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Food Stamp Trafficking: Why Small Groceries Need Judicial Protection from the Department of Agriculture (And from Their Own Employees)

by

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NOTE

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Elliot Regenstein

A neon sign in the window of 7-Van Drugs reads "Food Stamps," but the contradictory truth is posted inside on a handwritten sign taped to a thick pane of bulletproof plastic.

7-Van Drugs sits at the intersection of Seven Mile Road and Van Dyke in northern Detroit, where it has "serv[ed] the community since 1948 at the same corner."[1] Inside 7-Van is an array of staple foods and basic household cleaning items, and there is a small pharmacy in the back. Customers must use a turnstile to pass their purchases through the bulletproof plastic to the cashier. There are no open windows, which could afford a clean shot. There is, however, a small slot to pass money back and forth, and above it is taped a pink piece of paper that says in black magic marker "We don't accept food stamps."

The store was still part of the food stamp program when an undercover officer from the Michigan State Police walked in on December 12, 1994.[2] The officer was there to ensure that 7-Van was not illegally trafficking in food stamps. He walked up to two cash registers offering to sell food stamps for cash. Neither cashier took the bait. The officer then left the store but was followed into the parking lot by Saimir Jamel, a seventeen-year-old clerk who is the nephew of the store's co-owners. Jamel, whose duties were limited to sweeping the floor and parking lot and stocking the shelves, offered to buy the food stamps for cash. He bought $270 in food stamps with $150 of his own money and gave the officer his pager number. He went on to make two more illegal food stamp purchases in January 1995, using his own money in both cases. After the third, the police arrested him in the parking lot outside of 7-Van.

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1. The author visited the store September 1, 1997 and May 17, 1998. Seven Mile Road is flanked by a long low line of buildings and is one of the primary commercial thoroughfares in northern Detroit. While a number of the buildings on Seven Mile Road are now abandoned, 7-Van Drugs currently shares a relatively modern plaza and a small parking lot with a manicurist, an independent insurance agent, and a fashion accessories store.

2. The facts in this paragraph come from *Bakal Bros. v. United States*, 105 F.3d 1085, 1087 (6th Cir. 1997).

After Jamel's arrest, the Department of Agriculture's Food and Consumer Service (FCS)[3] notified the owners of 7-Van that Jamel's actions might result in the store's permanent disqualification from the food stamp program.[4] As part of that notification, the FCS told the store's owners that if, within ten days, they provided all the information necessary to request an agency hearing officially, the FCS would consider fining the store instead of permanently disqualifying it.[5] The store's owners did not, however, file a response with the FCS within ten days, and the agency punished 7-Van with permanent disqualification.[6]

Between 1982 and 1988, permanent disqualification was the only punishment the FCS could administer to a store whose employees illegally trafficked in food stamps.[7] The FCS could use this sanction on store owners who were entirely unaware of their employees' illegal acts.[8] In 1988, however, Congress amended the statute and allowed the Department of Agriculture (USDA) to impose a monetary sanction instead of permanent disqualification in some *innocent-owner*[9] cases.[10]

Although this change in the law granted the Department of Agriculture new discretion in deciding what sanction to impose, the Department quickly displayed its reluctance to exercise it to benefit innocent owners.[11] Its new regulations created an arduous proce-

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3. The Food and Consumer Service was formerly known as the Food and Nutrition Service. *See* Lopez v. United States, 962 F. Supp. 1225, 1227 (N.D. Cal. 1997).

4. *See Bakal Bros.*, 105 F.3d at 1087.

5. *See Bakal Bros.*, 105 F.3d at 1090 (citing 7 C.F.R. § 278.6(b)(2) (1994)).

6. *See Bakal Bros.*, 105 F.3d at 1090.

7. *See* 7 U.S.C. § 2021(b) (1982); *see also* Kim v. United States, 121 F.3d 1269, 1272 (9th Cir. 1997).

8. *See* Ghattas v. United States, 40 F.3d 281, 283 (8th Cir. 1994) (describing the state of the law prior to 1988). The FCS did not have complete freedom to apply this sanction, as the Ninth Circuit refused to allow the FCS to punish store owners who did not know about their employees' actions. *See Kim*, 121 F.3d at 1272; *Ghattas*, 40 F.3d at 283.

9. This Note uses the term "innocent owner" to describe the proprietor of a small grocery store whose employees have trafficked in food stamps illegally, and who did not know about or benefit from the transaction. *See* 7 U.S.C. § 2021(b)(3)(B); *see also Kim*, 121 F.3d at 1274 ("Congress believed that punishing innocent employers for the misdeeds of their employees would create a powerful incentive for employers to guard against illegal . . . conduct."); *Bakal Bros.*, 105 F.3d at 1090 ("Congress has made clear that innocent store owners should be held responsible for the independent, unauthorized acts of store personnel."). To qualify as an innocent owner, the proprietor must also have in place an "effective policy and program to prevent violations." *See* 7 U.S.C. § 2021(b)(3)(B) (1988).

10. *See* 7 U.S.C. § 2021(b)(3)(B). The amended statute allows "the Secretary . . . discretion to impose a civil monetary penalty of up to $20,000 in lieu of disqualification . . . ."

The circuits have unanimously found that the change in the statute eliminates the innocent-owner defense as a complete bar to liability. *See Kim*, 121 F.3d at 1273 (collecting cases).

11. *See Ghattas*, 40 F.3d at 284 ("[The FCS's] regulations in many respects reflect a reluctant or hostile attitude toward the alternative monetary sanction."). The *Ghattas* court's concern about the FCS's actions was based in part on the fact that Congress had expressed some

dure for groceries seeking to benefit from the USDA's discretion. First, the regulations require stores to request a hearing on the civil monetary penalty — and to submit all of the evidence supporting their case — within ten days of receiving a charge letter.[12] Second, the evidence submitted may not include evidence about hardship to households that might arise from the store's closure.[13] Third, when the civil monetary penalty is applied, the formula for assessing it makes it likely that even small grocery stores will receive the maximum penalty.[14]

Innocent owners have challenged these three provisions through the Food Stamp Act's provision for de novo judicial review,[15] and store owners in St. Louis have met with some success. The Eighth Circuit has found that the ten-day limit to request a hearing is arbitrary and capricious,[16] that the FCS cannot bar evidence about hardship to households for stores that have committed trafficking violations,[17] and that the formula for determining the civil monetary penalty is also arbitrary and capricious.[18] Outside of the Eighth Circuit, however, courts have found the ten-day requirement to be either beyond the scope of judicial review[19] or permissi-

displeasure with the FCS's administration of the program. *See* H.R. CONF. REP. No. 101-916, at 1098 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5286, 5623 ("The Managers are concerned with the manner in which the Secretary has implemented the retailer disqualification provisions of the Food Stamp Act."); *see also* Castillo v. United States, 989 F. Supp. 413, 419 (D. Conn. 1997) (ruling on plaintiff's motion for preliminary injunction) ("[T]he [Administrative Review Officer] cites to 'internal USDA policy guidelines' for the proposition that trafficking 'shall warrant permanent disqualification, regardless of whether or not the firm benefited from the violation, or the owner or management of the firm had knowledge of the violation.' . . . This 'internal policy guideline' is in direct contravention of the Food Stamp Act . . . .").

12. *See* 7 C.F.R. § 278.6(b)(2)(i), (iii) (1994).

13. *See* 7 C.F.R. § 278.6(f)(1). The regulations make a "hardship-to-households" defense available only for offenses that would otherwise lead to a nonpermanent disqualification, but not for offenses that would otherwise lead to a permanent disqualification. *See* 7 C.F.R. § 278.6(f)(1). When it allows a hardship-to-households defense, the FCS considers whether "the firm's disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." 7 C.F.R. § 278.6(f)(1).

14. The formula bases the penalty on the dollar amount of food stamps redeemed by the violating store and dictates that the maximum penalty must be imposed if the trafficking violation exceeds ninety-nine dollars and if the store redeems $40,000 or more in food stamps annually. *See* 7 C.F.R. § 278.6(j). This formula effectively applies the maximum fine to almost every store with a meaningful food stamp redemption program. *See* discussion *infra* section III.B.

15. Parties aggrieved by FCS decisions are entitled to de novo review in United States district courts or state courts, and the law directs judges to "determine the validity of the questioned administrative action." 7 U.S.C. § 2023(a)(15) (Supp. II 1996).

16. *See Ghattas,* 40 F.3d at 285-86.

17. *See Ghattas,* 40 F.3d at 284-85.

18. *See* Corder v. United States, 107 F.3d 595, 598 (8th Cir. 1997).

19. *See* Goldstein v. United States, 9 F.3d 521, 524 (6th Cir. 1993); *see also* Bakal Bros. v. United States, 105 F.3d 1085, 1090 (6th Cir. 1997).

ble;[20] they have approved the agency's formula for the civil monetary penalty or found it to be beyond the scope of their review;[21] and they have upheld the FCS's refusal to allow evidence of hardship to households.[22]

This Note argues that courts should adopt the Eighth Circuit's approach in addressing the penalty procedures that follow food stamp trafficking violations. Part I argues that the Food Stamp Act's review provision allows for judicial review of the agency's rules, and that the ten-day response requirement is an arbitrary and capricious standard to which small store owners should not be held. Part II contends that Congress intended to allow stores to present evidence that their permanent disqualification would cause hardship to households — and that even absent that intent, the agency has no basis for excluding it. Part III asserts that courts that refuse to review the agency's formula for punishing violations misapply Supreme Court doctrine, and that courts reviewing the formula will find it cannot be upheld. This Note concludes that courts should not allow the FCS to require stores to respond to charge letters within ten days, that they should force the FCS to hear stores' evidence that their permanent disqualification would hurt the surrounding community, and that they should find the FCS's penalty formula too harsh for small grocery stores.

I. The Ten-Day Response Requirement

On March 1, 1995, the FCS notified the owners of 7-Van Drugs that the agency was considering permanently disqualifying their store from the food stamp program.[23] The FCS rules allowed the store's owners only ten days to request a civil monetary penalty in lieu of the permanent disqualification; otherwise, they faced an automatic permanent disqualification from the program.[24] The store's owners did not respond within ten days, and that, according to the Sixth Circuit, required the FCS to disqualify the store permanently.[25] Section I.A contends that courts can and should review whether the FCS's ten-day response requirement is consistent with Congress's intent in passing the Food Stamp Act. Section I.B further argues that when courts review the requirement they should

20. *See* Lopez v. United States, 962 F. Supp. 1225, 1231 (N.D. Cal. 1997).

21. *See Bakal Bros.*, 105 F.3d at 1090; *Goldstein*, 9 F.3d at 523. Several circuits have refused to review the agency's sanctions since well before the 1988 amendments to the statute. *See, e.g.*, Kulkin v. Bergland, 626 F.2d 181 (1st Cir. 1980). One district court recently found that the formula is not arbitrary and capricious. *See* Vasudeva v. United States, No. C96-1252Z, 1998 WL 279223, at *4-7 (W.D. Wash. May 27, 1998).

22. *See* Kim v. United States, 121 F.3d 1269, 1275-76 (9th Cir. 1997).

23. *See Bakal Bros.*, 105 F.3d at 1087.

24. *See* 7 C.F.R. § 278.6(b)(2)(iii) (1994).

25. *See Bakal Bros.*, 105 F.3d at 1090.

find it arbitrary and capricious because of the hardship it causes to the owners of small grocery stores, who may not have the resources necessary to prepare the immediate and thorough response that the agency requires.

A. *The Legitimacy of Judicial Review*

Judges should review the legitimacy of the FCS's ten-day response requirement because the Food Stamp Act requires reviewing courts to consider the *validity* of the FCS's rules.[26] Courts evaluating the validity of the ten-day response requirement should determine whether the requirement is consistent with both the language of the Food Stamp Act and Congress's intent in passing the Act.[27]

The Supreme Court requires courts evaluating the "validity" of an agency's actions to consider whether the regulations conform to the language and purpose of the statute.[28] If Congress has expressed a clear intent as to how an agency should act, the Court requires the agency to act in that manner.[29] Lower courts applying this legal standard when considering the validity of a statute generally have understood that a regulation's "validity" hinges on its compliance with a statutory scheme.[30] Courts should therefore compare the FCS's ten-day response requirement to the statutory scheme to see if the requirement is consistent with Congress's intent.

The Sixth Circuit has not followed the Supreme Court's directive.[31] Instead of comparing the ten-day requirement to the statutory scheme to evaluate its validity, the Sixth Circuit has merely ensured that the penalty imposed in each particular case is consis-

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26. *See* 7 U.S.C. § 2023(a)(15) (Supp. II 1996) ("[T]he court shall determine the validity of the questioned administrative action in issue . . . .").

27. *See* Ghattas v. United States 40 F.3d 281, 285-87 (8th Cir. 1994) (discussing whether regulations are consistent with Congress's intent).

28. *See* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In determining whether a challenged regulation is valid a reviewing court must first determine if the regulation is consistent with the language of the statute. . . . In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." (citations omitted)).

29. *See K-Mart*, 486 U.S. at 291 (discussing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

30. *See* RLC Indus. Co. v. Commissioner, 58 F.3d 413, 417 (9th Cir. 1995) ("The question, then, is whether (d)(5) is a valid regulation. . . . The inquiry thus becomes whether subsection (d)(5) . . . is consistent with Congress' mandate . . . ."); Illinois Envtl. Protection Agency v. United States Envtl. Protection Agency, 947 F.2d 283, 289 (7th Cir. 1991); Boettger v. Bowen, 923 F.2d 1183, 1186 (6th Cir. 1991) ("For the federal regulation and the state policy to be valid, they must be consistent with the statutory purpose. To the extent they are inconsistent with the controlling statute, they are invalid."); Clinton Meml. Hosp. v. Sullivan, 783 F. Supp. 1429, 1437 (D.D.C. 1992), *affd.*, 10 F.3d 854 (D.C. Cir. 1993).

31. *See* Goldstein v. United States, 9 F.3d 521, 523-24 (6th Cir. 1993).

tent with the agency's overall regulatory scheme.[32] It refuses to evaluate the regulation itself on the grounds that the Supreme Court prohibits it from interfering in the "shaping" of agency sanctions.[33] Because stores are foreclosed from a certain kind of sanction if they fail to meet the deadline, the Sixth Circuit found that the ten-day requirement affects the severity of the agency's sanction, which it sees as shaping the sanction.[34]

The fundamental problem with this rationale is that the ten-day response requirement is not a sanction. *Black's Law Dictionary* defines a sanction as a "penalty imposed."[35] The ten-day response requirement is a procedural requirement,[36] not a penalty. The agency itself makes this distinction — the ten-day requirement is described in a subsection of the Code of Federal Regulations titled "Charge letter,"[37] while the agency's available range of sanctions is discussed separately in a section titled "Penalties."[38] Because the requirement is procedural and is not a sanction, courts that compare the FCS's regulation to the statutory scheme need not show deference to it as if it were a sanction. When courts compare the

32. *See Goldstein*, 9 F.3d at 523-24 ("[T]he question before us is whether the [FCS] acted within its authority in permanently disqualifying Goldstein from the food stamp program. . . . 7 CFR § 278.6(a) states that the [FCS] may impose the sanction of disqualification for a violation of the statutes or regulations; such disqualification shall be permanent if the disqualification is based on trafficking. . . . The regulations thus authorize the [FCS] to prescribe the sanction imposed in this case.").

33. *See* Bakal Bros. v. United States, 105 F.3d 1085, 1088 (6th Cir. 1997); *Goldstein*, 9 F.3d at 523-24. The Sixth Circuit drew its reasoning from an Eighth Circuit Administrative Procedure Act case. *See* Glover Livestock Commn. v. Hardin, 454 F.2d 109, 114 (8th Cir. 1972) ("The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters . . . ."), *revd. on other grounds sub nom.* Butz v. Glover Livestock Commn., 411 U.S. 182 (1973). *See generally* American Power & Light Co. v. SEC, 329 U.S. 90, 112 (1946); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). The term "remedy" is used essentially as an analogous term to "sanction"; *see infra* note 35.

While this section assumes that the Sixth Circuit is correct that courts should not review the FCS's sanctions, section III.A argues that courts should evaluate those sanctions under the Food Stamp Act's de novo review provision.

34. *See Goldstein*, 9 F.3d at 524 ("The regulations confer on the [FCS] discretion to mitigate . . . the sanction . . . . As the decision to mitigate relates to the severity of the sanction, the [FCS's] denial of Goldstein's request for a civil money penalty in lieu of permanent disqualification [based on his missing the ten-day deadline] is precluded from our review . . . .").

35. *See* BLACK'S LAW DICTIONARY 1341 (6th ed. 1990) (defining a sanction as a "[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations[; t]hat part of a law . . . designed to secure enforcement by imposing a penalty for its violation"); *see also id.* at 1294 (defining a remedy as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated").

36. *Cf.* Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 329 (1985) ("The [agency] procedures cited by the court do permit a claimant to prejudice his rights by failing to respond in a timely manner to an agency notice . . . . [T]hese *procedural requirements* have [not] led to an unintended forfeiture . . . ." (emphasis added)).

37. 7 C.F.R. § 278.6(b) (1994).

38. 7 C.F.R. § 278.6(e).

ten-day response requirement to the statutory scheme, they are doing what the Food Stamp Act and the Supreme Court require of them: they are assessing the validity of the agency's rules.[39]

B. *The Arbitrariness and Capriciousness of the Ten-Day Requirement*

Courts that assess the validity of the ten-day requirement must determine whether the requirement is consistent with Congress's intent and whether it is arbitrary and capricious.[40] This section argues that the FCS's ten-day requirement is contrary to Congress's intent and arbitrary and capricious and should therefore be invalidated. Section I.B.1 argues that the FCS's requirement is inconsistent with Congress's intent to allow stores access to secretarial discretion. Section I.B.2 shows that the FCS failed to take into account the impact of its regulations on small grocery stores and that the regulations impose significant hardships on such stores. Section I.B.3 demonstrates that the FCS has provided an inadequate justification for its rule.

1. *The Inconsistency of the FCS's Rule with Congress's Intent*

The ten-day requirement is inconsistent with Congress's intent to allow stores access to secretarial discretion. When Congress modified the Food Stamp Act to allow the FCS discretion in the penalty it administered, it intended to end the "one-strike-and-out" rule then in effect:

> The permanent disqualification of retail food stores upon the first trafficking offense . . . seems excessively harsh. . . . [S]tores have been permanently disqualified from participation in the food stamp program . . . for the sale of $6.00 in food stamps for $6.00 in cash. . . . With Secretarial discretion, we can be assured that the punishment will more closely fit the crime.[41]

Discussion on the House floor made it clear that the Secretary's discretion was essential to the administration of the new law.[42] Be-

39. *See* 7 U.S.C. § 2023(a)(15) (Supp. II 1996); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

40. *See* Motor Vehicle Mfrs. Assn. of the United States, v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

41. H.R. REP. NO. 100-828, at 27-28 (1988). Even without the explanation in the legislative history, Congress's adding the secretarial discretion provisions to the statute is enough to infer that Congress intended the Secretary to exercise discretion. *See* 7 U.S.C. § 2021(b)(3)(B) (1988).

42. When a technical correction to the amendment was made in October 1988, both of the bill's primary advocates specifically noted the Secretary's newfound discretion. *See* 134 CONG. REC. 32,269 (1988) (remarks of Rep. Panetta) ("The permanent disqualification . . . without any evaluation of preventive measures . . . was excessively harsh. It is for this reason that [the amendment] gives the Secretary of Agriculture the discretion to impose a fine . . . ."); *id.* at 32,269 (remarks of Rep. Emerson) ("The bill provides the Secretary of Agriculture . . . discretion . . . .").

cause access to secretarial discretion is one of the amendment's expressly stated purposes, courts assessing the validity of the FCS's ten-day requirement must consider whether the regulation furthers that goal.[43] The requirement makes it difficult for stores, particularly small stores,[44] to access secretarial discretion, putting the rule squarely in conflict with Congress's intent and requiring courts to invalidate it.[45]

2. *The Harsh Impact of the Ten-Day Requirement on Small Grocery Stores*

The ten-day response requirement is arbitrary and capricious because the FCS has failed to consider the negative impact its regulation has on small groceries. The Supreme Court requires courts to find agency rules arbitrary and capricious if the agency making the rule failed to consider some important aspect of the matter the rule addresses.[46] Courts therefore must demand that the agency consider all relevant factors of a problem and offer an explanation for its decision.[47] Furthermore, courts cannot provide an explanation for the agency if the agency did not provide one itself.[48]

The FCS has not offered evidence that it considered the impact of the ten-day requirement on small grocery stores.[49] In the absence of direct evidence that the FCS considered the impact of its rule on small businesses, courts reasonably can infer that the FCS did not consider the negative impact its regulations would have on

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43. *See K-Mart,* 486 U.S. at 291.

44. *See* discussion *infra* Part I.B.2.

45. *See K-Mart,* 486 U.S. at 291 ("In determining whether a challenged regulation is valid, a reviewing court must . . . determine if the regulation is consistent with the language of the statute.").

46. *See, e.g.,* Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) ("As we have often recognized, an agency ruling is 'arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.'" (citation omitted)).

47. *See* Motor Vehicles Mfrs. Assn. of the United States v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 43 (1983).

48. *See State Farm,* 463 U.S. at 43 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." (citation omitted)).

49. When the FCS made the ten-day requirement part of an interim rule, it did not explicitly say whether it had or had not considered the impact on small businesses in doing so. *See* Food Stamp Program; Civil Money Penalties in Lieu of Permanent Disqualification for Trafficking, 54 Fed. Reg. 18,641 (1989) (to be codified at 7 C.F.R. pt. 278). The interim rule was put in place in order to bring the regulations in line with the revised statute, which became effective October 1, 1988. The FCS invited public comment before the final rulemaking. *See id.* at 18,642.

The FCS has not only failed to give a clear explanation of its actions in the Federal Register, but also apparently has failed to give a clear explanation when the regulation has been challenged in court. One district court, in upholding the regulation as not arbitrary and capricious, did not discuss in any detail what the agency actually considered when formulating the regulation; instead, it discussed what inferences can be made from the FCS's regulatory scheme. *See* Lopez v. United States, 962 F. Supp. 1225, 1231 (N.D. Cal. 1997).

small groceries, because it would be difficult — if not impossible — for most small grocery stores to meet the FCS's uncompromising requirements in only ten days.[50]

The FCS's requirements are harsh: the agency requires stores to provide every piece of documentation relating to the store's training program for new employees within ten days; otherwise the agency will permanently disqualify the store from the program.[51] Many proprietors of small businesses may not understand that they need to provide the necessary documentation, let alone organize it within ten days. In one case, a store owner whose employee had committed a trafficking violation sent a detailed letter begging the FCS for forgiveness, but failed to include the documentation of the store's compliance program.[52] When the store owner later found out that the FCS required the documentation, she sent it, but the

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50. *See* Ghattas v. United States, 40 F.3d 281, 285-86 (8th Cir. 1994), *quoted infra* in text accompanying note 59. The *Lopez* court vigorously disagreed with *Ghattas*'s attack on the ten-day requirement, saying:

> While it might be convenient for an owner busy running a store to have more than ten days, there is nothing in the nature of drafting or copying such documents that makes a ten day limit inherently unreasonable, nor therefore the imposition of that limit "a clear error of judgment." If the regulation allowed only one day, presuming that all the required documentation would be extant and available for immediate mailing, then one could conclude that the agency had "entirely failed to consider an important aspect of the problem."

Lopez, 962 F. Supp. at 1231 (citation omitted). By admitting that one day is not enough, the *Lopez* court engages in the same exercise as the *Ghattas* court: considering how many days in which a store could reasonably be expected to respond to an FCS notice. Careful consideration would require evidence of the business circumstances of small grocery stores, to see if they could reasonably be expected to meet a ten-day deadline. While the *Lopez* opinion cites portions of the *Ghattas* opinion explaining the hardship the requirement causes to owners of small groceries, the *Lopez* court apparently was not convinced that a small grocery store would need more than ten days to find an attorney who could then organize the extensive documentation required by the FCS.

51. *See* 7 C.F.R. § 278.6(b)(2)(iii) (1994) ("If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty."); *see also Lopez*, 962 F. Supp. at 1228 ("[I]n order to be considered for the money penalty, [the store's owner] had to enclose copies of all documentation demonstrating the violation prevention policy in use at [the] store.").

52. *See Lopez*, 962 F. Supp. at 1227-28. In *Lopez*, clerk Alonzo Lopez, the son of the owners of the Chavez Meat Market in Newark, California, sold an investigator ineligible items, and another clerk purchased food stamps for cash. *See Lopez*, 962 F. Supp. at 1227.

In response to the allegations, Guadalupe Lopez, Alonzo's mother, wrote to the FCS admitting the store's guilt eight days after receiving the charge. She admitted that their son had not been properly trained before working at the store while on a break from school. (Any store that requests a civil monetary penalty must have an adequate training program for its employees to be considered, *see* 7 U.S.C. § 2021(b)(3)(B) (Supp. II 1996), but the FCS apparently did not reach the issue of the store's training program). The owners said that they had explained the rules to their employees again, and were translating them into Spanish to ensure that all of them understood; they did not, however, provide any documentary evidence of these programs. The letter closed with Ms. Lopez begging for forgiveness, and asking if the case could be re-evaluated. *See Lopez*, 962 F. Supp. at 1227-28.

The FCS did not consider Ms. Lopez's letter a timely request for a civil monetary penalty. *See Lopez*, 962 F. Supp. at 1228.

FCS refused to hear her appeal because she had missed the deadline.[53] If the FCS showed more sympathy to owners[54] and allowed some flexibility in the ten-day limit for owners making a good-faith effort to comply with the FCS's investigation,[55] the FCS's rule would be more reasonable and less capricious.

Furthermore, ten days is too short a time for the owner of a small grocery store to find counsel to help in these matters.[56] In other adversarial proceedings, parties are given more time to gather less material than innocent owners are expected to gather to request an FCS hearing.[57] Having counsel certainly could give the store a better chance in the difficult FCS administrative review process.[58] While an attorney presumably could organize the documentation in the time required, as the Eighth Circuit found, the rule

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53. After sending the documentation, Lopez brought the FCS to court. The court granted the FCS summary judgment against her on the procedural ground, without ever reaching the merits of the case. *See Lopez*, 962 F. Supp. at 1231-32.

54. Some agencies, when imposing response requirements on themselves, allow themselves waivers in "unusual" circumstances, and the FCS could allow waivers for stores in certain circumstances. *See, e.g.*, 15 C.F.R. § 4b.5 (1997) ("If a response [to a request for information] cannot be made within ten days due to unusual circumstances . . . the [Commerce Department officer] shall send an acknowledgment . . . providing information on the status of the request . . . .").

55. *Cf. Ghattas*, 40 F.3d at 286 ("[The FCS's] unreasonable ten-day time limit would not be of great concern if the innocent store owner retained a later opportunity to urge the agency's ultimate decision-maker to impose a lesser monetary sanction."). If a store cannot produce the necessary material even after an extension, then a permanent disqualification would be appropriate. *See* Ibay, Inc. v. United States. No. 97-1558, 1997 WL 741365, at *1 (4th Cir. Dec. 2, 1997) (per curiam) (unpublished) ("Although given a lengthy extension, Ibay failed to provide any documentation at the administrative level . . . .").

56. *See Ghattas*, 40 F.3d at 285-86.

57. Many agencies that require responses to charge letters allow longer than ten days. *See, e.g.*, Procedures for Implementation of the Fastener Quality Act, 15 C.F.R. §§ 280.1, .605, .608 (1997) ("The Fastener Quality Act . . . protect[s] the public safety [by requiring] that certain fasteners . . . conform to the specifications to which they are represented to be manufactured . . . . The Director . . . may begin administrative enforcement proceedings . . . by issuing a charging letter. . . . The respondent must answer the charging letter within 30 days . . . .").

The Eighth Circuit also noted that the ten-day requirement is "far shorter than the time for filing a one-paragraph notice of appeal to this court." *See Ghattas*, 40 F.3d at 285.

58. In fiscal year 1994, 1452 food stamp cases were processed through the Department of Agriculture's administrative review process. *See* FOOD & CONSUMER SERV., U.S. DEPT. OF AGRIC., RETAILER ACTIVITY REPORT: FISCAL YEAR 1994 19, 61 (1996) [hereinafter RETAILER ACTIVITY REPORT]. Of those, 168 (12%) were reversed, 54 (4%) were reduced, and 1230 (85%) were sustained. *See id.*

Courts reviewing the results of these administrative determinations generally have been more sympathetic than the FCS. For comparison, in fiscal year 1994, 83.5% of administrative review cases led to disqualification, including 53% that led to permanent disqualification, while 8.2% led to a civil monetary penalty in lieu of disqualification. *See id.* at 20. Of the cases that reached judicial review, 50% led to a disqualification, including 28.6% that led to permanent disqualification, while 24.5% led to a civil monetary penalty in lieu of disqualification. *See id.* The FCS's administrative review officers dismissed only 2.3% of the prosecutions before them, while courts dismissed 16.3%. *See id.*

disadvantages smaller stores that may have limited access to counsel:

> Perhaps the general counsel of a supermarket chain could comply with this command . . . . We have little doubt that most sole proprietors of small grocery stores would find it virtually impossible to locate and hire an attorney who could master this area of the law and gather and file the necessary materials in ten days. Once again, the [FCS] regulations dramatically skew the administrative process to the disadvantage of small business.[59]

For the most part, the businesses that have proceeded against the FCS pro se have been unsuccessful.[60] The FCS's rule disproportionately harms small businesses, suggesting that the agency did not consider its impact when promulgating the regulation and making the regulation arbitrary and capricious.

3. *The FCS's Inability to Justify Its Requirement*

When forced to defend its regulations in court, the FCS has failed to offer direct evidence in support of its regulations. Instead, it has relied on analogies, and the analogies it has used are inappropriate. While the FCS correctly claims that some other agencies do require responses to charge letters within ten days,[61] those other agencies may do so in order to comply with statutorily imposed deadlines. In those situations, allowing more than ten days for a response would compromise the agencies' ability to fulfill their stat-

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59. *Ghattas,* 40 F.3d at 285-86. Oddly enough, the Eighth Circuit's next major food stamp case did involve a pro se litigant, but one who had managed to make a timely request for a civil monetary penalty. *See* Corder v. United States, 107 F.3d 595, 596 (8th Cir. 1996).

60. *See* Brooks v. United States, 64 F.3d 251 (7th Cir. 1995) (per curiam) (finding against the owner of a small store who made a pro se challenge of FCS disqualification); Haskell v. United States Dept. of Agric., 930 F.2d 816 (10th Cir. 1991) (same); Woodard v. United States, 725 F.2d 1072 (6th Cir. 1984) (same); Hernandez v. United States Dept. of Agric. Food & Consumer Serv., 961 F. Supp. 483 (W.D.N.Y. 1997) (finding against the owner of a small store who made a pro se challenge of FCS withdrawal of authorization); Calderon v. United States Dept. of Agric. Food & Nutrition Serv., 756 F. Supp. 181 (D.N.J. 1990) (dismissing case because of inadequacy of pleadings filed pro se, and plaintiff later retained counsel to no avail); Reason v. Heslin, 723 F. Supp. 1309 (S.D. Ind. 1989) (same); Wilson v. United States, 651 F. Supp. 701 (E.D. Wis. 1986) (finding against the owner of a small store who made a pro se challenge of FCS disqualification); *cf.* Moon v. United States, Nos. 95-1797, 95-2364, 1996 WL 342005, at *4 (4th Cir. June 21, 1996) (per curiam) (unpublished) (finding against plaintiffs because of attorney error); Mused v. United States Dept. of Agric., Food & Nutrition Serv., 169 F.R.D. 28 (W.D.N.Y. 1996) (dismissing a case brought by a small store that hired a sole practitioner who missed a court deadline). *But see Corder,* 107 F.3d at 596 (finding for pro se challenger of FCS sanction); Harrison v. United States Dept. of Agric., 915 F. Supp. 115 (E.D. Mo. 1995) (finding for the owner of a small store who challenged FCS's refusal to allow the store to participate in program).

61. *See* Food Stamp Program; Civil Money Penalties in Lieu of Permanent Disqualification for Trafficking, 55 Fed. Reg. 31,809, 31,812 (1990) (to be codified at 7 C.F.R. pt. 278) ("[T]his 10-day timeframe is consistent with other regulatory requirements . . . .").

utorily imposed duties.[62] The FCS has no similar statutory requirement to justify its position, making its analogy inadequate.[63]

Assuming arguendo that the FCS *did* take into account the impact on small businesses, the regulations only seem more in conflict with Congress's intent. In this scenario, the FCS would seem to want to harm small businesses, which are less able to meet a strict requirement than large supermarkets.[64] By creating this obstacle, the requirement institutes a de facto one-strike-and-out policy for small groceries. That, however, would create an explicit conflict with Congress's intent to end the one-strike-and-out practice that automatically disqualifies groceries after one trafficking offense by a store's employees.[65]

There are legitimate policy reasons underlying the FCS's reluctance to make it easier for the owners of small grocery stores to request a hearing to appeal their disqualifications. Small grocery stores have been hotbeds of corruption in the food stamp program,[66] particularly in poor neighborhoods.[67] Most of the stores participating in the food stamp program are small and independently owned; while supermarkets redeem 77% of all food stamps,

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62. *See, e.g.,* New Drug and Antibiotic Regulations, 50 Fed. Reg. 7452, 7485 (1985) ("[T]he primary purpose in [imposing a ten-day response requirement] was to provide for agency action within the 180-day time frame specified by the act.").

63. *See* Civil Money Penalties in Lieu of Permanent Disqualification for Trafficking, 55 Fed. Reg. at 31,812.

The Department also justifies its narrow window by saying that it is "simply requesting copies of policies and documentation of compliance program activities already in existence." *See id.* The fact that the FCS requires small stores to keep extensive written records has also come under criticism, and the FCS has responded that the standards are the same for both small and large stores. *See id.* at 31,810. While stores are required to keep these records on an ongoing basis, they may not understand how to use the information in a response to an FCS charge letter. *See* Kim v. United States, 121 F.3d 1269, 1271 (9th Cir. 1997); *Ghattas,* 40 F.3d at 285-86; Lopez v. United States, 962 F. Supp. 1225, 1227-28 (N.D. Cal. 1997). See also discussion *supra* Section I.B.

64. *See Ghattas,* 40 F.3d at 286 ("[T]he [FCS] regulations dramatically skew the administrative process to the disadvantage of small business."); *see also* discussion *supra* Part I.B.1.

65. *See supra* text accompanying note 41.

66. *See* FOOD & CONSUMER SERV., U.S. DEPT. OF AGRIC., THE EXTENT OF TRAFFICKING IN THE FOOD STAMP PROGRAM 4 (1995) [hereinafter THE EXTENT OF TRAFFICKING] (noting that only 4.2% of supermarkets are involved in trafficking, while 12.8% of small grocery stores are involved in trafficking); *see also Changes in Food Stamps: U.S. Officials Consider Limitations on Stores,* ST. LOUIS POST-DISPATCH, Jan. 6, 1995, at 12A ("Agriculture Department officials believe the USDA can curb black-market trafficking in food stamps by dropping from the program some of the small, independently owned groceries where fraud tends to occur."); Jennifer Dixon, *Fraud in Food Stamps Thrives, Inquiry Finds,* ST. LOUIS POST-DISPATCH, Sept. 2, 1995, at 13B ("The black market for food stamps is thriving largely because federal regulators have authorized scores of questionable businesses to accept food stamps . . . ."); John R. Emshwiller, *Hot Special at Small Stores: Food-Stamp Fraud,* WALL ST. J., June 1, 1995, at B1 ("[S]mall businesses play a surprisingly big role in food-stamp fraud.").

67. *See* THE EXTENT OF TRAFFICKING, *supra* note 66, at 7 (showing that in areas where 0 to 10% of households are in poverty, 4.6% of stores are involved in trafficking, while in areas where over 30% of households are in poverty, 19.2% of stores are involved in trafficking).

they compose only 15% of the stores enrolled in the program.[68] Fraud is far more common in smaller stores,[69] and that will become increasingly true as larger stores install electronic transfer systems that make trafficking more difficult.[70] Small stores are on the front lines in the Department of Agriculture's crackdown on food stamp fraud, which often involves the exchange of food stamps for cash or contraband.[71]

Despite the role of small stores in food stamp trafficking, the FCS cannot justify its ten-day requirement, because it does not conform with the Food Stamp Act's statutory scheme. When Congress amended the statute it was aware that trafficking was a problem, but it still demanded that store owners be given access to secretarial discretion.[72] Congress provided for secretarial discretion because some store's manager' fight corruption and Congress felt that those owners should not receive the same punishment as owners who made no effort.[73] The FCS should therefore protect innocent owners' ability to defend themselves. Owners who are in fact guilty will still face permanent disqualification after the hearing. For that reason, making it easier for store owners to receive a hearing would not necessarily allow corrupt owners to stay in the program.[74]

Courts should not allow the FCS to enforce its ten-day response requirement strictly. The rule denies small stores access to the pro-

68. H.R. REP. NO. 104-77, at 48 (1995); RETAILER ACTIVITY REPORT, *supra* note 58, at 9.

69. *See* Emshwiller, *supra* note 66, at B1 ("'Most retailer trafficking occurs in smaller stores,' Roger C. Viadero, the Agriculture Department's inspector general, recently testified before Congress."); *see also* H.R. REP. NO. 104-77, at 48 ("USDA has found that most retail trafficking occurs in smaller food stores . . . .").

70. Electronic transfer systems make food stamp fraud easier to detect than the paper stamps that had been used exclusively until recently. *See* Merrell Foote, *Texas Saying Goodbye to Paper Food Stamps; Debit Card System Designed to Reduce Fraud,* WASH. POST, Sept. 10, 1995, at A20. Smaller stores may be reluctant, however, to spend the money necessary to install these systems. *See* Mark Hornbeck, *Food Stamps: State Plans Test From Coupons to Debit Card System,* DETROIT NEWS, Apr. 4, 1997, at C1.

71. The Secret Service has found that food stamps are frequently sold to small stores for cash that then is used to buy drugs, often right in the store in which the food stamps were illegally sold. *See Probe of Food Stamp Fraud Targets Grocers,* L.A. TIMES, Sept. 10, 1994, at 9; *see also* H.R. REP. NO. 104-77, at 47 ("In many communities, food stamps have become a second currency. . . . [F]ood stamps [are] traded for cash, drugs, [and] guns . . . .").

72. *See* H.R. REP. NO. 100-828, at 27 ("Sale of food stamps at a discount price or trading food stamps for non-food items is a serious offense. It violates the purpose of the food stamp program and harms needy food stamp families. . . . [Nevertheless t]he permanent disqualification of retail food stores upon the first trafficking offense — without any evaluation of preventive measures or complicity in the trafficking — seems excessively harsh.").

73. *See* H.R. REP. NO. 100-828, at 27-28 ("[T]here are instances in which trafficking in food stamps will take place — despite the best efforts of all people committed to a well-run food stamp program. . . . Under current law no discretion is provided to the Secretary of Agriculture to evaluate a store's actions to prevent . . . violations. This provision provides this discretion.").

74. *See* 7 U.S.C. § 2021 (b)(3)(B) (Supp. II 1996) (explaining that the penalty for innocent-owner trafficking violations is permanent disqualification unless the Secretary finds sufficient evidence to reduce the penalty).

tection Congress intended for them to have, and does not even assist the FCS in its efforts to root out illegal food stamp trafficking. The requirement has no good justification, and courts should therefore prevent the agency from applying it.

II. Evidence of Impact on the Community

Even if 7-Van Drugs had made a timely request for a hearing on whether to impose a civil monetary sanction instead of permanent disqualification, the store would not have been allowed to present evidence at that hearing of the detrimental effect that losing its food stamp privileges would have on the surrounding community. In some food stamp trafficking cases, the FCS allows stores to present hardship-to-households evidence, but not in permanent disqualification cases.[75]

In evaluating the agency's regulation that prevents innocent owners from presenting hardship-to-households evidence,[76] courts should consider whether the agency's rule is consistent with Congress's intent by applying the two-step *Chevron* test.[77] Under *Chevron,* the court must first decide if Congress had an unambiguous intent that hardship-to-households evidence be either included or excluded.[78] If Congress's intent is unambiguous, the court must force the FCS to comply with Congress's intent.[79] If, however, Congress's intent is ambiguous, the court must then decide whether the agency's regulation is a reasonable construction of the statute.[80] Section II.A shows that Congress unambiguously intended to require the FCS to permit hardship-to-households evidence in innocent-owner cases. Section II.B argues that even if Congress's intent

75. The FCS sometimes mitigates penalties because "the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." *See* 7 C.F.R. § 278.6(f)(1) (1994). Such evidence is not allowed, however, in cases in which the firm is facing a permanent disqualification, such as in innocent-owner cases. *See* 7 C.F.R. § 278.6(i). This section criticizes that distinction as contrary to Congress's intent and as arbitrary and capricious.

In the particular case of 7-Van Drugs, it is possible the store's hardship-to-households evidence might not have been compelling because of the presence of competitors within walking distance.

76. All innocent-owner cases fall under the FCS's exception, because permanent disqualification is a potential penalty. *See* 7 U.S.C. § 2021(b)(3)(B).

77. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The two courts that have addressed this particular issue have both done so within a *Chevron* framework. *See* Kim v. United States 121 F.3d 1269, 1275 (9th Cir. 1997) (citing *Chevron*); Ghattas v. United States, 40 F.3d 281, 284-85 (8th Cir. 1994) (citing Smithville R-II Sch. Dist. v. Riley, 28 F.3d 55, 57-58 (8th Cir. 1994), which relied on *Chevron*).

78. *See Chevron,* 467 U.S. at 843.

79. *See Chevron,* 467 U.S. at 842-43 & n.9.

80. *See Chevron,* 467 U.S. at 843.

had been ambiguous, the FCS's exclusion of hardship-to-households evidence in these cases is not a reasonable construction of the statute.

A. *Congress's Clear Intent to Allow Innocent Owners to Present Hardship-to-Households Evidence*

This section argues that Congress, when amending the Food Stamp Act, intended to compel the FCS to consider evidence of hardship to food stamp households in innocent-owner cases. Section II.A.1 demonstrates that the plain language of the statute supports this conclusion. Section II.A.2 shows how this interpretation is consistent with the legislative history of the Food Stamp Act amendments.

1. *The Plain Language of the Statute*

The Food Stamp Act directs the FCS to consider evidence of hardship to households when deciding whether to disqualify violators of the act or to assess them a monetary penalty. The language mandating the consideration of hardship-to-households evidence appears in the statute's introductory paragraph subsection (a) ("the introduction"). It provides, in relevant part:

> (A) DISQUALIFICATION OR CIVIL PENALTY[:] Any approved retail food store . . . may be disqualified for a specified period of time . . . or subjected to a civil money penalty of up to $10,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households . . . .[81]

All of the penalty provisions for specific offenses, detailed immediately following the introduction in subsection (b) (the "specific penalty clauses"), incorporate by reference the language of this introduction:

> (B) PERIOD OF DISQUALIFICATION[:] Disqualification under subsection (a) of this section shall be . . .
> (3) permanent upon . . .
> (B) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons . . . by a retail food store . . . except that the Secretary shall have the discretion to impose a civil money penalty of up to $20,000 for each violation . . . in lieu of disqualification . . . if the Secretary determines that there is substantial evidence that such store . . . had an effective policy and program in effect to prevent violations of the chapter and regulations . . . .[82]

The language "Disqualification under subsection (a) of this section" at the beginning of subsection (b) makes it clear that each

81. 7 U.S.C. § 2021(a).

82. 7 U.S.C. § 2021(b).

subparagraph in section (b) should include the language of the introduction. This incorporation by reference therefore requires the Secretary to consider a hardship-to-households defense for disqualifications under subparagraph (b)(3)(B) (the *innocent-owner penalty clause*).[83] Had Congress included the hardship-to-households language in the body of the innocent-owner penalty clause, it would have been repetitive.[84]

The FCS's present rule makes sense only if the innocent-owner penalty clause does not incorporate the hardship-to-households defense by reference. The FCS claims that the different maximum civil monetary penalty in the innocent-owner penalty clause[85] makes that clause "mutually exclusive" of the introduction, so the hardship-to-households defense in the introduction does not apply to cases decided under the innocent-owner penalty clause.[86] The Supreme Court has held that if one section of a statute includes particular language, and another section of the same statute does not, it should be presumed that Congress intentionally excluded the language in the section that does not include it.[87]

Where specific language of the innocent-owner penalty clause disagrees with the introduction, the specific language must trump the general. But the innocent-owner penalty clause's incorporation of the introduction is not destroyed. Here, the difference in the maximum penalties does not matter, because the remainder of the introduction's language is still incorporated by reference into the specific penalty clauses,[88] and the innocent-owner penalty clause describes a specific subset of the violations described broadly in the introduction.[89] Because the specific language controls the gen-

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83. *See* 7 U.S.C. § 2021(b), (b)(3), (b)(3)(B).

84. The legislative history does not speak directly to why Congress did not include the provision in the innocent-owner penalty clause, so it is impossible to know definitively why it was not put in. *See* H.R. REP. NO. 100-828.

85. *Compare* 7 U.S.C. § 2021(a) (the introduction) (setting a maximum civil monetary penalty of $10,000 for any violations of the Food Stamp Act) *with* 7 U.S.C. § 2021(b)(3)(B) (the specific penalty clause) (setting a maximum civil monetary penalty of $20,000 for any trafficking violations).

86. *See* Kim v. United States, 121 F.3d 1269, 1275-76 (9th Cir. 1997).

87. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987); *see also Kim*, 121 F.3d at 1276 ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Tang v. Reno, 77 F.3d 1194, 1197 (9th Cir. 1996), which quotes *Cardoza-Fonseca*, 480 U.S. at 432)).

88. *See* 7 U.S.C. § 2021(b); *supra* text accompanying note 82.

89. *Compare* 7 U.S.C. § 2021(a) ("[Firms may be] subjected to a civil monetary penalty of up to $10,000 for each violation . . . [of] . . . any of the provisions of this chapter or the regulations issued pursuant to this chapter.") *with* 7 U.S.C. § 2021(b)(3)(B) ("a civil monetary penalty of up to $20,000 for each violation . . . for *such purchase of coupons or trafficking in coupons or cards* that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter" (emphasis added)).

eral,[90] the higher limit of the innocent-owner penalty clause trumps the limit of the introduction.[91] It is not proper, however, to infer that the difference in penalty limits makes the incorporation by reference invalid — a leap necessary to support the FCS's position.[92]

Furthermore, the FCS's regulation is inconsistent with the plain language of the statute because it distinguishes between types of offending stores in ways that the statute itself does not. The Food Stamp Act discusses instances when a hardship-to-households defense will make a civil monetary penalty available in lieu of disqualification, and the Act never says that the civil penalty will be available only if the store's disqualification would have been temporary and not permanent.[93] The FCS, however, allows evidence of hardship to households only when the store's maximum penalty is a temporary disqualification.[94] Because this FCS regulation is inconsistent with the plain meaning of the statute, courts "must give effect to the unambiguously expressed intent of Congress"[95] and find the agency's regulation unlawful. The FCS's distinction "deprives food stamp beneficiaries of a statutory exception enacted for their benefit."[96]

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90. *See, e.g.*, Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over a general one . . . .").

91. *See Kim*, 121 F.3d at 1275 (citing Security Pac. Natl. Bank v. RTC, 63 F.3d 900, 904 (9th Cir. 1995)). While the Ninth Circuit cites one of its own cases to support this proposition, the idea that a specific statute controls over a general statute is well settled in American law. *See Bulova Watch Co.*, 365 U.S. at 758.

92. The Ninth Circuit made this leap, but made it without the support of any other court. *See Kim*, 121 F.3d at 1275 ("Moreover, the difference in the monetary limits suggests the provisions are mutually exclusive." (no citation provided in text)).

93. *See* 7 U.S.C. § 2021(a) ("Any approved retail food store . . . may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to $10,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households . . . ."). The term "specified period of time" includes permanently. Outside the trafficking context, where permanent disqualification can be imposed for a firm's first violation, the FCS has used its authority under this paragraph to disqualify repeat offenders permanently. *See* 7 C.F.R. § 278.6(a) (1994) ("[FCS] may disqualify any authorized retail food store . . . if the firm fails to comply with the Food Stamp Act . . . . [D]isqualification shall be permanent for a firm's third sanction . . . ."); *see also* Castillo v. United States, 989 F. Supp. 413, 419 (D. Conn. 1997) (ruling on plaintiff's motion for preliminary injunction) ("[T]he statute does not limit the 'hardship to households' exception to non-permanent disqualification, but rather provides generally that *any* disqualification may be replaced by a money penalty.").

94. *See* 7 C.F.R. § 278.6(f)(1) ("A civil money penalty for hardship to food stamp households may not be imposed in lieu of a *permanent* disqualification." (emphasis added)).

95. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

96. Ghattas v. United States, 40 F.3d 281, 285 (8th Cir. 1994); *Castillo*, 989 F. Supp. at 419 (quoting *Ghattas*). The Ninth Circuit has found that Congress did not speak directly to the issue of this distinction. *See Kim*, 121 F.3d at 1275.

2. *The Legislative Purpose*

The FCS's refusal to hear hardship-to-household defenses in innocent-owner cases is also inconsistent with Congress's intent in passing the Food Stamp Act and its amendments. Congress passed the Food Stamp Act with the stated intention of providing healthy food to people who might not otherwise be able to afford it.[97] The Supreme Court found in *United States Department of Agriculture v. Moreno* that providing low-income households with healthier foods is the primary purpose of the Act.[98] While the Act's language has changed over the years, this fundamental purpose remains unchanged.[99] The FCS's refusal to hear hardship-to-households evidence in innocent-owner cases is inconsistent with Congress's purpose to provide healthier food for poorer families.[100] Administrative disregard for hard-hit households punishes the intended beneficiaries of the Act, rather than protecting them.

The 1988 amendments to the Food Stamp Act made substantial changes to the penalties imposed on innocent owners, but the amendments' legislative history makes no mention of whether a hardship-to-households defense should be denied to innocent owners.[101] The legislative history focuses solely on narrow, technical changes made in subsection (b)[102] and does not address the part of the statute that remained the same: the incorporation by reference

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97. *See* Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703 (codified as amended at 7 U.S.C. § 2011) ("It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively . . . to the maximum extent practicable to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.").

98. 413 U.S. 528, 533-34 (1973). In *Moreno* the Court was evaluating the constitutionality of an amendment to the Food Stamp Act requiring all members of a food stamp household to be blood relatives. The Court reiterated its holding 15 years later in *Lyng v. International Union,* 485 U.S. 360, 371 (1988) ("[T]he Act was passed to alleviate hunger and malnutrition and to strengthen the agricultural economy.").

99. *See* Dan Glickman, Letter to the Editor, *Food Stamp Fraud: No Joke,* WASH. POST, Dec. 9, 1995, at A23 ("[W]e . . . ensure that the food stamp program will accomplish its health mission: getting food to people who need it."); John L. Mitchell, *683 Stores Barred From U.S. Food Stamp Program,* L.A. TIMES, Nov. 17, 1995, at B1 ("'[W]holesome, nutritious, affordable food [is what] the food stamp program is meant to provide,' [Agriculture Secretary Dan Glickman] said [in 1995].").

100. *Cf.* Rodway v. United States Dept. of Agric., 514 F.2d 809, 823 (D.C. Cir. 1975) ("The purposes of the Food Stamp Act — the health and well-being of our populace — are too important, and the legislative intent that those purposes be achieved for substantially all recipients too clear, for us to allow their administrative evisceration."). For an explanation of the hardship caused to food stamp households, see discussion *infra* Part II.B.2.

101. *See* H.R. REP. NO. 100-828, at 27-28. It does emphasize that the antitrafficking provisions must serve the statute's purpose of assisting families in need. *See* H.R. REP. NO. 100-828, *supra.*

102. *See id.* (discussing the kinds of policies and programs that would allow the Department of Agriculture to conclude that a store's management had trained employees to know which food stamp transactions were legal and which were illegal, and to further conclude that management had actively discouraged employees from participating in illegal transactions).

of the hardship-to-households defense in subsection (a) to subsection (b).[103] That the incorporation by reference remained unchanged in the amended statute suggests that Congress expected it to remain in force.[104]

Courts should find that the FCS is required to consider hardship-to-households evidence, based on the plain language of the statute and Congress's legislative intent. They should find that the FCS was mistaken when it severed the innocent-owner penalty clause from the introduction and drew distinctions between stores in a way Congress did not authorize. They should also find that the agency's action is inconsistent with Congress's policy of providing quality food to impoverished households and its expectation that hardship-to-households evidence will be available to innocent owners defending themselves. If, however, a court finds that Congress's intent on this matter was ambiguous, it must proceed to consider whether the agency's rule is arbitrary and capricious under the second step of *Chevron*.[105]

B. *The FCS's Decision to Exclude Hardship-to-Households Evidence Is Arbitrary and Capricious Under the Second Step of* Chevron

This section argues that even if Congress's intent in the statutory scheme were ambiguous, the FCS's exclusion of hardship-to-households evidence should be found arbitrary and capricious under the second step of the *Chevron* test.[106] Section II.B.1 finds that the FCS failed to explain this exclusion, making it difficult for a court to sustain the FCS's regulation. Section II.B.2 argues that the FCS could not reasonably decide to exclude hardship-to-households evidence.

1. *The FCS's Failure to Explain Its Actions*

The FCS's decision to exclude hardship-to-households evidence is arbitrary and capricious because the FCS has failed to explain the

103. *Compare* 7 U.S.C. § 2021 (1988) *with* 7 U.S.C. § 2021 (1982) (incorporation by reference remains identical); *see* H.R. REP. NO. 100-828 (no discussion of that fact).

104. *See* Pierce v. Underwood, 487 U.S. 552, 567 (1988) ("Quite obviously, reenacting precisely the same language is a strange way to make a change.").

105. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). If the court finds that Congress's clear intent was to exclude hardship-to-households evidence, it must uphold the FCS's regulation without reaching step two of *Chevron*. 467 U.S. at 842-43.

106. As noted above, both circuits to consider this issue have found Congress's intent to be unambiguous, and did not reach the issue of whether the FCS's action was arbitrary and capricious. *See* Kim v. United States, 121 F.3d 1269, 1276 (9th Cir. 1997); Ghattas v. United States, 40 F.3d 281, 285 (8th Cir. 1994). Because these courts disagreed about what Congress's "unambiguous" mandate was, it is possible that future courts will find Congress's mandate ambiguous, and reach the second step of the *Chevron* test.

reasons behind the exclusion and has failed to consider compelling evidence that permanent disqualification harms the intended beneficiaries of the food stamp program. The Supreme Court requires agencies to explain the rationale behind their rules.[107] When the FCS promulgated its regulations, it did not discuss the reasons behind its decision to exclude the hardship-to-households defense in innocent-owner cases.[108] A court could legitimately find the rule arbitrary and capricious based solely on the agency's failure to explain the evidence and rationale supporting its action.[109]

2. *The Evidence of the Need for a Hardship-to-Households Defense*

A court could uphold the regulation at the second step of the *Chevron* test despite the agency's lack of explanation if the rule is a rational one based on the available evidence.[110] In this case the agency has provided no evidence to consider.[111] Much of the evidence that exists suggests that the agency's decision to exclude hardship-to-households evidence cannot reasonably be reconciled with the Food Stamp Act's general purpose, providing healthier food to people who otherwise might not be able to afford it,[112] and the rule is therefore arbitrary and capricious under the second step of the *Chevron* test.

There is strong evidence that food stamp households may experience hardship when stores are permanently disqualified.[113] Despite the positive impact of the Food Stamp Act, it has become increasingly difficult for lower-income households in the inner city

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107. *See* Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action . . . .").

108. *See* Food Stamp Program; Civil Money Penalties in Lieu of Permanent Disqualification for Trafficking, 55 Fed. Reg. 31,809 (1990) (to be codified at 7 C.F.R. pt. 278) (including no discussion of hardship-to-households evidence). This is analogous to the agency's failure to provide an explanation of its ten-day response requirement. *See* discussion *supra* Part I.B.

109. *See State Farm,* 463 U.S. at 43.

110. *See State Farm,* 463 U.S. at 43 (explaining that an agency rule would be arbitrary and capricious if the agency based its decision on the wrong factors, or offered an explanation that was counter to the evidence).

111. *See supra* text accompanying note 108.

112. *See supra* notes 97-100 and accompanying text.

113. *See, e.g.,* Mitchell, *supra* note 99, at B1 ("Most of the stores eliminated from the program were in the county's poor urban areas where the need is greatest . . . ."). The hardship may extend beyond food stamp households; a permanent disqualification from the food stamp program could drive some stores out of business, forcing all consumers to travel farther to purchase groceries. *See* Cross v. United States, 512 F.2d 1212, 1217 (4th Cir. 1975) (en banc) ("[D]isqualification may have grave economic consequences to a retailer engaged in business in a depressed economic area where there is widespread use of food stamps. In such an area one who holds himself out as a retailer of food would be cut off from a substantial segment of the buying public if he is disqualified from engaging in food stamp transactions.").

to benefit from the program. Poorer neighborhoods are less likely than wealthier neighborhoods to have full-service supermarkets, which are located primarily in the suburbs.[114] Instead, poor neighborhoods are more likely to have small convenience stores that provide food that is often less nutritious and higher priced than the food at grocery stores.[115] The urban grocery stores that do remain in the inner city may do a high percentage of their business in food stamps, meaning that a permanent disqualification from the pro-

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114. In high-poverty urban areas, 35.2% of the stores participating in the food stamp program are small groceries, while only 7.8% are supermarkets. *See* OFFICE OF ANALYSIS & EVALUATION, U.S. DEPT. OF AGRIC., FOOD RETAILERS IN THE FOOD STAMP PROGRAM: CHARACTERISTICS AND SERVICE TO PARTICIPANTS 15 tbl.6 (1997) [hereinafter CHARACTERISTICS]. In low-poverty urban areas, 39.8% of the participating stores are supermarkets, while 5.1% are small groceries. *See id.* The same degree of imbalance between poverty bands also exists in mixed and rural areas, although to a lesser extent. *See id.* at 16-17 & tbls.7-8. These small groceries are less likely to have the kind of selection available in supermarkets. *See id.* at 24 & tbl.11 (showing that supermarkets have an average of 95% of the FCS's standard "market basket," while stores that are not supermarkets or large groceries have an average of 44% of the market basket); *see also* Charles Boisseau, *Few Choices for Shoppers: Survey Reveals Dearth of Inner-city Markets,* HOUSTON CHRON., May 17, 1995, at 2C ("Residents of low-income neighborhoods in Houston and other U.S. cities have fewer and smaller supermarkets at which to shop than folks in higher-income areas . . . ."); Sarah Okeson, *The Grocery Gap,* PEORIA J. STAR, Mar. 31, 1996, at B1. New development of "supercenters," stores with both full-service supermarkets and other merchandise, has also been concentrated outside of urban areas. *See* Fred Faust, *Wal-Mart Starting to Satisfy Large Appetite for Food,* ST. LOUIS POST-DISPATCH, June 29, 1997, at 1E ("As it did with its discount stores, Wal-Mart seems to be focusing on small towns for its supercenters, forming rings around major metropolitan areas."). Some chains are, however, planning to open supermarkets in inner-city areas, according to the Food Marketing Institute, a supermarket trade association. *See* Boisseau, *supra,* at 2C.

115. The FCS's data support the proposition that small grocery stores are more expensive than supermarkets. At supermarkets in high-poverty urban areas, the cost of the FCS's market basket is 102% the cost of the same market basket at an average supermarket. *See* CHARACTERISTICS, *supra* note 114, at 22 & tbl.9. At small grocery stores, the price jumps to 141% of the cost at an average supermarket. *See id.; see also* Boisseau, *supra* note 114, at 2C ("[P]oor families [are forced] to shop at small grocery and convenience stores where they pay higher prices for less-nutritious food."); Okeson, *supra* note 114, at B1 ("[Velmon Cleveland] refuses to shop at the nearby Downtown 66 gas station, where milk is $2.79 a gallon and eggs are $1.79 a dozen, a third higher than to almost double the prices at a discount grocery store.").

The poor nutritional value of convenience store food is so widely accepted that it has even become a subject for satire:

"I suddenly realized that I was trapped in the [Kwik-E-Mart] with . . . no food!"

"But Uncle Apu, what about the heat lamp dogs and nacho chips with synthetic cheese-covering?"

"Tsk, tsk. How soon you seem to be forgetting lesson 12 — 'Food from *Kwik-E* can make you *sicky.*'"

Matt Groening, *Apu Nahasapeemapetilon's Kwik-E-Comics, in* SIMPSONS COMICS: STRIKE BACK! 61, 65 (1996).

At urban supermarkets, the situation is somewhat better. The FCS notes that "[a]lthough the cost, availability, and quality of food do not vary between urban supermarkets in high-poverty and other areas, the total shopping experience does. Supermarkets in high-poverty urban areas offer substantially fewer full-service departments and non-food product lines than supermarkets in other areas." CHARACTERISTICS, *supra* note 114, at 25.

gram could have a crippling effect on stores,[116] potentially reducing service to already underserved food stamp households.

The fact that food stamp households may suffer when retailers are disqualified suggests that the FCS did not consider the potential hardship to food stamp households when it carved out an exception to the usual rule permitting hardship-to-households evidence. Any "permissible construction of the statute"[117] must take into account the impact on food stamp program participants.[118] Because inner-city neighborhoods are already underserved by grocery stores, the FCS's harsh actions may serve to widen the "grocery gap."[119] The FCS's regulation means that even if a store is the sole provider of healthy, inexpensive food in a poor urban[120] neighborhood, an innocent-owner violation could force neighborhood food stamp users to go to convenience stores where they would pay more for food with less nutritional value.[121] Courts should find that to be an unreasonable construction of the statutory goal of "raising levels of nutrition among low-income households."[122]

Innocent owners should be allowed to present evidence that their store's closure will harm food stamp households. If the store facing disqualification is the best store in a poor neighborhood or the only store easily accessed in a particular neighborhood, the store's closure could have a negative impact on food stamp house-

116. The average small or medium grocery store redeems approximately $46,000 per year in food stamps. *See* RETAILER ACTIVITY REPORT, *supra* note 58, at 4. By definition, small groceries have annual gross sales of under $500,000. *See* CHARACTERISTICS, *supra* note 114, at 5. This means that a small grocery doing the maximum possible business for a small grocery, with an average food stamp redemption program, would be losing almost 10% of its business by losing its food stamp privileges.

117. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

118. *See supra* notes 97-100 and accompanying text.

119. *See* Okeson, *supra* note 114, at B1 ("A study by the Food Marketing Policy Center at the University of Connecticut . . . found that lower-income areas had fewer grocery stores than more affluent neighborhoods.").

120. While many food stamp recipients are urban, one Republican Congressman from a rural district noted that his constituents would also benefit from the availability to stores of a hardship-to-households defense. *See House Panel Approves Food-Stamp Bill,* 46 CONG. Q. WKLY. REP., 1995, 1995 (1988) ("[Congressman Bill] Emerson said the added [Secretarial] discretion [is] needed because stores [are] being disqualified for small infractions and in some rural areas, only one store is available to serve a community.").

121. *See* Kim v. United States, 121 F.3d 1269, 1276 (9th Cir. 1997) (acknowledging "the obvious merit of considering hardship to food stamp households in the section 2021(b)(3)(B) calculus").

The majority of trafficking offenses are taking place at small stores, which do not always provide the high-quality food that people in poor neighborhoods need. *See* THE EXTENT OF TRAFFICKING, *supra* note 66, at 4. Trafficking is higher at all stores in poor neighborhoods, however, *see id.,* and the hardship-to-households evidence exclusion applies to all stores, even those that do provide high quality food and service, *see* 7 C.F.R. § 278.6(f)(1) (1994).

122. 7 U.S.C. § 2011 (1994).

holds, denying them the healthy food that Congress intended the Food Stamp Act to provide for them.

III. Judicial Review of the FCS's Sanctions

If 7-Van Drugs had made a timely request for a hearing, then regardless of what evidence it was allowed to present at that hearing, the FCS would have been forced to consider what the most appropriate sanction for the store would have been: either permanent disqualification or a civil monetary penalty.[123] If the agency had decided to administer the civil monetary penalty, 7-Van hardly would have escaped without being penalized. The FCS's penalty formula guarantees that most stores will pay the maximum possible fine for innocent-owner violations, $40,000,[124] which can be devastating to stores with low annual budgets and narrow profit margins.

Regardless of which penalty they received at the hearing, the owners of 7-Van could have then challenged the penalty in court under the Food Stamp Act's de novo review provision. While some courts would have heard 7-Van's case, some courts have refused to review the agency's sanction. Section III.A argues that the courts' de novo review should include the agency's sanction.[125] Section III.B criticizes the FCS's penalty formula as arbitrary, capricious, and contrary to the purposes of the statute.

A. *Sanctions Under the Food Stamp Act Are Subject to De Novo Review*

The de novo review provision of the Food Stamp Act does not include an exception for courts' consideration of agency sanctions.[126] The term "validity" in the de novo review provision means that courts must compare the agency's sanction to the statutory scheme, not only to the agency's own regulations.[127] Courts that compare the agency's sanction to the agency's own regulations and then halt their inquiry[128] are not fulfilling the requirements of the

123. *See* 7 U.S.C. § 2021(b)(3)(B) (Supp. II 1996); 7 C.F.R. § 278.6(b).

124. *See* 7 C.F.R. § 278.6(j).

125. This section addresses the merits of the argument referred to in note 33, *supra,* and the accompanying text.

126. *See* 7 U.S.C. § 2023(15) (1994) ("The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action . . . .").

127. *Compare* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute.") *with* Goldstein v. United States, 9 F.3d 521, 523 (6th Cir. 1993) ("If the agency properly applied [its] regulations, then the court's job is done and the sanction must be enforced."); *see also* discussion *supra* Part I.A.

128. The Sixth Circuit has consistently done this. *See* Bakal Bros. v. United States, 105 F.3d 1085, 1089 (6th Cir. 1997); *Goldstein,* 9 F.3d at 524; Woodard v. United States, 725 F.2d 1072, 1076-78 (6th Cir. 1984); Martin v. United States, 459 F.2d 300, 301 (6th Cir. 1972) ("The

statute. Courts considering actions brought under the Food Stamp Act should therefore review de novo all of the issues raised, including sanctions.[129]

The Supreme Court held in *United States v. First City National Bank*[130] that courts undertaking de novo review of an agency action should not defer to any agency findings.[131] Courts considering the validity of the FCS's sanctions therefore need not be influenced by the FCS's determinations.[132] The scope of review under the Food Stamp Act is broader than review under the Administrative Procedure Act, which allows only consideration under the arbitrary and capricious standard.[133] De novo review requires courts to make an

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statute authorizes a review only on the merits of the cases, and not on the period of disqualification."). *See also* Ibay, Inc. v. United States, No. 97-1558, 1997 WL 741365, at *2 (4th Cir. Dec. 2, 1997) (per curiam) (unpublished) (citing *Goldstein*).

129. *See* Freedman v. United States Dept. of Agric., 926 F.2d 252, 261 (3d Cir. 1991) ("[7 U.S.C. § 2023] requires the district court to examine the entire range of issues raised . . . ."); Modica v. United States, 518 F.2d 374, 376 (5th Cir. 1975).

130. 386 U.S. 361, 368 (1967) ("[T]he . . . Act provides that the court . . . 'shall review *de novo* the issues presented.' . . . The critical words to us seem to be *'de novo'* and 'issues presented.' They mean to us that the court should make an independent determination of the issues.").

131. The *First City National Bank* case dealt with particular administrative decisions, not an agency rule of the kind discussed here. The discussion of *First City National Bank* is included only to explain the standards of de novo review, which apply to all agency actions under the Food Stamp Act. *See* 7 U.S.C. § 2023(a) (1994). An agency rule, such as 7 C.F.R. § 278, is considered an agency action. *See* Food Stamp Program; Civil Money Penalties in Lieu of Permanent Disqualification for Trafficking, 55 Fed. Reg. 31,809 (1990) (to be codified at 7 C.F.R. pt. 278) ("7 CFR Part 278 . . . ACTION: Final rule . . . . This final rule establishes eligibility criteria for firms seeking a civil money penalty in lieu of a permanent disqualification for trafficking . . . . This action is effective retroactively to October 1, 1988.").

132. The Food Stamp Act language differs slightly from the language of the statute considered in *First City National Bank,* but preserves the important "de novo" language. *See* 7 U.S.C. § 2023(a) ("The suit . . . shall be a trial de novo . . . in which the court shall determine the validity of the questioned administrative action in issue . . . ."). The critical difference in the Food Stamp Act language is the inclusion of the word "validity." *See* Martin v. United States, 459 F.2d 300, 302 (6th Cir. 1972) (Edwards, J., dissenting) ("My brothers construe the language which follows 'trial de novo by the court' as a limitation upon that term. On its face, however, the phrase 'in which the court shall determine the validity of the questioned administrative action in issue' describes but does not limit."); *see also* Doe v. United States, 821 F.2d 694, 708 (D.C. Cir. 1987) (en banc) (Wald, C.J., dissenting) ("The term 'de novo' is hardly vague — to a court of law. . . . The court should determine the matter 'anew,' BLACK'S LAW DICTIONARY 392 (5th ed. 1979), without deference to the prior administrative proceedings and decision.").

133. *Compare* 7 U.S.C. § 2023(a) (1994) *with* 5 U.S.C. § 706(2)(A) (1997) ("[T]he reviewing court shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."); *see also* Ibrahim v. United States, 834 F.2d 52, 53 (2d Cir. 1987) ("The Food Stamp Act's de novo review provision embodies a different and broader scope of review than that available under the APA, 5 U.S.C. § 706(2)(A)."); *Modica,* 518 F.2d at 376.

independent determination of the issues presented, without being bound by the administrative record.[134]

Courts have sometimes mistakenly used the term "validity" to narrow the de novo review of sanctions to review under the *Butz v. Glover* standard.[135] In *Glover,* the Court held that agency sanctions are not to be overturned unless found to be unwarranted in law or without justification in fact.[136] Under the *Glover* standard, courts protect stores from the most badly misguided agency decisions while still showing deference to agency expertise.[137] *Glover,* however, resolved an action brought by a company found in violation of the Packers and Stockyards Act, which has no provision for de novo review.[138] The standard of review in *Glover* was therefore derived from the Administrative Procedure Act (APA),[139] and is not analogous to de novo review under the Food Stamp Act.[140]

There is a suggestion that Congress intended to narrow the scope of review to approximate the APA standard more closely, but that suggestion need not be followed by courts. According to the legislative history of the 1977 Food Stamp Act amendments, the House Committee on Agriculture thought that review of agency sanctions under the Act should not be conducted de novo.[141] That

134. *See First City Natl. Bank,* 386 U.S. at 368 (citing with approval a comment in the legislative record that in de novo review, a court should not "give any special weight to the determination of the . . . supervisory agency").

135. *See, e.g.,* Kulkin v. Bergland, 626 F.2d 181, 184-85 (1st Cir. 1980) ("While the de novo review provision of the Food Stamp Act raises certain problems, it does not, in our view, call for a departure from the usual standard of review concerning sanctions. . . . [We] believe the court must still be guided by the concepts implicit in the *Butz v. Glover Livestock Commission Co.* standard."). The *Kulkin* standard is still followed in the First Circuit, *see* Massachusetts Dept. of Pub. Welfare v. Secretary of Agric., 984 F.2d 514, 520 (1993), and is also the standard adopted by the Sixth Circuit in *Goldstein v. United States,* 9 F.3d 521, 523 (6th Cir. 1993) (citing *Kulkin*).

136. 411 U.S. 182, 185-86 (1973).

137. *See Kulkin,* 626 F.2d at 185 ("From a practical standpoint, it would not make sense for a court to substitute its judgment for that of the agency charged with administering the food stamp program as to the appropriate penalty for a given violation."); Nowicki v. United States, 536 F.2d 1171, 1178 (7th Cir. 1976) ("[W]e feel compelled to reverse that part of the judgment of the district court which reduced the sanction . . . as an impermissible intrusion into the administrative domain . . . ."); Cross v. United States, 512 F.2d 1212, 1218 (4th Cir. 1975) (en banc) ("[T]he scope of review of a sanction is not as broad as the scope of review of the fact of violation. The more limited scope of review of a sanction results from the vesting of discretion by Congress in the Secretary to devise and administer a scheme of disqualifications . . . .").

138. *See* Packers and Stockyards Act, 7 U.S.C. § 210(f) (1994). Section 210 has been amended only once since *Glover,* and the amendment made no change to § 210(f). *See* 7 U.S.C. § 210 note (Amendments).

139. *See Glover,* 411 U.S. at 185.

140. *See supra* notes 130-34 and accompanying text (explaining the differences between de novo review and review under the Administrative Procedure Act).

141. *See* H.R. REP. No. 95-345, at 397-98, *reprinted in* 1997 U.S.C.C.A.N. 2326-27 ("[T]he Committee does not intend that, in the trial de novo in the United States district court or state court of the final administrative determination of disqualification, the sanction or pe-

legislative history has been used to justify applying the arbitrary and capricious standard to agency sanctions administered under the Food Stamp Act.[142] Despite the commentary in the legislative history, however, Congress did not change the language of the statute itself.[143] Without any change in the language of the statute, the pre-1977 cases holding that review of agency sanctions should be de novo cannot be considered overruled.[144] Courts should therefore undertake de novo review of agency sanctions under the Food Stamp Act.

B. *The Inappropriateness of the FCS's Civil Monetary Penalty Formula*

The FCS's penalty formula is ill-suited for innocent-owner cases. The penalty formula is based solely on a retailer's honest food stamps redemptions, and thus punishes an innocent owner for doing good business.[145] Even under an arbitrary and capricious standard, this formula hardly seems to make "the punishment . . . more closely fit the crime" as the legislative history to the amendments suggests it should.[146]

The FCS's penalty provision fails to make meaningful distinctions based on the seriousness of the crime and the effect the fine will have on the store. The FCS has defended its formula by saying that it "appropriately recognizes variations based upon the severity of the trafficking offense."[147] In the case of first-time offenders,

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riod of disqualification imposed would itself be subject to judicial review as several courts have held that it is. . . . The trial de novo . . . should be limited to the determination of the validity of the administrative action, but not of the severity of the sanction." (citations omitted)).

142. *See, e.g.,* Broad St. Food Mkt., Inc. v. United States, 720 F.2d 217, 219-20 (1st Cir. 1983).

143. *See* Hough v. United States Dept. of Agric., 707 F.2d 866, 868 n.1 (5th Cir. 1983) (per curiam) ("What Congress intended to do is thus plain enough, but what it actually did do is another matter entirely. . . . [Congress] reenact[ed] the 1964 provisions without, for our purposes, making any changes at all. The intent . . . stated in the legislative history, in other words, seems not to have found expression in the statute itself." (citations omitted)).

144. *See* Pierce v. Underwood, 487 U.S. 552, 567 (1988) ("Quite obviously, reenacting precisely the same language is a strange way to make a change."). Although there was no change in the language of the statute, the 1977 legislative history specifically disapproves of those cases that had reviewed the sanction de novo. *See* H.R. REP. NO. 95-464, at 706 (1997).

145. *See* 7 C.F.R. § 278.6(j) (1994) (showing that the only variable in the formula is the store's average monthly food stamp redemption).

146. *See* H.R. REP. NO. 100-828, at 28; *see also* Corder v. United States, 107 F.3d 595, 598 (8th Cir. 1997) ("[A] fine based entirely on this formula . . . must be overturned as arbitrary, capricious, and contrary to the statute."). *But see* Vasudeva v. United States, No. C96-1252Z, 1998 WL 279223, at *7 (W.D. Wash. May 27, 1998) (finding that the FCS's formula is not arbitrary and capricious: "An agency may decide to exclude certain factors from a formula because evaluating those factors accurately costs more than any benefit gained.").

147. Food Stamp Program; Civil Money Penalties in Lieu of Disqualification for Trafficking, 55 Fed. Reg. 31,809, 31,810 (1990) (to be codified at 7 C.F.R. pt. 278).

"recognizing variations" means simply that the fine is doubled if the trafficking offense involved more than $99 in food stamps.[148] Other than doubling the fine if the offense was for $99 or more, the only variable in the penalty formula is how much food stamp business a store transacts, a variable that the agency puts through a series of multipliers to determine the penalty.[149]

In practice, the multistep formula promulgated by the FCS always leads to the same simple conclusion: the fine for a store's first violation is exactly half of the store's annual food stamp redemptions for violations involving $99 or less in food stamps, and is exactly the store's annual food stamp redemptions for violations of $100 or more in food stamps.[150] The fine for the second violation is twice that.[151] Because the maximum penalty is $20,000 for each violation, with no more than a $40,000 penalty for each investigation,[152] the formula dictates that any store that redeems more than $40,000 in food stamps in a given calendar year will receive the maximum penalty for any employee-trafficking violation.[153]

Many stores with food stamp redemption programs do, in fact, redeem much more than $40,000 a year in food stamps.[154] The formula guarantees that all of these stores will receive the maximum possible fine, without recognizing any variation in the severity of the offense.[155] The maximum penalty is also the probable sanction for stores with annual redemptions between $20,000 and

148. *See* 7 C.F.R. § 278.6(j)(3) ("For the first trafficking offense by a firm, [apply formula] if the largest amount . . . involved in a single trafficking transaction had a face value of $99 or less. If the . . . value . . . was $100 or more, the amount of the product obtained in this paragraph shall be doubled . . . .").

149. *See* 7 C.F.R. § 278.6(j)(1)-(3) ("Multiply the average monthly redemption figure by 10 percent . . . multiply the product obtained . . . by 60 . . . .").

150. Working through the formula: "*X*" represents a store's annual food stamp redemptions. The first step of the formula is to convert that to a monthly figure, *X*/12. *See* 7 C.F.R. § 278.6(j)(1). This figure is then multiplied by 10%, bringing the figure to *X*/120. *See* 7 C.F.R. § 278.6(j)(2). The figure is then multiplied by 60, bringing the total to 60*X*/120, or *X*/2. *See* 7 C.F.R. § 278.6(j)(3). This total, *X*/2 (half of the annual redemptions), is the final fine for violations of "$99 or less." *See* 7 C.F.R. § 278.6(j)(3). If the transaction was "$100 or more," the *X*/2 total is doubled, leaving a fine of *X*, the annual food stamp redemption total. *See* 7 C.F.R. § 278.6(j)(3).

151. *See* 7 C.F.R. § 278.6(j)(4) (multiplying by 120 instead of 60, as it does for the first offense).

152. *See* 7 U.S.C. § 2021(b)(3)(B) (Supp. II 1996).

153. *See* 7 C.F.R. § 278.6(j).

154. Based on data from fiscal year 1994, the average medium or small grocery in the food stamp program redeems approximately $46,000 in food stamps annually — a far cry from the $540,000 redeemed annually at the average supermarket in the food stamp program, but still enough to receive the maximum fine. *See* RETAILER ACTIVITY REPORT, *supra* note 58, at 4.

155. *See* Corder v. United States, 107 F.3d 595, 598 (8th Cir. 1997) ("The formula . . . applies a series of arithmetic multipliers designed, as best we can determine, to guarantee that nearly every *unknowing first offender* will incur the statutory maximum $40,000 penalty.").

$40,000, because the higher penalty applies for any violation involving more than $100. Many trafficking offenses involve more than $100 in food stamps.[156] Even small-time operators routinely conduct illegal food stamp trafficking violations over $100.[157] Because the threshold is so low, the maximum penalty will be assessed to stores with annual food stamp redemptions of $20,000 or more.[158] The fine can cripple small inner-city stores with low profit margins.[159] This is particularly harsh because the owner of the store has not benefited from the illegal transaction.[160]

The FCS has the flexibility to improve the formula by adding new criteria.[161] Because the statute does not explicitly enumerate criteria for consideration in the formula, the FCS could incorporate, for example, the criteria for criminal fines.[162] These criteria could include, as they do now, the store's income and financial resources.[163] The formula could also distinguish between large and small stores and consider whether the store has taken any action against the employee(s) involved in the illegal trafficking;[164] and it could consider whether the fine will cause other people, such as

156. In Fiscal Year 1994, the FCS conducted 902 trafficking investigations, involving $224,503 in food stamps and $124,779 in cash. *See* RETAILER ACTIVITY REPORT, *supra* note 58, at 12 tbl. The average investigation therefore involved approximately $250 in food stamps and $140 in cash, easily enough to qualify for the higher penalty.

157. *See* Bakal Bros., v. United States, 105 F.3d 1085, 1087 (6th Cir. 1997) ("[A 17-year-old store clerk] followed [the officer] into the parking lot and offered to purchase food stamps. The officer then sold [him] $270 in food stamps for $150 in cash."); *see also* Emshwiller, *supra* note 66, at B1 ("An early and typical Cleveland case involved Amin Salem, currently serving a 42-month prison sentence for his role in some $6.6 million of illegal food-stamp transactions."); Dean Murphy, *Spotlight Shines on Food Stamp Fraud,* L.A. TIMES, Feb. 7, 1994, at B1 ("[A] Los Angeles man was sentenced to 15 months in prison last year after he sold $29,400 in food stamps to an undercover agent for $25,000 in cash. Agents also found $82,000 in food stamps in the man's home.").

158. *See* 7 C.F.R. § 278.6(j).

159. Take the example of a small grocery store with average sales of $200,000, which redeems $20,000 in food stamps annually. If an employee sells $100 in food stamps for cash on two separate occasions, the store can be subjected to the maximum $40,000 penalty. This means the store would lose 20% of its annual *income,* not profits. This could be devastating in an industry that traditionally has very low profit margins. *See* Faust, *supra* note 114, at 1E ("Margins on food are notoriously tight.").

160. *See* 7 U.S.C. § 2021(b)(3)(B)(i) (1994) ("[N]either the ownership nor management of the store . . . was aware of, approved, benefited from, or was involved in the conduct or approval of the violation . . . .").

161. *See* Vasudeva v. United States, No. C96-1252Z, 1998 WL 279223, at *7 (W.D. Wash. May 27, 1998) ("Agency discretion is exercised . . . in the choice among formulas.").

162. *Cf.* First Am. Bank v. Dole, 763 F.2d 644, 651 n.6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature.").

163. *See* 18 U.S.C. § 3572(a)(1) (1994) (regulating criminal sentences).

164. *See* 18 U.S.C. § 3572 (a)(1), (8) ("[T]he court shall consider . . . the size of the [defendant] organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense . . . .").

food stamp consumers, to suffer any financial loss.[165] Courts should find the current formula arbitrary and capricious because it allows the agency to administer the maximum fine in too many cases; the FCS should be forced to develop a formula that meets the statutory goal of making the fine appropriate for the particular violation.

CONCLUSION

The FCS has consistently misinterpreted the Food Stamp Act's purpose in promulgating regulations relating to innocent-owner violations. It has erected procedural hurdles that prevent innocent owners from accessing statutory procedures designed for their benefit, it prevents them from presenting compelling evidence that their punishment should be mitigated, and it applies a penalty formula that imposes the maximum penalty for even minor offenses in small stores. The cumulative effect of its regulations is to harm small stores, and to reduce the Food Stamp Program's impact on the poor communities that need its help the most.

In the case of 7-Van Drugs, the opportunity to present evidence on its own behalf might have allowed the store to keep its food stamp privileges — at some cost, but perhaps not an unreasonable one. Instead, a teenaged clerk's personal greed has forced the store from the food stamp program. Even the court that upheld the FCS's sanction was concerned that the result it reached might be unjust.[166] While that court agreed with the FCS's misinterpretation of the Food Stamp Act, future courts reviewing FCS actions under the Food Stamp Act's de novo review provision should force the FCS to comply with Congress's statutory scheme and stop the FCS from trampling on the rights of small grocery store owners in poor neighborhoods.

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165. *See* 18 U.S.C. § 3572(a)(1), (7) ("[T]he court shall consider . . . any pecuniary loss inflicted upon others as a result of the offense . . . [and] whether the defendant can pass on to consumers or other persons the expense of the fine . . . .").

166. *See* Bakal Bros., v. United States, 105 F.3d 1085, 1090 (6th Cir. 1997) ("[W]e sympathize with plaintiff's position . . . .").