Specifically the District Court held that because in analyzing security of the EBT system the USDA considered "theft and the security of EBT cards" and required "[S]tate agencies … to ensure EBT systems met performance and technical standards for system security," they did not need to consider evidence of skimming, which the District Court described as merely "one permutation of theft." SPA-9–11 (Order at 9–11.).

By treating skimming and cyberfraud as a mere nuance of card theft and general system security, SPA-9 (*id.* at 9), the District Court misunderstood both the technological changes associated with the transition from paper coupons to the EBT system and the related implications for the overall security of SNAP benefits. In disregarding skimming and cyberfraud in its analysis of the EBT system security, and equating it with the theft of EBT cards and instructions to State agencies regarding generalized system security, the District Court made a clearly erroneous factual finding and therefore abused its discretion.

The District Court's erroneous decision to exclude Appellants' extra-record evidence was a prejudicial error that undermined Appellants' argument that the 2010 Regulation was arbitrary and capricious for failure to consider an important aspect of the problem. Without this evidence, the District Court determined that the USDA had sufficiently considered the problem of skimming, SPA-15–17 (*id.* at 15–17). However, had the District Court considered the excluded materials, it would have seen that skimming, as a phenomenon independent from other forms of theft, was widespread and known at the time of the 2010 Regulation and therefore should have been considered in the Regulation's promulgation. *See supra* Factual Background, Section I.D; Argument, Section II.A–B.[10]

[10] All of the documents that Plaintiffs requested the District Court to consider are judicially noticeable. Fed. R. Evid. 201; *see* Req. for Judicial Notice in Supp. of Pls.' Mot. for Summ. J., ECF No. 76. Among them are publicly available

For these reasons, this Court should reverse the District Court's decision to exclude extra-record evidence indicating that the USDA failed to consider skimming and cyberfraud and should instruct the District Court to consider such evidence on remand.

III. THE DISTRICT COURT DID NOT CONSIDER WHETHER THE USDA PROVIDED A REASONED EXPLANATION FOR THEIR DECISION TO PROHIBIT REPLACEMENT OF SKIMMED BENEFITS.

The District Court's conclusion that the 2010 Regulation is not arbitrary and capricious is erroneous for the independent reason that it did not consider the USDA's failure to provide a reasoned explanation for their decision to prohibit the replacement of skimmed benefits.

When an agency departs from an established policy, it must "display awareness that it is changing position" and articulate a "reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the

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documents published by government entities and courts regularly take notice of such documents. *Fernandez v. Zoni Language Ctrs., Inc.*, 2016 WL 2903274, at *3 (S.D.N.Y. May 18, 2016), *aff'd*, 858 F.3d 45 (2d Cir. 2017); *see also New York v. EPA*, 525 F. Supp. 3d 340, 347 n.6 (N.D.N.Y 2021) (taking judicial notice of "published government sources"). *See, e.g.*, JA-662 (Ex. V); JA-593 (Ex. L); JA-745 (Ex. Z); JA-756 (Ex. CC); JA-651 (Ex. T). They also include articles published by reliable news outlets which show the fact of press coverage of skimming and related issues. This Circuit has held that "it is proper to take judicial notice of the fact that press coverage … contained certain information." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008); *see* JA-584 (Ex. I); JA-587 (Ex. J); JA-590 (Ex. K); JA-596 (Ex. M).

prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *New York v. DHS*, 969 F.3d 42, 82 (2d Cir. 2020) (agency must demonstrate "reasoned explanation" for its changed position). Failure to do so renders the agency action "arbitrary" or "capricious." *Ohio v. EPA*, 603 U.S. 279, 292 (2024); *see also Am. Sec. Ass'n, Citadel Sec. LLC v. SEC*, 147 F.4th 1264, 1273, 1275 (11th Cir. 2025) (same); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 83 (2d Cir. 2006) (finding regulation arbitrary and capricious when the agency "supplied no contemporaneous explanation at all in promulgating" the relevant provision).

As explained, the 2010 Regulation introduced a significant change that lessened replacement protections for SNAP beneficiaries. The regime governing paper coupons allowed for the replacement of benefits stolen prior to receipt by SNAP beneficiaries based on the rationale that SNAP recipients did not have control of the benefits at the time of the loss. However, in the 2010 Regulation, the USDA eliminated this protection for benefits stolen prior to receipt like benefits stolen via skimming and other forms of electronic theft. *Supra* Factual Background, Section I.E.

As the administrative record reveals, the USDA did not explain its reasons for this reversal. *See* JA-70–511 (CHEN-00000001–441). Nor did the USDA address the statutory requirement of similarity or explain how the EBT replacement rules comply with the congressional mandate. *See* SPA-71 (7 C.F.R. § 274.6

(2010)). *See also* SPA-16 (Order at 16) (stating that "the record is sparse as to the USDA's rationale for adopting the 2010 Regulation"). Such an "[u]nexplained inconsistency" in agency reasoning is a classic hallmark of arbitrary and capricious rulemaking. *New York v. HHS.*, 414 F. Supp. 3d 475, 547 (S.D.N.Y. 2019); *see also Am. Sec. Ass'n, Citadel Sec.*, 147 F.4th at 1275 (same).

Here, however, the District Court never analyzed nor reached a holding on whether the USDA's failure to provide the required explanation rendered the 2010 Regulation arbitrary and capricious. SPA-15–17 (Order at 15–17). Instead, the District Court held only that the 2010 Regulation was not arbitrary and capricious for failure to consider an important aspect of the problem. SPA-15–17 (Order at 15–17). Because the District Court did not reach a holding, remand is warranted. *See Zivkovic v. Laura Christy LLC*, 94 F.4th 269, 270 (2d Cir. 2024) (remanding to the district court "because the partial final judgment did not contain a disposition" as to the issue).

IV. THE DISTRICT COURT ERRONEOUSLY HELD THAT APPELLANTS DID NOT PLEAD THE 2022 POLICY IN THE COMPLAINT.

The District Court found that Appellants "did not timely plead their allegations regarding the 2022 Policy," stating that the Complaint "does not put Defendants on notice that Plaintiffs are challenging the 2022 Policy," and "neither alleges that a policy exists separate from the 2010 Regulation nor describes the

basic contours of that policy sufficient to put Defendants on notice of Plaintiffs' claim that the policy is unlawful." SPA-18 (Order at 18). That holding misreads both the Complaint and the federal pleading standard.

First, Appellants specifically pleaded the existence of the USDA's policy separate from the 2010 Regulation. Throughout the Complaint, Appellants reference "policies *and* regulations," making clear that their lawsuit is not limited to the formal rule. *See, e.g.*, JA-45 (Complaint ¶ 114) ("By adopting policies and regulations that do not authorize States to reimburse victims of skimming, Defendants are acting contrary to the statutory command"); *see also* JA-46 (*id.* ¶ 116). The plain language signals two separate sources: the codified regulation *and* the policy. Courts routinely interpret the use of "and" to denote unique categories, not a single conjunctive action. *See Cottam v. Glob. Emerging Cap. Grp., LLC*, 2020 WL 1528526, at *6 (S.D.N.Y. Mar. 30, 2020) (internal citations omitted) (interpreting the word "and" as separating two independent categories rather than as creating a conjunctive clause because the latter could lead to the absurd result where the first clause was "meaningless").[11]

[11] The Complaint did not specifically refer to a "2022 Policy" because this term was introduced for convenience in Appellants' Motion for Summary Judgment and was in fact defined to include documents cited in the Complaint. *See* Pls.' Mot. for Summ. J. at 21–23, ECF No. 66.

Second, the Complaint pleads a cohesive policy and does far more than offer conclusory references. It details the content and operation of the challenged policy: describing the agency's decision—made against the backdrop of surging electronic skimming—that the USDA "prohibits replacing stolen SNAP benefits using federal funds," and that "the limitations that Defendants impose on replacement of full value of stolen EBT benefits remain in force." JA-19, 18 (Complaint ¶¶ 68, 64). The Complaint cites specific federal administrative communications and alleges these directives are relayed to, and applied by, the State agencies that administer SNAP. JA-35–37 (*id.* ¶¶ 61–65, 68).

Third, Appellants' challenge to the USDA's policy in the Complaint satisfied the liberal pleading requirements under the Rule 8(a)(2) of the Federal Rules of Civil Procedure.

A complaint must "merely" include enough facts to "identify the nature of the claim to sufficiently put the defendant on notice of the suit it needed to defend." *Bensch v. Est. of Umar*, 2 F.4th 70, 78 (2d Cir. 2021); *Kittay v. Kornstein*, 230 F.3d 531, 541–42 (2d Cir. 2000) (internal citations omitted) (defendants only needed a "fair understanding" of what the plaintiff is alleging to meet the notice requirement). Plaintiffs are not required to plead extensive facts or legal theories. *See Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) ("Federal pleading rules…do not countenance dismissal of a complaint for imperfect statement of the legal

theory supporting the claim asserted."); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 323 (S.D.N.Y. 2003) ("Rule 8(a) does not require plaintiffs to plead the legal theory, facts or elements underlying their claim.").

In the APA context, plaintiffs can satisfy the federal pleading requirements when they identify the agency whose actions they challenged, set out the implicated rights, and indicate that the agency's actions have adversely affected those rights. *See, e.g.*, *United States v. Hage*, 2008 WL 11388771, at *8 (D. Nev. Oct. 6, 2008).

The Complaint clearly meets this low threshold. It identifies the USDA as the agency responsible, access to SNAP benefits as the impacted right, and the USDA's policy against replacement of skimmed benefits as the adverse action and cites four specific documents as evidence that the policy existed. JA-20–21, 24, 29, 34–38, 45 (Complaint ¶¶ 4, 5, 23, 43, 59, 63–65, 68–69, 114). Moreover, Appellants relied on the documents referenced in the Complaint in support of their Motion for Summary Judgment in arguing that the 2022 Policy exists. *Compare* Pls.' Mot. for Summ. J. at 8–10, ECF No. 66, *with* JA-34–37 (Complaint ¶¶ 59, 63, 64, 68).

Applying this liberal standard to the Complaint is particularly appropriate because the USDA has suffered no prejudice. Even assuming the USDA misapprehended the Complaint, it fully understood the thrust of Appellants' policy

claim by the time the parties briefed the motion to dismiss. Appellants specifically raised this challenge in their opposition to the USDA's motion to dismiss, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 2, 8–10, 17–19, ECF No. 38, to which the USDA responded. Defs.' Reply Mem. in Supp. Mot. to Dismiss at 1, ECF No. 40.

Thus, the USDA's ability to "maintain[] a defense upon the merits" was in no way prejudiced. *See* Wright & Miller, Federal Practice and Procedure § 1219 (4th ed. 2025) ("[W]hen a party has a valid claim, he should recover on it regardless of [a] ... failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits."); *Labram v. Havel*, 43 F.3d 918, 920–21 (4th Cir. 1995) (declining to dismiss an improperly characterized tort claim because "[l]egal labels characterizing a claim cannot, standing alone, determine whether [a complaint] fails to meet [notice pleading principles]," and defendant was not prejudiced because it was "obvious" that he was aware of the "legal and factual basis of the claim"). Appellants' challenge to the 2022 Policy raises "substantially the same issues" as their challenge to the 2010 Regulation (*i.e.*, whether the agency actions are contrary to law and arbitrary and capricious), which the USDA "must defend" regardless. *Warren v. Int'l Bus. Machs. Corp.*, 358 F. Supp. 2d 301, 317 (S.D.N.Y. 2005). For these reasons, the District Court's ruling

that Appellants did not plead a challenge to the non-replacement Policy should be reversed.

V. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE 2022 POLICY WAS NOT FINAL AGENCY ACTION.

The District Court also incorrectly rejected Appellants' challenge to the 2022 Policy on the grounds that it "does not constitute final agency action." SPA-20 (Order at 20). According to the District Court, this is because Appellants challenged "the actions taken by [New York] agencies" which cannot be "attributed to Defendants for the purposes of APA review" and also because Appellants failed to "provide a definitive statement" from the USDA on replacement of skimmed benefits with federal funds. SPA-20–21 (Order at 20–21). This too was error.

First, the fact that several of the memoranda describing the 2022 Policy were issued by New York agencies administering SNAP does not alter the result. As the Complaint and Appellants' subsequent briefs make clear, Appellants brought an APA challenge to the action taken by the USDA, not by the State agencies that are required to abide by the USDA's decisions with respect to benefit replacement. *See, e.g.*, JA-21, 27 (Complaint ¶¶ 6, 114); Pls.' Mot. for Summ. J. at 21–24, ECF No. 66. Appellants referenced documents issued by State and city agencies administering SNAP—OTDA and HRA—not to challenge State action, but to confirm the existence of the challenged federal policy. *See* JA-564 (Ex. E); JA-615 (Ex. O); *see Her Majesty the Queen v. U.S. EPA*, 912 F.2d 1525, 1530–32 (D.C.

Cir. 1990) (letters of a "subordinate agency official" regarding EPA policy constituted final agency action even where the official "cautioned that his letters represented his own views and not necessarily those of his agency.").

Moreover, these memoranda explicitly attribute the non-replacement policy to the USDA. *See* JA-564 (Ex. E) ("The United States Department of Agriculture, Food and Nutrition Service … prohibits replacing stolen SNAP benefits using federal funds."); JA-615 (Ex. O) (same). Nothing in the administrative record suggests this was an initiative of the State agencies (OTDA and HRA). *See* JA-70–512 (CHEN-00000001–441). Accordingly, the District Court erred in concluding that Appellants seek to challenge "some other agency['s]" action. SPA-21 (Order at 21).

Additionally, OTDA and HRA were acting as the USDA's agents for the purposes of communicating federal policy to program participants. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 387.0(a) (OTDA "is the agent of the [USDA] for the purposes of participation in" SNAP); 7 U.S.C. § 2020(e)(1)(A) ("the State agency shall … inform low-income house-holds about the availability, eligibility requirements, application procedures, and benefits of the supplemental nutrition assistance program"); N.Y. Comp. Codes R. & Regs. tit. 18, § 387.2(t) ("each social services district shall … inform all food stamp applicants and recipients of their program rights and responsibilities."). Thus, under "[t]raditional vicarious

liability rules," the USDA is "liable for acts of their agents … when the agents act 'in the scope of their authority.'" *Meyer v. Holley*, 537 U.S. 280, 285 (2003). There is no indication, and the USDA has so far made no claim, that OTDA and HRA were acting outside of "the scope of their authority" in publishing the memoranda that stated the 2022 Policy. Indeed, OTDA and HRA were simply following their statutory command to "inform" SNAP recipients of their "rights and responsibilities," in this case that they did not have the right to reimbursement for skimmed benefits because the USDA prohibits it. *See* 7 U.S.C. § 2020(e)(1)(A); N.Y. Comp. Codes R. & Regs. tit. 18, § 387.2(t).

Second, the District Court erred in holding that the USDA's messages and memoranda do not provide a "definitive statement" on the replacement of skimmed benefits with federal funds. SPA-21 (Order at 21). Rather than assessing these documents in isolation, the District Court should have evaluated the record as a whole.

When properly considered together, the USDA's memoranda and messages, as well as OTDA and HRA's statements reflecting federal instructions, definitively communicate the USDA's position on the replacement of skimmed benefits. *See Widakuswara v. Lake*, 773 F. Supp. 3d 46, 53–54 (S.D.N.Y. 2025) (finding that "taken together" the agency's multiple actions "were final"); *Tendo v. United States*, 2024 WL 3650462, at *14 (D. Vt. Aug. 5, 2024); *see also Venetian Casino Resort,*

LLC v. EEOC, 530 F.3d 925, 929 (D.C. Cir. 2008) (concluding that "the record" as a whole "leaves no doubt" that a policy exists). These documents unequivocally state that the USDA "prohibits replacing stolen SNAP benefits using federal funds." JA-564 (Ex. E); JA-615 (Ex. O). In describing options available to SNAP recipients, the USDA instructed them to contact their local SNAP office but conspicuously omit any mention of replacement. JA-641–642 (Ex. R); JA-637 (Ex. Q).

It is immaterial that the 2022 Policy was not reduced to one single written statement. *New York v. Trump*, 767 F. Supp. 3d 44, 76 (S.D.N.Y. 2025) (internal citations omitted) ("[T]he absence of a formal statement of the agency's position, as here, is not dispositive[.]"); *Am. Fed'n of Gov't Emps. v. U.S. Off. of Pers. Mgmt.*, 777 F. Supp. 3d 253, 279 (S.D.N.Y. 2025) (same). "[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position." *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986); *see also Her Majesty the Queen*, 912 F.2d at 1532 (finding that agency officials' "letters serve to confirm a definitive position" that the agency had "adhered to" in practice for the prior four years). Nor can the agency evade judicial review by avoiding the written form all together. *See Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003) ("Both law and logic suggest …

[that u]nwritten agency actions [may be] subjected to judicial review under the [APA].").

The District Court erred in characterizing the 2022 Policy as an unreviewable "on-going program" akin to the program challenged in *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001); *see* SPA-21–22 (Order at 21–22). *Cobell* is distinguishable on multiple grounds. In *Cobell*, plaintiffs challenged several federal agencies' "one hundred year[]" "mismanage[ment]" of Individual Indian Money ("IIM") trusts for their beneficiaries. 240 F.3d at 1086. Plaintiffs there accordingly sought a substantial overhaul of the entire IIM program including both that the government 1) "come into compliance with their [fiduciary] duties" as trustees and 2) provide "an accurate accounting of all money in the IIM trust," a step that itself required the agency to "establish written policies and procedures" to enable proper accounting. *Id.* at 1093–94. Moreover, the court in *Cobell* did not hold that the IIM trust program was unreviewable but instead merely "question[ed]" the issue of whether it was final agency action and then determined it had jurisdiction to hear plaintiffs' claims through the lens of "unreasonable delay." *Id.* at 1095.

In any event, the long-standing fiduciary operation at issue in *Cobell* is not the type of action Appellants challenge here. Instead, the 2022 Policy represents the type of "single step or measure" that the court in *Cobell* indicated *would* be

reviewable as final agency action. *See id.* at 1095; *accord Torres v. DHS*, 411 F. Supp. 3d 1036, 1069 (C.D. Cal. 2019) (describing a reviewable final agency action as "an agency decision not to enforce the terms of its contract"). Specifically, Appellants seek review of the USDA's decision (crystalized in a series of memoranda and alerts issued in late 2022 and early 2023) not to replace skimmed benefits with federal funds. This is a discrete action which determines the legal rights of Appellants, resulting in the denial of a concrete benefit (replacement funds) in a specific, factually limited situation.

The District Court's ruling that the 2022 Policy was not final agency action should therefore be reversed.

CONCLUSION

For the reasons stated herein, the District Court's judgment should be reversed.

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FRESHFIELDS US LLP

By: /s/ *Mary Eaton*
Mary Eaton

Mary Eaton
Maria Slobodchikova
Grace Brody
Elizabeth Lewis
3 World Trade Center
175 Greenwich St., 51st Floor
New York, New York 10007
Telephone: (212) 277-4000

mary.eaton@freshfields.com
maria.slobodchikova@freshfields.com
grace.brody@freshfields.com
liz.lewis@freshfields.com

THE LEGAL AID SOCIETY

Judith Goldiner
Edward Josephson
Civil Law Reform Unit
49 Thomas Street
New York, New York 10013
Telephone: (212) 298-5221
jgoldiner@legal-aid.org
ejosephson@legal-aid.org

Susan Welber
Government Benefits Unit
Bronx Neighborhood Office – Civil Practice
260 East 161st Street, 8th Floor
Bronx, New York 10451
Telephone: (929) 228-4539
sewelber@legal-aid.org

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that:

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32.1(a)(4)(A), allowing a brief of not more than 14,000 words, because this brief contains 13,734 words, as determined by the word count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

s/ *Mary Eaton*
Mary Eaton