IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *et al.*, *Plaintiffs*, vs. SONNY PERDUE, Secretary, U.S. Department of Agriculture, in his Official Capacity, *et al.*, *Defendants*.	Case No. 8:19-cv-01004-GJH

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs hereby move for the Court to grant summary judgment in their favor, on the ground that there are no material facts in dispute and Plaintiffs are entitled to judgment as a matter of law. As explained in the accompanying brief in support of this Motion, the Court should declare that the challenged rule, *Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements*, 83 Fed. Reg. 63,775 (Dec. 12, 2018), is arbitrary, capricious, an abuse of discretion, and contrary to law, *see* 5 U.S.C. § 706, should vacate the rule and remand to the agency, and award other appropriate relief.

Dated: August 2, 2019

Respectfully submitted,

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BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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REQUEST FOR ORAL ARGUMENT

Plaintiffs raise Administrative Procedure Act challenges to a final rule issued by the U.S. Department of Agriculture, *Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements*, 83 Fed. Reg. 63,775 (Dec. 12, 2018). That rule weakened nutrition standards governing school meals served as part of the National School Lunch and Breakfast Programs and did so in a manner contrary to the unambiguous requirements of the National School Lunch Act, 42 U.S.C. §§ 1751 *et seq.* and related statutes. This case presents important questions about whether the Department acted arbitrarily, capriciously, or otherwise not in accordance with law in weakening those standards. Given the importance of the issues to be addressed—which affect meals served to 30 million students every school day—and the extensive administrative record, Plaintiffs respectfully submit that oral argument may assist the Court's resolution of this matter.

INTRODUCTION

Every school day, the National School Lunch and Breakfast Programs help provide food to more than 30 million schoolchildren, 22 million of whom are poor and low-income. For those served, the meals often comprise up to half their daily caloric intake. As a result, these programs represent one of the most powerful tools to improve public health and nutrition in the United States today. Recognizing the critical role these programs play in shaping children's diets and in fighting diet-related diseases from hypertension to diabetes, Congress has long required that meals served under these programs meet standards grounded in sound nutrition science. Specifically, since 1994, Congress has directed the U.S. Department of Agriculture to promulgate school nutrition standards consistent with the *Dietary Guidelines for Americans*—a statutorily-mandated report published every five years that provides nutrition and dietary information based on nutrition science. For decades, the Department faithfully understood this mandate to require that nutrition standards be consistent with the most recent Dietary Guidelines.

But in December 2018, the Department abruptly reversed course, publishing a final rule that dramatically weakened the school-meal nutrition standards, decoupling them from the Guidelines and nutrition science. *See Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements*, 83 Fed. Reg. 63,775 (Dec. 12, 2018) ("Rollback Rule"), AR_22.[1] The Rollback Rule made two key changes. First, it authorized schools to serve meals with higher sodium levels, so that children consuming such meals for breakfast and lunch will almost certainly exceed the Guidelines' daily consumption limits. Second, the rule dramatically

[1] The abbreviation "AR" refers to the administrative record. The administrative record provided by the Department used the abbreviation "MGS" in its bates numbering.

weakened the standards for whole grains—again falling short of the Guidelines' recommendation that half of grains consumed be whole grains.

The Rollback Rule is unlawful in numerous respects. It flouts Congress's direction that nutrition standards be based on, and consistent with, the Dietary Guidelines; it sharply changes course from previous rules without acknowledgment or a reasoned explanation; it ignores comments raising concerns about adverse effects on children's health; and it results from a rulemaking process that did not provide fair notice or an opportunity to comment on the changes ultimately adopted. For those and other reasons, the Rollback Rule cannot stand.

BACKGROUND AND STATEMENT OF THE CASE

The School Lunch and Breakfast Programs. In 1946, Congress enacted the Richard B. Russell National School Lunch Act of 1946, Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751 *et seq.*), which created the National School Lunch Program, in an effort to "assist states through grants in aid to provide nutritious food for the nation's children." *Sowell's Meats & Servs., Inc. v. McSwain*, 788 F.2d 226, 228 (4th Cir. 1986). The school lunch program was later supplemented, through the Child Nutrition Act of 1966, with a school breakfast program. *See* 42 U.S.C. § 1773. Under these programs, the federal government reimburses states at federally established rates for qualifying meals served. *See* 42 U.S.C. § 1758.

Congress charged the Secretary of Agriculture with implementing the school lunch and breakfast programs, *id.* § 1752, which are administered by state educational agencies under contract with the Department. *See Alcaraz v. Block*, 746 F.2d 593, 597 (9th Cir. 1984). The Department is also required to provide "technical assistance and training" to help states, food service professionals, and schools comply with school meal standards under these programs.

See, e.g., Pub. L. No. 103-448, sec. 105, § 1758(a)(2)(B), 108 Stat. 4699 (1994).[2] A key House report noted that technical assistance is an "important feature" of these programs, necessary to "insur[e] that … new nutritional content requirements are implemented effectively." H.R. Rep. No. 103-535, pt. 1 (1994).

Though originally designed to combat underconsumption, the programs have refocused over time to ensure that children receive proper nutrition. Congress now requires that school nutrition standards—which provide the minimum nutrition criteria for meals that are eligible for federal reimbursement—conform to the Dietary Guidelines. The Guidelines, which are updated and published every five years, 7 U.S.C. § 5341(a), provide "nutritional and dietary information and guidelines for the general public," *id.* § 5341(a)(1), and are "based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared," *id.* § 5341(a)(2). They are thus "the cornerstone for Federal nutrition programs," USDA, *About the Dietary Guidelines*, https://www.fns.usda.gov/cnpp/dietary-guidelines-americans, and "reflect the current science-based consensus on proper nutrition," 76 Fed. Reg. 2494, 2495 (Jan. 13, 2011).

Congress repeatedly has emphasized the close relationship between the Department's school nutrition standards and the Guidelines with increasing specificity over time. In 1994, Congress first directed that those standards be brought "into conformance with the guidelines contained in the most recent 'Dietary Guidelines for Americans.'" Pub. L. No. 103-448, sec. 112, § 1760(k)(1), 108 Stat. 4699 (1994). In 2004, Congress directed the Department to promulgate rules "based on the most recent Dietary Guidelines for Americans, that reflect

[2] *See also* Pub. L. No. 111-296, sec. 201, § 1753(b)(3)(F)(i), 124 Stat. 3183 (2010); *id.* sec. 209, § 1758(k)(1)(B); *id.* sec. 244, § 3179(a).

specific recommendations, expressed in serving recommendations, for increased consumption of foods and food ingredients offered in school nutrition programs." Pub. L. No. 108-265, sec. 103, § 1758(a)(4)(B), 118 Stat. 729 (2004). And in 2010, Congress directed that the Department promulgate rules to "update the meal patterns and nutrition standards for the school lunch program … and the school breakfast program … based on recommendations made by the Food and Nutrition Board of the National Research Council of the National Academy of Sciences [the "IOM Report" or the "Report"]." Pub. L. No. 111-296, sec. 201, § 1753(b)(3)(A)(i), 124 Stat. 3183 (2010) (referencing Inst. of Med. of the Nat'l Acads., *School Meals: Building Blocks for Healthy Children* (Virginia A. Stallings et al. eds., 2010), https://www.nap.edu/read/12751/chapter/1, AR_7893). The Department commissioned the IOM Report—published in 2009—to provide recommendations to bring school nutrition standards into conformance with the Dietary Guidelines.

The School Nutrition Rule Sets Nutrition Standards Based on the Guidelines. In 2011, in an effort to comply with its statutory obligations, the Department published a Notice of Proposed Rulemaking ("NPRM") to update school meal nutrition standards "to align them with the 2005 Dietary Guidelines for Americans" and the IOM Report. 76 Fed. Reg. at 2494.

The 2005 Guidelines recommended a maximum intake of 2,300 mg of sodium per day.[3] In 2010 this limit was further delineated by age group, with declining maximum levels for children in specific age ranges (14-18, 9-13, and 4-9).[4] The IOM Report, in turn, translated the

[3] U.S. Dep't of Agric. & U.S. Dep't of Health and Human Servs., Dietary Guidelines for Americans 40 (6th ed. 2005), https://health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf? [hereinafter 2005 Guidelines].

[4] U.S. Dep't of Agric. & U.S. Dep't of Health & Human Servs., Dietary Guidelines for Americans 76 (7th ed. 2010), https://health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf [hereinafter 2010 Guidelines].

Guidelines' *daily* consumption limits into *meal-specific* limits, by estimating (among other factors) the percentage of daily calories allotted for breakfast and lunch. *See generally* IOM Report, ch. 7. It also recommended a gradual reduction in the maximum amount of sodium served in school meals. *Id.* at 121, 196. Separately, the 2005 Guidelines recommended that half of all grains consumed daily be whole grains. *See* 2005 Dietary Guidelines at 24, 36. The IOM Report, relatedly, recommended incremental increases to the minimum required percentage of foods that are "whole grain-rich"—*i.e.*, which are at least 51 percent whole grains—setting an initial target of 50 percent, and increasing that number over approximately three years to ensure that the proportion of whole grains "will exceed 50 percent." IOM Report at 124, 199.

In 2012, the Department promulgated a final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs*, 77 Fed. Reg. 4088 (Jan. 26, 2012) (the "School Nutrition Rule"), AR_3040. The Department explained that this rule was needed to "align" "meal patterns and nutrition standards" with the Dietary Guidelines and was "largely based on" the IOM Report. *Id.* at 4088. For sodium, the School Nutrition Rule established a ten-year, three-phase schedule for reducing sodium levels. Schools were required to reach a first set of target levels by July 1, 2014; a second by July 1, 2017; and the third by July 1, 2022. 77 Fed. Reg. at 4098. The Department explained that compliance with the Guidelines would not be achieved until the third target: "[m]eeting the *final sodium targets* will enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendations to limit sodium intake to less than 2,300 mg per day." *Id.* (emphasis added). A phased schedule would "give[] industry more time to develop products that meet the rule's standards." *Id.* at 4127.

The School Nutrition Rule also adopted the recommendation from the 2005 and 2010 Guidelines that half of all grains served should be whole grains. The rule thus required that

within one year, 50 percent of all grains served in school lunches be whole grain-rich, with that figure rising to 100 percent for both lunches and breakfasts within two years. *Id.* at 4093, 4123. The Department defined a whole grain-rich product as one in which at least 51 percent of the grains are whole grains, with the remaining grains enriched. *Id.* at 4093. The 100 percent whole grain-rich requirement thus ensured that school meals contain at least 50 percent whole grains, as required by the Dietary Guidelines.

Consistent with Congress's directives concerning technical assistance, the Department committed to assisting participating schools in meeting the School Lunch Rule's requirements by facilitating the monitoring of school meals, *id.* at 4099; "help[ing] school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality," *id.* at 4104; assisting state agencies in training school food professionals through agency-led initiatives like "Team Nutrition," *id.* at 4125, 4132; and developing "[r]esources and training materials" on "identifying and purchasing whole grain-rich foods, lowering the sodium on menus, and meeting the new meal plan requirements," *id.* at 4104. The Department underscored its "commit[ment] to helping program operators reduce sodium in school menus," explaining that its "Team Nutrition and the National School Food Service Management Institute have developed guidance for reducing sodium," and that "USDA also continues to make low-sodium USDA Foods available to schools." *Id.* at 4098.

By 2017, approximately 85 percent of schools were meeting the School Nutrition Rule's 100 percent whole grain-rich requirement, 82 Fed. Reg. 56, 703, 56,711 (Nov. 30, 2017), AR_1, and virtually all schools (99.8%) had met the Rule's sodium Target 1 levels, 83 Fed. Reg. at 63,785 n.7. Despite these successes, Congress enacted a series of appropriations riders that directed the Department to allow certain *temporary* "flexibilities" in the compliance dates for

sodium and to allow for waivers for whole grain products. Congress directed that the Department retain sodium Target 1 through SY 2017-2018 and allow states to grant waivers from the 100 percent whole grain-rich requirement on a school-by-school, product-by-product basis. *E.g.*, Pub. L. No. 115-31, § 747, 131 Stat. 135 (2017). The last rider was set to expire after the 2017-2018 school year. *Id.*

Rolling back the School Nutrition Rule. In November 2017, the Department published an Interim Final Rule extending "flexibilities" (*e.g.*, retaining sodium Target 1 and whole-grain waivers) through the 2018-2019 school year, and opening a 60-day public comment period. *See* 82 Fed. Reg. 56,703. The Department cited "menu planning and procurement challenges, local operational differences, and community preferences," *id.* at 56,704, and stated that its short-term action would provide regulatory clarity that the food procurement cycle "may take up to a year to complete, beginning in August of the previous school year," *id.* at 56,705. For sodium, the Interim Rule retained Target 1 for school year 2018-2019 and requested comment on the "long-term availability of this flexibility and its impact on the sodium reduction timeline established in 2012 and, specifically, the impact on Sodium Target 2." *Id.* at 56,704. For whole grains, the Interim Rule extended the availability of the school-by-school, product-by-product waiver into school year 2018-2019 and sought "public comments in order to develop a final rule that address[es] the whole grain-rich exemptions." *Id.* at 56,708. The Interim rule made no mention of changing the whole grain-rich requirement from 100 percent to 50 percent.

The Department recorded 86,247 comments on the Interim Rule. 83 Fed. Reg. at 63,777. Less than 1 percent supported either a further delay of sodium Target 2 or retention of the whole grain-rich exemption. *Id.* at 63,778. A vast majority of commenters (96 percent for sodium and 97 percent for whole grains) favored keeping the 2012 standards intact. *Id.* at 63,777-78.

Nonetheless, on December 12, 2018, the Department published the School Nutrition Rollback Rule, 83 Fed. Reg. 63,775, weakening both standards to an extent far beyond that contemplated in the Interim Rule. For sodium, the Rollback Rule retained Target 1 for the near term, delayed the compliance date for Target 2 by five more years, and eliminated Target 3. *Id.* at 63,776. For whole grains, the Rule eliminated the waiver program and halved the whole grain-rich requirement so that only 50 percent of grains served must be whole grain-rich. *Id.*

Plaintiffs Center for Science in the Public Interest ("CSPI") and Healthy School Food Maryland ("HSFM")—nonprofit organizations focused on promoting healthy eating habits for children and ensuring that schools serve meals that conform to the Dietary Guidelines—challenge the Rollback Rule as unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and contrary to the statutes governing the school lunch and breakfast programs, 42 U.S.C. §§ 1751-1760, 1771-1789.

JURISDICTION AND STANDING

This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because the action arises under the APA, 5 U.S.C. §§ 551 *et seq.*

Plaintiffs have organizational standing to bring this case. An organization has standing to sue when it shows that the challenged agency action "impede[s] [the organization's] efforts to carry out its mission" and causes the organization to divert resources from other activities. *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 3363, 379 (1982)). While the case may proceed if either Plaintiff has standing, *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018), here, both do.

As nonprofit advocacy organizations with nutrition-focused missions, both Plaintiffs have long undertaken a range of activities and advocacy efforts to ensure that school meals are consistent with the Dietary Guidelines. *See* Schwartz Decl. ¶¶ 4, 8-9; Yangarber Decl. ¶¶ 4-11.

The Rollback Rule's curtailing of federal nutrition standards—effectively decoupling them from the Guidelines—has impeded Plaintiffs' activities in this area, and caused them to divert resources from other activities, in at least three ways, as detailed below and in Plaintiffs' supporting declarations.

First, the Department has reduced, eliminated, or fundamentally changed its many technical assistance initiatives to assist schools in complying with the Dietary Guidelines (as implemented through the 2012 School Nutrition Rule). Schwartz Decl. ¶¶ 23-25. This frustrates CSPI's mission because it can no longer rely on those initiatives to support and amplify its own services—for example, by attending and speaking at Department-hosted fora on school nutrition and incorporating the Department's Guidelines-focused educational and training materials into its services. *See* Schwartz Decl. ¶¶ 14-19. Now CSPI must fill the gap by, for example, hosting its own fora on school nutrition and developing new Guidelines-focused educational materials. Schwartz Decl. ¶¶ 26-27, 32; *see also Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 721-22 (D. Md. 2011) (organization's mission was "perceptibly impaired" where it diverted resources to outreach, education, and trainings).

Second, the Rollback Rule impedes CSPI's and HSFM's mission-driven efforts to align school meals with the Guidelines by "depriv[ing]" both organizations "of key information" that allowed them to focus and optimize their efforts: namely, whether schools are on track to comply with the Guidelines' whole grain and sodium recommendations. *See People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*"); *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986) (finding organizational standing where challenged action "restrict[ed]" the "flow of information" used in organization's services). To receive certain federal reimbursement under the lunch and breakfast

programs, schools must certify compliance with Department regulations, including those setting nutrition standards. *See* 42 U.S.C. § 1753; Schwartz Decl. ¶ 28; Yangarber Decl. ¶ 14. Because the standards set under the School Nutrition Rule were consistent with the Dietary Guidelines, CSPI and HSFM could rely on a school's certification of compliance with that Rule as evidence of progress towards compliance with the Guidelines. *Id.* But now, compliance with the Rollback Rule does not serve as a proxy for compliance with the Guidelines. Accordingly, both organizations have been denied "access to information," resulting in an "inhibition of [their] daily operations." *PETA*, 797 F.3d at 1094. To compensate, Plaintiffs have diverted resources from other projects by, for example, spending time and resources to contact individual school districts to ascertain whether they intend to serve Guidelines-compliant meals, Schwartz Decl. ¶¶ 28, 31; Yangarber Decl. ¶¶ 15, 21, and by evaluating the sodium and whole grain content of individual menu items to determine whether those meals comply with the Guidelines, Yangarber Decl. ¶¶ 15-18, 21.

Third, the Rollback Rule harms Plaintiffs' efforts to align school meals with the Guidelines by generating misinformation about the nutritional impacts of the weakened standards. *See People for the Ethical Treatment of Animals v. Tri-State Zoological Park of W. Md., Inc.*, No. 17-02148, 2018 WL 5761689, at *3-4 (D. Md. Nov. 1, 2018) ("*Tri-State*") (organization had standing where it diverted resources to counteract the "Zoo's normalization … of alleged mistreatment [of animals]"). In departing from the Guidelines' recommendations, the Rollback Rule and subsequent Department materials undermine the clear scientific consensus on the significance of whole grains and sodium for children's health—thereby creating an incorrect public impression, including among school personnel, that the weakened standards are lawful and do not harm students' health or nutrition. *See* Schwartz Decl. ¶ 32; Yangarber Decl. ¶ 19.

The Rollback Rule thus "undermin[es] [Plaintiffs'] educational programming" and "mak[es] it harder to persuade the public" that adherence to the Guidelines on sodium and whole grains is critical for children's health, *Tri-State*, 2018 WL 5761689, at *1, *4, requiring a diversion of resources, *see* Schwartz Decl. ¶ 32 (listing activities); Yangarber Decl. ¶ 19 (same).

CSPI also has standing on behalf of its members. A membership organization has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Lane*, 703 F.3d at 674 n.6 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). CSPI's members include parents whose children will eat school meals that are higher in sodium and lower in whole grains as a result of the Rollback Rule, subjecting them to a higher risk of diseases like diabetes and high blood pressure. *See* Johnson Decl. ¶ 10. If parents wish to prevent their children from eating less healthy school foods and thereby avoid these harms, they will be forced to spend time and money to make breakfasts and lunches for their children at home. *Id.* ¶ 9. Additionally, many of CSPI's members have spent, and will spend, time engaging with school districts to encourage that schools continue working towards compliance with the Dietary Guidelines. *Id.* ¶ 11. Accordingly, CSPI's members would have standing to sue in their own right. The interests CSPI seeks to represent are certainly germane to its mission, as improving the diets of children is a core part of CSPI's mission. *See supra* 8-9; Schwartz Decl. ¶ 4. And because the remedy Plaintiffs seek is vacatur and remand of the Rule under the APA, the participation of individual members is unnecessary.

All of the organizational and membership harms discussed above are "fairly traceable" to the Rollback Rule. *Kravitz v. U.S. Dep't of Com.*, 336 F. Supp. 3d 545, 559 (D. Md. 2018). But

for the unlawful weakening of the sodium and whole grains standards and retrenchment of the Department's technical assistance programs, CSPI and HSFM would not have been required to divert resources to address the resulting technical assistance gap, information gap, and misinformation, Schwartz Decl. ¶¶ 12, 23, 26-27, 31-32; Yangarber Decl. ¶¶ 15-16, 19; nor would CSPI's members have to face the prospect that without an expenditure of time and resources, their children will be eating less healthy food at school, Johnson Decl. ¶¶ 9-11. Vacatur and remand with instructions to issue a rule consistent with the statute would redress these harms.

LEGAL STANDARD

In APA cases, the court must decide "as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Andreas-Myers v. Nat'l Aeronautics and Space Admin.*, No. 16-3410, 2017 WL 1632410, at *5 (D. Md. Apr. 28, 2017). The Court "shall … hold unlawful and set aside agency actions … that are … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory … authority," or "without observance of procedure required by law," 5 U.S.C. § 706(2).

ARGUMENT

I. The Rollback Rule Is Inconsistent with Statutes Governing the National School Lunch and Breakfast Programs

A series of interlocking statutory provisions require that meals served under the School Lunch and Breakfast Programs meet federal nutrition standards and require the Department to promulgate nutrition standards consistent with the Dietary Guidelines. Because the Rollback Rule breaks from the Department's past practice by decoupling the nutrition standards from the

Dietary Guidelines—and by the Department's own admission, creates federal standards that fail to require meals to comply with the Guidelines—the Rule is contrary to law.

"When interpreting statutes, [courts] start with the plain language," and "when a statute is unambiguous, … [the] 'judicial inquiry is complete.'" *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 243 (4th Cir. 2009) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).[5]

A. Congress Required That Nutrition Standards be Consistent With the Dietary Guidelines

Through several interlocking statutory provisions, the plain text of the School Lunch Act unambiguously requires the Secretary to promulgate nutrition standards that conform with nutrition science as reflected in the Dietary Guidelines. First, and most fundamentally, Congress required schools participating in the federal lunch and breakfast programs to serve meals that "are *consistent with* the goals of the most recent Dietary Guidelines." 42 U.S.C. § 1758(f)(1)(A) (emphasis added); *see also id.* § 1773(e)(1). Second, to achieve that core requirement, Congress has, since 1994, required the Department to promulgate and maintain nutrition standards that bring school meals "into conformance with the guidelines contained in the most recent 'Dietary Guidelines for Americans.'" Pub. L. No. 103-448, sec. 112, § 1760(k)(1), 108 Stat. 4699 (1994).

[5] "Only when"—unlike here—"a statute is silent or ambiguous regarding the precise question at issue is it appropriate to defer to an administrative agency's interpretative regulations and only then if such interpretation is reasonable." *Stone*, 591 F.3d at 243. Moreover, deference to an agency's interpretation is not warranted unless "Congress delegated authority to the agency generally to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

As currently codified, that directive requires the Department to establish nutrition standards that are "based on the most recent Dietary Guidelines for Americans, that reflect specific recommendations, expressed in serving recommendations, for increased consumption of foods and food ingredients offered in school nutrition programs," 42 U.S.C. § 1758(a)(4)(B). Third, Congress modernized and reinforced this mandate in 2010 when it directed the Department to issue regulations that "update the meal patterns and nutrition standards for the school lunch [and breakfast] program[s] … based on recommendations" in the IOM Report, *id*. § 1753(b)(3)(A), which was used to promulgate nutrition standards based on the Dietary Guidelines, *see supra* 4.

In ascertaining the plain meaning of these interrelated provisions, a court must "read [them] in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000). The goal is to "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Id.* Doing so here evinces a clear congressional intent that nutrition standards adhere to nutrition science and in particular, the Dietary Guidelines and IOM Report.

The core obligation that school meals be "*consistent with* the goals of the most recent Dietary Guidelines," 42 U.S.C. § 1758(f)(1)(A) (emphasis added), requires that meals be "compatible [with], or conforming [to]" the Guidelines. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1496 (9th Cir. 1997) ("'Consistent' means in agreement with, compatible, or conforming to the same principles or course of action." (citing *Webster's II New Riverside U. Dictionary* (1984)). Conversely, meals with sodium levels that exceed the Guidelines' maximum levels, or that lack recommended levels of whole grains, are not "coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities" with the Guidelines—and thus do not satisfy Congress's directive of consistency. *See Matthews v. Wis.*

Energy Corp., 534 F.3d 547, 556 (7th Cir. 2008) (citing *Webster's Third New Int'l Dictionary* 484 (1981)).

The statutory provisions addressing the Department's duty to promulgate federal nutrition standards require a similarly close linkage with the Dietary Guidelines. In particular, the command that nutrition standards be "*based on* the most recent Dietary Guidelines," *id*. § 1758(a)(4)(B); *accord id.* § 1753(b)(3)(A), requires that the Guidelines be the "foundation" for such standards, *McDaniel v. Chevron Corp*., 203 F.3d 1099, 1111 (9th Cir. 2000) (citing cases); *Webster's Third New Int'l Dictionary* 180 (1971), and that the standards be "substantially similar" to the Guidelines, *see Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 (7th Cir. 2013) (statutory provision barring *qui tam* claims "based upon [a] public disclosure" applies to claims that are "substantially similar to publicly disclosed allegations"). Indeed, the Department long understood the statutory scheme to function just this way. *See* 77 Fed. Reg. at 4132 (noting that statute "requires" meals to be consistent with the Guidelines, and that "by updating program regulations [*i.e.*, nutrition standards] consistent with Dietary Guidelines goals and aligning the regulations with the requirements placed on schools under the statute, [the School Nutrition Rule] will ensure that school meal nutrition requirements reflect current nutrition science").[6]

[6] In other contexts, the word "base" (or a phrase such as "based on") may permit a less exacting correspondence. In a case involving the federal Sentencing Guidelines, for instance, "base" was understood to mean "[t]o make, form, or serve as a foundation for," or "[t]o use (something) as the thing from which something else is developed." *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018) (quoting *Black's Law Dictionary* 180 (10th ed. 2014)); *see also id.* (noting definition of "base" as "[t]he starting point or foundational part of something," or "[a] point, part, line, or quantity from which a reckoning or conclusion proceeds"). But whatever their role in a discretionary criminal sentencing scheme, those definitions are inappropriate here. For one, the School Lunch Act uses the phrase "based on" in a provision coupled with, and intended to help implement, the core requirement that states serve meals that are "consistent with" the Guidelines. *See* 42 U.S.C. § 1758(f)(1)(A). Federal nutrition standards that fall short of achieving the Guidelines' recommendations will not ensure that states serve meals consistent with the

The history of the relevant statutes supports this reading of the plain statutory text: Congress intended that school nutrition standards be calibrated to achieve compliance with the Dietary Guidelines and nutrition science. In 1994, Congress first required that nutrition standards be brought "into conformance with" the Guidelines, setting a deadline of the 1996-97 school year by which schools would begin serving meals "consistent with" the Guidelines. *See* Pub. L. No. 103-448, sec. 112, 106, §§ 1760(k)(1), 1758(2)(A), 108 Stat. 4699 (1994). In enacting that provision, Congress was aware of then-recent studies linking poor diets (including diets high in sodium and low in whole grains) with heart disease and diabetes. *See* S. Rep. 103-300, at 3 (1994) (noting that school lunches had "nearly twice the recommended amount of sodium"). When Congress amended the School Lunch Act in 2004 to require the Department to update nutrition standards "based on" more recent Dietary Guidelines, *see* Pub. L. No. 108-265, sec. 103, § 1758(a)(4)(B), 118 Stat. 729 (2004), a key Senate report "encourage[d] the Secretary, for the school year beginning in July 2004, to take action to encourage schools to offer foods that reflect consumption recommendations made by the Dietary Guidelines." S. Rep. No. 108-279, at 24-25 (2004) (discussing Guidelines' recommendation to increase whole grain consumption). And when Congress amended the School Lunch Act in 2010, reiterating that schools must serve meals "consistent with" the Guidelines and that the Department must set nutrition standards "based on" the IOM Report, a key committee report explained that "considerable work remains to be done to improve children's diets and to bring Federally-subsidized meals in line with [the

Guidelines. And even if *Hughes*' definition of "based on" were appropriate here, the Department would have to show that the Guidelines were the "starting point" for its standards, and (given basic norms of reasoned decisionmaking) to explain any deviations from the Guidelines, and to show that such standards would nonetheless result in schools serving meals that are consistent with the Guidelines. The Department did nothing of the sort.

Guidelines]," noting in particular that children's diets were low in whole grains and high in sodium. S. Rep. No. 111-178, at 4-5 (2010).

In short, the statutes governing the School Lunch and Breakfast Programs unambiguously require the Department to promulgate school meal standards that will ensure compliance with the recommendations in the Dietary Guidelines and IOM Report.

B. The Rollback Rule's Nutrition Standards Violate the Statute

As described above, the Dietary Guidelines recommend consuming no more than 2,300 mg of sodium per day, and the IOM Report translated that recommendation into meal-specific consumption limits. *See* 2005 Dietary Guidelines at 3; IOM Report at 123. For whole grains, the Dietary Guidelines recommend that half of all grains consumed *daily* be whole grains. *See* 2005 Guidelines at 24, 36; 2010 Guidelines at 30. The IOM Report thus proposed gradually increasing the percentage of grains that are "whole grain-rich" to eventually require that 100 percent of grains served in school meals be whole grain-rich. IOM Report at 124, 199.

The Department's own analysis of the School Nutrition Rule demonstrates why the Rollback Rule deviates from the Guidelines and IOM Report and violates the statute. Consistent with the Department's prior, long-standing interpretation of the law, the School Nutrition Rule implemented compliance targets for both sodium and whole grains that aligned with the Guidelines. As the Department explained, it was only "[m]eeting the final sodium targets [*i.e.*, Target 3] [that would] enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendation to limit sodium intake to less than 2,300 mg per day." 77 Fed. Reg. 4098. And only by meeting the 100 percent whole grain-rich target would schools offer meals that reflect the Guidelines' recommendation that half of all grains consumed should be whole grains. *See id.* at 4,093, 4,103, 4,123.

The Department has now up-ended that alignment. Under the Rollback Rule, schools no longer are required to meet sodium Target 3 and only 50 percent of grains served must be whole grain rich. *See* 83 Fed. Reg. at 63,776. Yet the Department never renounced, nor even questioned, its prior conclusion that the nutrition standards adopted in the School Nutrition Rule were needed to "address key inconsistencies between the diets of school children and [the] Dietary Guidelines." 77 Fed. Reg. at 4115. This renders the Rollback Rule unlawful, as it violates Congress's mandate that school nutrition standards be consistent with the Dietary Guidelines.

II. The Rollback Rule Reflects Unexplained and Arbitrary Decisionmaking

The Rollback Rule reflects arbitrary decisionmaking.[7] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must consider "relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

First, the Department arbitrarily elevated its consideration of student taste preferences and operational flexibilities over those of nutrition science, children's health, and the goals of the Dietary Guidelines. *Id.* ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem."); *see also Yousefi v. INS*, 260 F.3d 318, 329-30 (4th Cir. 2001) (agency failed to engaged in reasoned decisionmaking when it relied on factors that the agency lacked authority to consider).

[7] For the same reasons, even assuming the statutes were ambiguous, the Rollback Rule does not constitute a reasonable interpretation of the same. *See Schafer v. Astrue*, 641 F.3d 49, 61 (4th Cir. 2011) (noting the overlap between *Chevron* Step Two analysis, and arbitrary and capricious review under the APA); *Pharma. Res. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015) (same).

The school lunch and breakfast statutes require the Secretary to *consider* the Guidelines (as well as their goals and underlying nutrition science) in setting standards. *See* 42 U.S.C. § 1758(a)(1)(A) (requiring that school meals "shall meet minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research"); *see also id*. § 1758(f)(1); *accord id* § 1773(e)(1). Yet the Department paid those factors mere lip service, explaining that it expected the "health benefits of the [prior] meal standards" to be "mainly left intact," 83 Fed. Reg. 63,784, that the weakened whole grains standards "reflect[] in a practical and feasible way the Dietary Guidelines' emphasis on whole grains," *id.* at 63,781, and that its "intention is to ensure that the sodium targets reflect the most current Dietary Guidelines," *id.* at 63,783.

Instead, the Department repeatedly emphasized that it was rolling back nutrition standards based on considerations of student taste preferences and schools' desire for operational flexibility. *See id.* at 63,776 ("This rule … affirm[s] USDA's commitment to assist schools in overcoming operational challenges related to the school meals regulations implemented in 2012."); *id*. at 63,778 ("[S]chool nutrition operators have made the case that this final rule's targeted regulatory flexibility is practical and necessary for efficient Program operation."); *id.* at 63,784 ("eases the operational challenges"); *id.* at 63,786 ("There are select products that are difficult to prepare, procure, or do not appeal to students."). The Department thus elevated concerns for student preference and feasibility over nutrition science and health concerns, without reasoned explanation and in a manner inconsistent with Congress's directives. As in *Kravitz v. U.S. Department of Commerce*, this inversion of the statutory scheme was arbitrary and capricious. 366 F. Supp. 3d 681, 748-49 (D. Md. 2019) (an agency's decision to add a citizenship question to the 2020 Census was arbitrary and capricious, given that statutes

prioritized gathering information from administrative sources); *see id.* at 749 ("choice between [alternatives] … [was not] entirely within [agency's] discretion.").

Second, to the extent the Department acknowledged a relationship between federal standards and the nutritional content of school meals, its reasoning was flawed. For instance, the Department stated that it did not "anticipate" that the weakened standards would "deter the significant progress made to date … to achieve healthy, palatable meals for students." 83 Fed. Reg. at 63,784-85. Yet the Department simultaneously *agreed* with commenters who explained that having minimum federal regulatory standards (like those in the School Nutrition Rule) was "essential to incentivize the food industry's efforts to support the service of wholesome and appealing school meals." *Id.* at 63,783. The Department made no effort to reconcile these two inconsistent positions and left unaddressed the concern that rolling back federal standards would likely halt industry's progress on developing new, or reformulating existing, food products.

Nor did the Department engage with evidence in the record that federal nutrition standards created the incentive for industry to develop and manufacture Guidelines-compliant products. *See* Comment of Mars, Inc., Nestle, & Unilever, AR_4916 (opposing rollbacks, and asserting that retaining the standards from the School Nutrition Rule "will have a meaningful impact on student health and justify continued public and private efforts to further the development of lower-sodium and whole grain-rich products"). Similarly, the Department ignored the design and purpose of the School Nutrition Rule's phased goals, which contemplated that graduated targets would provide time for and facilitate product innovation and development.

Finally, the Department made no effort to reconcile the Rollback Rule with the School Nutrition Rule's predictions that the 2012 standards would yield "substantial improvements in meals served to more than half of all school-aged children on an average school day." 77 Fed.

Reg. at 4107; *see also id.* at 4093 (2012 standards "help children … benefit from the important nutrients [that whole grains] provide"); *id.* at 4133 (sodium reduction targets "could substantially reduce cardiovascular events and medical costs"). Such flatly inconsistent positions on a key analytical issue renders the Rollback Rule arbitrary and capricious.

Similar defects plagued other aspects of the Department's reasoning. For instance, in stating that it "expects the health benefits of the meal standards" to be "mainly left intact" notwithstanding a significant weakening of the rules, the Department undertook no analysis and provided no explanation. *See* 83 Fed. Reg. at 63,784. Importantly, the Department did not even attempt to reconcile its rosy view with its prior finding that the School Nutrition Rule's action-forcing minimum standards would generate significant public health benefits, including the "substantial health benefits" from sodium reduction, which it had declared a "key objective" of the prior rulemaking. *See* 77 Fed. Reg. at 4133, 4097.

Nor did the Department make any effort to explain why nationwide, across-the-board rollbacks were necessary to respond to discrete issues reportedly experienced by a minority of program participants. For example, the Rollback Rule identified specific issues that some schools had experienced with whole grains pertaining to "select products that are difficult to prepare, procure, or do not appeal to students," 83 Fed. Reg. at 63,786, but ignored numerous alternative approaches suggested by commenters, *see infra* § IV, that would have avoided the need for across-the-board rollbacks. Commenters emphasized, for instance, the small percentage of schools that had sought product-specific waivers from the whole grain-rich requirement and recommended that specific implementation challenges be addressed through training and technical assistance. *See* 83 Fed. Reg. at 63,782. The Department gave no response to these suggestions and failed to furnish a reasoned explanation for its baby-and-bathwater approach.

For these reasons, the Department's decision to roll back nutrition standards for sodium and whole grain is arbitrary and capricious and based on an unreasoned interpretation of statutes requiring nutrition standards to be "consistent with" the Dietary Guidelines.

III. The Rollback Rule Represents an Unacknowledged and Unexplained Change in Position

Although an agency may change a policy or statutory interpretation in appropriate circumstances, it must provide a "reasoned explanation" for the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). In particular, an agency must: (1) acknowledge it is changing direction, (2) offer good reasons for the change, and (3) take into account reliance interests. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Further, an agency must supply a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 2126. Because the Rollback Rule fails in all respects, it is, for this additional reason, arbitrary and capricious.

A. The Department Did Not Acknowledge that It Was Changing Position

"An agency may not … depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox*, 556 U.S. at 515. But that is precisely what the Department did here. It "display[ed] [no] awareness" that it was abandoning its prior, longstanding interpretation of the school meal statutes and instead issuing nutrition standards that are inconsistent with the Dietary Guidelines. While the Rollback Rule acknowledged changing the nutrition standards, *see* 83 Fed. Reg. at 63,784, 63,786, it did not acknowledge, or attempt to justify, the fundamental interpretative shift it effectuated.

Prior to the Rollback Rule, the Department had consistently understood Congress's direction to promulgate standards "based on the most recent Dietary Guidelines" and IOM Report, 42 U.S.C. §§ 1758(a)(4)(B), 1752(b)(3)(A)(i), as constraining the factors that the agency

could consider in establishing nutrition standards, and requiring that standards be consistent with the Dietary Guidelines. *See, e.g.*, 77 Fed. Reg. at 4088 (interpreting § 1758(a)(4) to "require[] that school meals reflect the latest 'Dietary Guidelines for Americans'" and interpreting § 1753(b) to require the agency to "issue regulations to update the … nutrition standards … based on [IOM] recommendations"). That reading was the Department's consistent position for decades. *See, e.g.*, 65 Fed. Reg. 26,904, 26,904 (May 9, 2000) (since 1995, school lunches and breakfasts "*must meet* the Dietary Guidelines" (emphasis added)); 60 Fed. Reg. 31,188, 31,188 (June 13, 1995) ("The foundation of this final rule is the *requirement* that … school lunches and breakfasts *comply with* the recommendations of the Dietary Guidelines." (emphases added)); *id.* at 31,192 (statutes "*mandate compliance* with the Dietary Guidelines" (emphasis added)).

The Rollback Rule departed without acknowledgment or explanation from this position. The Rollback Rule's standards neither "meet," 65 Fed. Reg. at 26,904, nor "comply with" the Guidelines, 60 Fed. Reg. at 31,188, and cannot be reconciled with the Department's prior interpretation of its statutory obligations. Instead, the Rollback Rule set standards based on extra-statutory factors such as student taste preferences and "operational challenges."[8] *E.g.*, 83 Fed. Reg. at 63,776 ("This rule … affirm[s] USDA's commitment to assist schools in overcoming operational challenges related to the school meals regulations implemented in

[8] The 2012 Rule did consider student preferences and operational complexity in establishing an implementation timeline to achieve compliance with the Dietary Guidelines. *See* 77 Fed. Reg. at 4088. But those compliance targets ensured that the "goals" (the nutrition standards) were ultimately aligned with the Dietary Guidelines, as required by law. *See id.* ("This final rule updates the meal patterns and nutrition standards … to align them with the Dietary Guidelines."); *id*. at 4098 ("Meeting the final sodium targets will enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendation."); *id*. at 4094 ("This grains requirement still reflects the Dietary Guidelines' recommendation … [that] all grains must be whole grain-rich" after "the first two years.").

2012."); *id.* at 63,784 ("eases the operational challenges"); *id.* at 63,786 ("There are select products that are difficult to prepare, procure, or do not appeal to students.").

The failure to acknowledge, explain or justify a change in the Department's statutory interpretation was arbitrary and capricious.

B. The Department Failed to Adequately Justify Its Change in Policy

The Department also failed to provide "good reasons" to justify the Rollback Rule's weakened nutrition standards. "For reasons to qualify as 'good' under *Fox*, they must be 'justified by the rulemaking record.'" *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 66 (D.C. Cir. 2017) (quoting *State Farm*, 463 U.S. at 42), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018); *see also Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 742 F.3d 82, 101 (4th Cir. 2014) ("[B]ecause changes to existing standards must result from reasoned judgment, the agency must explain a change in course well enough for us to be sure that such a change in course was made as a genuine exercise of the agency's judgment." (citation omitted)). "[G]ood reasons" include, for instance, explaining how a new policy or rule carries out a statutory mandate. *See Fox*, 556 U.S. at 515.

Here, the Department did not offer good reasons for its change in policy because it failed to ground the Rollback Rule in any change in dietary or nutrition science or the Dietary Guidelines themselves. As discussed above, *supra* 19-21, the Department did not provide a reasoned explanation for the decisions to retain Target 1 for an additional five years and eliminate Target 3, particularly because only in achieving Target 3 would schools achieve consistency with the Dietary Guidelines. 77 Fed. Reg. at 4098. Instead, the Department merely acknowledged the anticipated release of the 2020 Dietary Guidelines, *see* 83 Fed. Reg. at 63,783, without suggesting that its standards would comply with those future requirements or that anticipated future updates to the Guidelines could justify preemptively weakening the standards.

Cf. Air All. Hous. v. EPA, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (agency could not justify delaying effective date of certain standards on the basis of needing time to consider comments and potentially reconsider the rule). And the Department's stated reasons for rolling back the sodium standards—concerns about student preferences for salty foods, 83 Fed. Reg. at 63,783, and purported "operational burden" at some schools, *id.* at 63,784—do not suffice because the Department lacked authority to elevate these reasons over considerations about how to align school meals with the Dietary Guidelines. *See Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n*, 891 F. Supp. 2d 162, 196 (D.D.C. 2012) (analyzing agency's stated rationale in light of the relevant statute's context and purpose).

Likewise for whole grains. The Secretary did not explain how its changes to the whole grain standards were grounded in the statute, the Dietary Guidelines, the IOM Report, or nutrition science. The School Nutrition Rule characterized the 100 percent whole grain-rich standard as "reflect[ing] the Dietary Guidelines' recommendation." 77 Fed. Reg. at 4094. But the Department failed to explain how halving that requirement to only 50 percent could also be consistent with the Dietary Guidelines. Instead, the Department gutted the whole grain-rich requirement based on anecdotal concerns about student taste and operational flexibility, 83 Fed. Reg. at 63,781, despite the fact that by 2017, 85 percent of schools were meeting the 100 percent whole grain-rich requirement without product-waivers. Such inconsistent and unsupported rationale does not suffice under *Fox*.

C. The Department Arbitrarily Relied on Factual Findings that Contradicted Its Prior Determinations and Failed to Consider Reliance Interests

The Rollback Rule failed to provide the "more detailed justification" required where a change in position rests on factual findings that contradict those in prior policies, or "when [the] prior policy has engendered serious reliance interests." *See Fox*, 556 U.S. at 515-16.[9]

As to the contradictory factual findings, in the School Nutrition Rule, the Department found that sodium Target 3 "will enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendation to limit sodium intake to less than 2,300 mg per day." 77 Fed. Reg. at 4098. The Rollback Rule, by contrast, suggests that Target 3 was not necessary for school lunches to "reflect" the Dietary Guidelines. 83 Fed. Reg. at 63,782-83 ("This final rule will … eliminat[e] the Final Target…. Our intention is to ensure that the sodium targets reflect the most current Dietary Guidelines."). And for whole grains, the School Nutrition Rule found that the 100 percent whole grain-rich requirement would "reflect[] the Dietary Guidelines' recommendation … as … all grains must be whole grain-rich." 77 Fed. Reg. at 4094. The Rollback Rule, in contrast, suggests that eliminating the 100 percent requirement would also comply with the Guidelines. 83 Fed. Reg. at 63,781 ("this final rule … reflects in a practical and feasible way the Dietary Guidelines' emphasis on whole grains"). The Department did not explain these contradictions.

As to reliance interests, the Department failed to consider that organizations like CSPI have relied on technical assistance programs meant to help schools comply with the Guidelines.

[9] Courts have used the term "factual finding" broadly in this context. For example, *Organized Village of Kake v. U.S. Department of Agriculture* considered the agency's ultimate conclusion about whether "the roadless values in the Tongass [Forest] are sufficiently protected under the Tongass Forest Plan" to be a "factual finding[]," 795 F.3d 956, 968 (9th Cir. 2015). The court found that a "more substantial justification" was necessary for the agency's decision to exempt the Tongass National Forest from the Roadless Rule based on prior contradictory factual findings. *Id.* at 967.

42 U.S.C. § 1758(a)(1)(B). CSPI relied on that technical assistance to amplify its own services to schools and accordingly allocated internal resources to other programs and activities. *See supra* 9. The Rollback Rule upended this reliance by lowering the nutrition standards, which fundamentally changed the type of technical assistance that the Department is providing and required CSPI to spend resources to fill the gap. *Id.* The Department did not address this reliance interest in the Rollback Rule. *See Encino Motorcars*, 136 S. Ct. at 2126 (automobile dealers had negotiated and structured employee compensation plans based on prior agency position).

IV. The Department Failed to Provide Adequate Notice or Opportunity to Comment on the Rollback Rule

"The requirement of notice and a fair opportunity to be heard is basic to administrative law," *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098. 1102 (4th Cir. 1985), protecting the public from bait-and-switch rulemaking. Thus, a notice of proposed rulemaking (here, the Interim Rule, which sought comments on a future final rule, 82 Fed. Reg. 56,703) must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979) (applying these principles in the context of an interim rule). That notice must be "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking." *Kennecott v. EPA*, 780 F.2d 445, 452 (4th Cir. 1985) (citation omitted). "The purpose … is both to allow the agency to benefit from the experience and input of the parties who file comments … and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules." *Chocolate Mfrs.*, 755 F.2d at 1103 (citation omitted). If a "final rule substantially departs from the terms or substance of the proposed rule, the notice is inadequate." *Id.* at 1105 (citation omitted).

A. Eliminating Sodium Target 3 Was Not a Logical Outgrowth of the Interim Rule

The Department deprived plaintiffs of adequate notice or an opportunity to comment because while the Interim Rule contemplated extending the then-current "flexibilities" and further delaying the 2012 Rule's compliance schedule, it did not suggest that the Department was considering abandoning sodium Target 3 entirely. Nor did the Interim Rule suggest that the Department was considering undoing the School Nutrition Rule's fundamental goal of setting nutrition standards that ultimately achieve compliance with the sodium Guidelines.

On sodium, the Interim Rule stated two goals: (1) to give schools, students, and food manufacturers "more time," 82 Fed. Reg. at 56,704, to meet sodium targets from the 2012 Rule; and (2) to seek public comment on the potential "long-term availability of this flexibility" through a future final rule, *id.* In context, the Interim Rule's references to "long-term" flexibilities conveyed only that the Department was considering making the same kinds of "flexibilities" available going forward: namely, retaining a three-target scheme but delaying the compliance date for Target 2.

The Interim Rule acknowledged that "to reduce the sodium content of meals consistent with the [IOM Report] … and the Dietary Guidelines," the 2012 Rule had established "two intermediate sodium targets and a final target that were calculated based on the sodium recommendations from the 2010 Dietary Guidelines." *Id.* at 56,708. While "recogniz[ing] the importance of reducing the sodium content of school meals," the Interim Rule stated that "*reaching this objective* will likely require a more gradual process than the planned 10 years [under the 2012 Rule]." *Id.* (emphasis added). On that basis, the Department explained that temporarily "retaining Target 1 is appropriate and necessary." *Id.* And while the Department "anticipate[d] retaining Sodium Target 1 … through at least the end of [school year] 2020-2021,"

id., and sought "public comments on the long-term availability of this flexibility and its impact on the sodium reduction timeline established in 2012," it "specifically" sought comment only on "the impact [of extending the Target 1 compliance dates] on Sodium Target 2." *Id.* at 56,704.[10]

The process here replicated the errors in *Chocolate Manufacturers*. There, a proposed rule generally discussed the negative effects of foods with high sugar content, specifically mentioning cereals and juices, but not flavored milk (which was authorized under the existing regulatory regime). 755 F.2d at 1101. The final rule abruptly changed the regulatory treatment of flavored milk, deleting it from the list of authorized products. *Id.* at 1102. The Fourth Circuit analyzed the adequacy of notice by viewing the proposed rule in the context of the background regulatory scheme. It compared the Department's explicit discussion of certain issues (*e.g.*, cereals), with its "total silence" concerning the change at issue (elimination of flavored milk), noting that the preamble's only reference to flavored milk dealt with the appropriate quantity to be given, not its elimination. As a result, "[t]he total effect of the history of the use of flavored milk, the preamble discussion, and the proposed rule ... could have led interested persons only to conclude that a change in flavored milk would not be considered." *Id.* at 1107.

So too here. The Interim Rule's discussion of a general topic (here, flexibility) was accompanied, and limited, by its discussion of certain specific changes (here, extending the compliance deadline for sodium Target 2), paired with "total silence," *id.*, about other potential changes (*i.e.*, elimination of Target 3 and abandoning the goal of complying with the sodium

[10] To the extent the Interim Rule discussed potential changes in the ultimate sodium target, it stated only that the agency would, in the future, "reevaluate the sodium … requirements in light of the 2020 Dietary Guidelines"—consistent with the agency's (then-longstanding) view that the School Lunch Act "requires that school meals reflect the latest Dietary Guidelines." 82 Fed. Reg. at 56,709 (citing 42 U.S.C. § 1758(a)(4)); *accord id.* at 56,704 ("the sodium requirement will continue to be reevaluated for consistency with the Dietary Guidelines").

Guidelines). The proposed rule's "only reference" to Target 3 conveyed the unmistakable message that the Department would preserve the status quo. *Compare* 82 Fed. Reg. at 56,708 (discussing "upper intake level" in sodium Guidelines and affirming the "importance of reducing the sodium content of school meals"), *with Chocolate Mfrs.*, 755 F.2d at 1106. As in *Chocolate Manufacturers*, the adequacy of the rulemaking notice must be judged in context, *i.e.* an existing regulatory regime that long linked nutrition standards with the Guidelines, and which since 2012 included phased sodium reductions with the goal of achieving compliance with the Guidelines. Because the "proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position" as to Target 3 and compliance with the Guidelines, the final rule was not a logical outgrowth of the proposed rule. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081, 1079-80 (D.C. Cir. 2009).

B. Eliminating the 100 percent Whole Grain-Rich Requirement Was Not a Logical Outgrowth of the Interim Rule

For similar reasons, the Interim Rule did not provide adequate notice of changes to the 100 percent whole grain-rich requirement. As to grains, the Interim Rule stated two purposes: (1) to extend the availability of a case-by-case, product-by-product waiver process, given the impending expiration of the appropriations statute providing that flexibility; and (2) to solicit public comment on "the long-term availability of the … whole grains … flexibilit[y]." 82 Fed. Reg. at 56,708-09. The Interim Rule emphasized that the Department had "retain[ed] the whole grain-rich regulatory requirement," *id.* at 56,708, while extending the availability of a case-by-case exemption to address concerns by those "[p]rogram operators that … experience[d] challenges." *Id.*; *see also id.* (exemption available only upon request and showing of "hardship in procuring or preparing specific products"). The Department explained that the continued

availability of such an exemption would give "manufacturers additional time to develop whole grain-rich food products." *Id.* But the Interim Rule simultaneously reaffirmed the Department's expectation that "the food industry will continue efforts to develop … products" with increased whole grains, and indicated that it would "evaluate school and food industry progress over time and consider public comments in order to develop a final rule that address[es] the whole grain-rich exemptions." *Id.*

In this context, the request for comment "on the long-term availability of the … whole grains … flexibilities" failed to put interested parties on notice that the Department was considering drastic changes to the underlying whole grain-rich requirement. The Interim Rule extensively discussed the case-by-case, product-by-product waiver framework, explaining how it would address operational difficulties experienced by some schools and provide time for manufacturers to develop more compliant products. *See* 82 Fed. Reg. at 56,704-09. That "very detailed" discussion was juxtaposed with "total silence concerning" the possibility of an across-the-board change to the 100 percent whole-grain-rich requirement itself. *Cf. Chocolate Mfrs.*, 755 F.2d at 1106-07. "The total effect of the history of the use of [a case-specific framework]," combined with "the preamble discussion … could have led interested persons only to conclude that a change in [the underlying whole grain-rich standard] would not be considered." *Id.* at 1107.

C. With Proper Notice, Plaintiffs Would Have Submitted Additional Comments

These notice defects justify vacatur and remand, so that Plaintiffs and other parties have "the opportunity to make [comments]" on the changes contemplated in the Rollback Rule and on the limitations of the Department's authority to set goals inconsistent with the Dietary Guidelines. *See id.*

If the Department had provided adequate notice, Plaintiffs would have submitted additional comments opposing the Rollback Rule's approach. As to sodium Target 3, plaintiffs would have submitted additional comments explaining, among other things, that: (a) the school meal statutes require the agency to retain Target 3, which ensures that the nutrition standards are consistent with the current Dietary Guidelines and IOM Report; (b) eliminating Target 3 would cause significant harms to student health and nutrition; and (c) eliminating Target 3 would negatively affect the market for, and availability of, lower-sodium foods, impeding progress even for schools seeking to perform above the federal regulatory floor, and stranding and chilling investment by food manufacturers in lower-sodium alternatives. *See* Schwartz Decl. ¶ 33-34; Yangarber Decl. ¶ 20 .

Similarly, if the Interim Rule had provided adequate notice that the Department was considering a dramatic change to the whole grains requirement, CSPI and HSFM would have submitted additional comments explaining: (a) the harms to health and nutrition from reducing the required amount of whole grains; and (b) the same adverse market effects as with elimination of sodium Target 3. *See* Schwartz Decl. ¶ 35; Yangarber Decl. ¶ 20. These comments on sodium and whole grains would have sharply undercut the basis for the Department to adopt such rollbacks.

* * *

These "failure[s] to comply with the APA's notice-and-comment requirements [are] unquestionably a 'serious' deficiency" in the rulemaking process, justifying vacatur. *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014) ("deficient notice is a fundamental flaw that almost always requires vacatur," especially where it is not "too late to reverse course").

V. The Agency Failed to Respond to Significant Comments

An agency must "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citing 5 U.S.C. § 553). "Significant comments" are those which, if true, "would require a change in an agency's proposed rule." *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (citation omitted); *Chan v. USCIS*, 141 F. Supp. 3d 461, 469-70 (W.D.N.C. 2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). "[C]onclusory" responses that "d[o] not resolve [] commentators' objections but … simply repeat [the agency's] view" do not satisfy that requirement. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010). Here, the Department's rulemaking notice fell short of these requirements.

Harms from Delaying or Weakening Nutrition Standards. Commenters explained that weakening sodium and whole grain standards would harm children's health and dietary habits.[11] As to whole grains, the Department merely acknowledged that it was "mindful" of health concerns and stated that the rule provided only minimum standards. 83 Fed. Reg. at 63,781. For sodium, it did not even go that far, failing even to mention health concerns. *See id.* at 63,783.

Disproportionate Impacts on Low-Income and Minority Students. The Department received numerous comments about the disproportionate impact on low-income and minority

[11] *E.g.*, Comment of Am. Pub. Health Ass'n, AR_4767; Comment of Pub. Health Inst., AR_4932; Comment of FoodCorps, AR_4928.

students.[12] Its only response was found in its *Civil Rights Impact Analysis*,[13] released publicly months *after* the Rollback Rule, *see* Answer ¶ 58, ECF No. 20. That analysis concluded that "the available data does not reveal a disproportionate impact" and that "the final rule will similarly impact all other racial/ethnic groups." *Id.* at 5, 9. The Department did not describe this analysis or otherwise explain the conclusions drawn in either the Rule or its summary Analysis.

Alternate Approaches. The Department received numerous comments suggesting alternatives to rolling back the standards, including increased technical assistance, training, sharing of best practices, taste tests with students, and adjusted recipes, to address the Interim Rule's stated concerns about whether all schools could meet the 2012 nutrition standards.[14] Aside from a cursory discussion of potential alternatives, 83 Fed. Reg. at 63,781, 63,782, the Department failed to offer a reasoned explanation for rejecting them. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) ("An agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." (citation omitted)).

Need for Additional Compliance Time. Commenters questioned the assertion that schools needed more time to comply with the 2012 nutrition standards and that industry would

[12] Comment of Am. Acad. of Pediatrics, AR_4570 (noting that school meals are often the only food such students eat each day); Comment of CSPI, AR_4829 (noting that school meal programs reduce nutritional disparity between affluent and low-income students); Comment of Vincent Fonseca, AR_4196 ("1 in 4 [Latino families] are food insecure.").
[13] Food and Nutrition Serv., USDA, *Civil Rights Impact Analysis: Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements* (Oct. 15, 2018), AR_3172.
[14] *E.g.*, Comments of Pub. Health Advocacy Inst., AR_4578; Comment of Pew Charitable Trusts, AR_4843; Comment of CSPI, AR_4829; Comment of Academy of Nutrition and Dietetics, AR_4994; Comment of Pub. Health Inst, AR_4932; Comment of FoodCorps, AR_4928.

continue developing healthier products even if the federal standards were lowered.[15] The Department offered no meaningful response, merely repeating its assertion that schools need more time to comply for "practical reasons," 83 Fed. Reg. at 63,783. It also failed to address the concern that lowering the standards would slow industry progress towards reformulation of products.

CONCLUSION

The Court should declare that the School Nutrition Rollback Rule is arbitrary, capricious, an abuse of discretion and contrary to law, vacate the Rule, and remand for further proceedings that ensure consistency with the statutory requirements.

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Respectfully submitted,

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[15] *E.g.*, Comment of Am. Heart Ass'n, AR_4989. *Cf.* Comment of Mars., Inc., Nestlé USA, and Unilever, AR_4916; *e.g.*, Comment of Am. Coll. of Preventive Med., AR_4783; Comment of Consumer Fed. of Am., AR_4908.