IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For decades, the United States Department of Agriculture ("USDA") has administered the school lunch and breakfast program to provide nutritionally balanced low-cost or free meals to millions of school children. In so doing, it sets minimum nutritional standards that balance a number of factors: the goals and objectives of the Dietary Guidelines for Americans, the operational abilities of the schools to provide compliant meals, and whether children will actually eat the food their schools prepare.

In 2012, USDA issued a rule (the "2012 Rule") to update the meal pattern requirements. The changes included requiring schools to offer fruits and vegetables as two separate meal components; offer fruit daily at breakfast and lunch; offer vegetables at lunch, including vegetable subgroups; offer fluid milk that is fat free and low fat; require all schools to serve whole grain-rich foods; and establish calorie, saturated fat, and sodium limits. Over time, however, USDA recognized that some schools faced difficulties in meeting these objectives, particularly the requirements to serve whole grain-rich and lower sodium foods. Additionally, the school food industry faced challenges developing products that met the new standards and were acceptable to students. Indeed, in response to those difficulties, Congress repeatedly delayed full implementation of the whole grain-rich and sodium requirements. Accordingly, in 2018, USDA implemented a rule (the "2018 Rule") that permitted flexibilities in the 2012 school meal requirements in two key respects: (1) it extended flexibilities around how schools serve whole-grain foods; and (2) allowed flexibilities with respect to certain sodium requirements. The 2018 Rule provided certainty for program operators and the food industry, ensured that students could adjust their taste preferences to the changing food standards, and still managed to satisfy the goals of the Dietary Guidelines by retaining the meal patterns established in the 2012 Rule.

Plaintiffs, two advocacy organizations, serve a hodgepodge of challenges to the 2018 Rule. Their fundamental statutory argument is that USDA's standards must be "consistent" with the Dietary Guidelines, which they interpret to require strict adherence to the Guidelines' recommendations in all respects. But this claim ignores the text of the governing statutes, which simply require that the regulations be "consistent with the *goals*" or be "based on" the Dietary Guidelines. And as the Supreme Court held just last term, these words require only that the Guidelines have served as the "starting point" for USDA's analysis, which it did here.

Next, Plaintiffs claim that the 2018 Final Rule is substantively arbitrary and capricious in violation of the Administrative Procedure Act. This is a deferential standard, which USDA satisfies. Contrary to Plaintiffs' arguments, USDA appropriately considered taste and operational flexibilities, the role of product innovation, and health in formulating the 2018 Rule, as well as the need for nationwide standards. Nor does the 2018 Rule represent an unacknowledged and unexplained change in position – USDA has not expressed inconsistency about its legal position, and it adequately explained why it was making the policy changes it did.

Finally, Plaintiffs raise several procedural objections based on the 2018 Rule's notice and comment process. But these, too, are without merit. The 2018 Final Rule was a logical outgrowth of the 2017 notice, and USDA adequately responded to all significant comments it received during the notice-and-comment period. That is all the APA requires.

Accordingly, this Court should grant Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment.

BACKGROUND

I. Statutory and Regulatory Background

The National School Lunch Program ("NSLP") and School Breakfast Program ("SBP") provide nutritious and well-balanced meals to millions of school children. The federal government and the States share responsibilities for these programs. USDA sets basic standards and provides funding, while the States, via agreements with local schools, administer the programs on a day-to-day basis. *E.g.*, 42 U.S.C. § 1758.

In establishing these programs, Congress required USDA to "promulgate rules, 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). Participating schools, in turn, must serve meals that "are consistent with the goals of the most recent Dietary Guidelines for Americans." *Id.* § 1758(f)(1)(A). The Dietary Guidelines for Americans ("Dietary Guidelines" or "Guidelines), are a statutorily mandated publication, jointly issued every five years by USDA and the Department of Health and Human Services, which "contain[s] nutritional and dietary information and guidelines for the general public." 7 U.S.C. § 5341(a)(1); *see also* AR 7656-7799 (2015-2020 Dietary Guidelines). In addition, in 2010, Congress required USDA to issue regulations to update the meal patterns and nutrition standards for school lunches and breakfasts based on the recommendations issued by the Food and Nutrition Board of the National Research Council of the National Academies of Science, part of the Institute of Medicine ("IOM"). 42 U.S.C. § 1753(b).

Pursuant to these authorities, USDA has issued several rules designed to effectuate the school meal programs. Two are at issue in this lawsuit: a Final Rule issued in 2012, which

implemented sodium and whole-grain requirements, 77 Fed. Reg. 4088 (Jan. 26, 2012) ("2012 Rule"), and a successor rule, issued in 2018, which codified flexibilities into the school meal programs in response to operational difficulties encountered by schools during the intervening period, 83 Fed. Reg. 63,775 (Dec. 12, 2018) ("2018 Rule").

A. The 2012 Rule's Sodium and Whole Grain Requirements

The 2012 Rule required, inter alia, that schools participating in the National School Lunch and School Breakfast Programs "make a gradual reduction in the sodium content of [school] meals." 77 Fed. Reg. at 4097. Participating schools were required to meet certain sodium reduction targets from the then-average content in school meals on a ten-year timeline—a sodium content reduction of about 25 percent in school breakfasts, and over 53 percent in school lunches—with two intermediate targets for schools to meet during that period. *See id.* at 4097-98, 4147, 4155. Within two years of the 2012 Rule's implementation ("Target 1"), or the 2014-2015 school year, schools were required to reduce sodium in school breakfasts by about five percent to seven percent, and in school lunches by about 10 percent. *Id.* Within five years of the 2012 Rule's implementation ("Target 2"), or the 2017-2018 school year, schools had to reduce sodium in school breakfasts by about 15 to 17 percent, and in lunches by about 32 percent. *Id.* Within ten years of the 2012 Rule's implementation ("Target 3" or "Final Target"), or the 2022-2023 school year, schools were required to reduce the sodium content of meals by approximately 25-50 percent from the baseline. *Id.*

The 2012 Rule also imposed a minimum whole-grain-rich requirement for school meals. 2012 Rule at 4093, 4144-45, 4155-56. Regarding school breakfasts, beginning in the 2013-2014 school year, the 2012 Rule required half of grain products offered to be whole-grain rich, or at least 50% whole grains. *Id.* at 4093, 4155-56. For the 2014-2015 school year and beyond, the

Rule required schools to serve only whole-grain-rich products. *Id.* at 4093, 4156. With respect to school lunches, the Rule required half of grain products offered in school years 2012-2013 and 2013-2014 to be whole-grain rich, and required all grain products to be whole grain rich in school year 2014-2015 onward. *Id.* at 4093, 4144-45.

B. Congressional Reaction to the 2012 Rule

Prior to the 2018 Rule's promulgation, between late 2011 and 2017, Congress repeatedly enacted legislation either delaying or providing for exemptions for the sodium and whole grain requirements specified in the 2012 Rule. *See* 82 Fed. Reg. 56,703, 56,703-704 (Nov. 30, 2017) ("2017 Interim Rule" or "2017 IFR").

In late 2011, Congress prohibited implementation of a sodium reduction target stricter than Target 1 of the 2012 Rule, as proposed at the time, "until the Secretary certifies that the [USDA] has reviewed and evaluated relevant scientific studies and data relevant to the relationship of sodium reductions to human health." Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55 § 743(2), 125 Stat. 552, 589 (Nov. 18, 2011). Congress renewed this prohibition in 2014, in late 2015, and in 2017, thereby limiting the sodium reduction requirement to Target 1 through the 2017-2018 school year. *See* 82 Fed. Reg. at 56,704.

With respect to the 2012 Rule's whole grain requirements, Congress mandated in late 2014 that the USDA "Secretary shall allow States to grant an exemption from" the only-whole-grain-rich products requirement, and "the States shall establish a process for evaluating and responding, in a reasonable amount of time, to requests for an exemption." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 751, 128 Stat. 2130, 2171 (2015). Congress further provided that such an exemption would require a school food authority to demonstrate hardship "in procuring specific whole grain products which are acceptable to the students and compliant with the whole grain-rich requirements." *Id.* Under an exemption, only

half of a school's grain product offerings were required to be whole grain-rich. *Id.* Congress subsequently renewed this exemption scheme through the 2017-2018 school year. *See* 2017 Interim Rule at 56,704.

In November 2017, USDA promulgated an interim rule (the 2017 IFR), which retained Target 1 as the applicable sodium reduction requirement, and Congress's whole grain exemption scheme, for the 2018-2019 school year. 82 Fed. Reg. at 56,704, 56,706-710. The 2017 Interim Rule acknowledged that Congress's "repetitive legislative action manifest[ed] a clear, Congressional message to USDA: The current regulatory provisions limiting . . . whole grain-rich[] and sodium options . . . are causing operational challenges and need further consideration." *Id.* at 56,709.

C. The 2018 Rule's Modification of Sodium and Whole-Grain Requirements

The 2018 Rule, which took effect on February 11, 2019, codified State's abilities to modify the whole-grain and sodium requirements. 83 Fed. Reg. at 63,775. Relevant here, the 2018 Rule extended Target 1's sodium reduction requirement through the end of the 2023-2024 school year, transitioned to Target 2's requirements by the 2024-2025 school year, and eliminated the 2012 Rule's final sodium targets that would have gone into effect in school year 2022-2023. 83 Fed. Reg. at 63,776, 63,782-83, 63,787-88.

The 2018 Rule acknowledged that "[s]chool children are consuming a considerable amount of sodium," and noted that "[i]t is important that the sodium level in school meals is gradually reduced to assist in introducing children to lower sodium foods." *Id.* at 63,787. The sodium reduction requirements provided by the 2018 Rule "balance[d] the needs for strong nutrition standards with the operational concerns and student acceptance of school meals" by allowing schools "to slowly introduce lower sodium foods to students and for industry to develop consistent lower sodium products that are palatable for students." *Id.* Further, they provided the additional

time needed for USDA to assess the review of the Dietary Reference Intakes—"a set of reference values used to plan and assess the diets of healthy individuals and groups," *id.* at 63,782—for sodium intake, which (at the time) was being undertaken by the National Academies, Sciences, Engineering, and Medicine, *id.* at 63,783, 63,787; the USDA also sought to assess the impact of the new Dietary Guidelines for Americans, which were expected to be released by the end of 2020. *Id.* The flexibilities provided by the 2018 Rule "allow[ed] for any adjustments to be made, including regulatory changes, to incorporate any updated scientific information regarding sodium." *Id.* at 63,787.

The 2018 Rule also required at least half of grain products in school meals be whole-grain-rich (as was the case initially under the 2012 Rule), but dispensed with the requirement that schools later serve only whole-grain-rich products—and, by extension, with Congress's above-described exemption process that authorized states to permit school food authorities that demonstrated hardship to have half (instead of all) of their grain product offerings be whole-grain-rich. *Id.* at 63,776, 63,780-81, 63,786. "This decision was made to reduce Program operator burden while still providing children access to whole grain-rich items." *Id.* at 63,786. The 2018 Rule noted that "[t]he requirement to offer exclusively whole grain-rich products proved impractical for many school districts" and "was never fully implemented nationwide" "due to a long history of administrative and legislative actions allowing exemptions." *Id.* at 63,781. The Rule acknowledged that "the vast majority (80 percent) of school food authorities strived to meet the [all-whole-grain-rich] requirement and did not request exemptions" from state agencies in school year 2017-2018, but that about 20 percent of school food authorities (totaling over 4,000 authorities) "still face[d] challenges and appl[ied] for exemptions," *id.* at 63,786, and nearly all (4,124 out of 4,297) "received exemption approval from their State agency," *id.* at 63,781. The

USDA "recognize[d] that it is not feasible to operate" the school breakfast and lunch programs "in an ad hoc fashion, with recurrent exemptions, without giving operators and the food industry a workable regulatory solution that provides the long-term certainty they need for food procurement and product reformulation." *Id.* The 2018 Rule makes clear that its sodium and whole grain flexibilities are minimum nutritional standards, and that States are free to impose additional or stricter requirements. *See* 83 Fed. Reg. at 63,781, 63,783; *see also* 7 C.F.R. § 210.19(e) (State agency may "impos[e] additional requirements for participation in the [National School Lunch] Program which are not inconsistent with the provisions of this part"). Even without additional State requirements, individual school districts may decide to meet higher nutritional standards.

II. Procedural Background

Plaintiffs, the Center for Science in the Public Interest, and the Chesapeake Institute for Local Sustainable Food and Agriculture, filed suit on April 3, 2019. Compl., ECF No. 1. They allege that the 2018 Final Rule violates the Administrative Procedure Act ("APA"), both because it is purportedly arbitrary and capricious in substance, and because it was purportedly published in violation of the APA's procedural requirements. *Id.* The parties agreed on a schedule to file the administrative record and for briefing. ECF No. 19. Plaintiffs moved for summary judgment on August 2, 2019. Pls.' Mot. Summ. J. ("Pls.' Br."), ECF No. 26.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under the APA, an agency's decision must be upheld unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Under this deferential standard, the agency's decision is presumed valid, and the Court considers only whether it "was based on a

consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The Court may not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n, Inc., v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. The 2018 Final Rule Accords With the Statutes Governing the National School Lunch and Breakfast Program.

The core of Plaintiffs' substantive APA challenge is their assertion that Congress required USDA to issue school meal regulations that duplicate or explicitly incorporate the most recent Dietary Guidelines. But Congress did no such thing. Instead, it required that USDA regulations be "based on" the Guidelines. That is an important difference, because, as courts have recognized, such language evinces Congress's intent that there be a connection between the Dietary Guidelines and the school meal regulations, but that such fit need not be exact. At a minimum, the statute does not clearly forbid USDA's interpretation, and this Court should therefore defer to USDA's reasonable construction.

USDA is charged with administering the school lunch and breakfast programs, and with promulgating rules designed to give effect to Congress's statutory commands. *See* 42 U.S.C. § 1758(a)(4)(B). It is therefore entitled to "the established rules of deference" set out in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when promulgating such rules. *See Morgan v. Sebelius*, 694 F.3d 535, 537 (4th Cir. 2012). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If 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." But if "the court determines Congress has not

directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43.

A. The 2018 Rule Unambiguously Supports USDA's Position at *Chevron* Step One, or, At a Minimum, Congress Has Not Unambiguously Foreclosed Its Position.

"Under *Chevron*'s first step, "[the court] 'employ[s] traditional tools of statutory construction' in considering whether Congress addressed 'the precise question at issue,' starting with the statutory text and structure." *Morgan*, 694 F.3d at 537 (quoting *Chevron*, 467 U.S. at 842, 843 n.9). Here, the statutory text repeatedly indicates that Congress has required USDA to take the Guidelines into account, rather than mandate that USDA simply adopt the Guidelines as the only permissible standard.

Two statutory provisions are central to this question. The first is 42 U.S.C. § 1758(f)(1)(A), which requires that schools participating in the school breakfast or lunch programs serve meals that "are consistent with the goals of the most recent Dietary Guidelines for Americans." 42 U.S.C. § 1758(f)(1)(A). The phrase "consistent with the goals" is a broad phrase, which merely requires some degree of consistency between the goals of the Guidelines and the standards, but otherwise provides considerable discretion to the agency. *See, e.g.*, *Tackitt v. Prudential Ins. Co. of Am.*, 758 F.2d 1572, 1575 (11th Cir. 1985) (characterizing a requirement that OPM act in a manner "consistent with the goals and policies" of a statute to be a "very broad" grant of authority); *Exxon Corp. v. Dep't of Energy*, 802 F.2d 1400, 1402 (Temp. Emer. Ct. App. 1986) (noting that an authority that provides that an agency can take action "as is consistent with the goals of the program" granted the agency "broad discretion" and was entitled to "great deference").

Toward this point, the Dietary Guidelines speak about increasing whole grains and reducing sodium. *See* AR at 7723 (intent of Guidelines is to "increase whole-grain intakes and lower refined grain intakes"); *id.* at 7732 (intent of Guidelines is to "shift food choices to reduce

sodium intake"). The school meal standards at issue here are consistent with those general objectives – they call for increased whole-grains and reduced sodium. *See generally* 83 Fed. Reg. at 63,787 (2018 Rule allowed schools "to slowly introduce lower sodium foods to students and for industry to develop consistent lower sodium products that are palatable for students); *id.* at 63,786 (2018 Rule "reduce[ed] Program operator burden while still providing children access to whole grain-rich items.").[1]

Notably, in referring to the "goals of the Dietary Guidelines," Congress did *not* require that the meal standards be "consistent with the Dietary Guidelines," although Plaintiffs phrase the subheading of their brief to invoke that requirement. *See* Pls.' Br. at 13. That is so even though, in a separate subsection of section 1758, Congress required that fluid milk offered in school lunches "be consistent with the most recent Dietary Guidelines for Americans" -- a phrase that was not confined to the goals of the Guidelines. 42 U.S.C. § 1758(a)(2)(A)(i). "[I]t is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 120 (D.D.C. 2017) (quoting *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)). And although Plaintiffs discuss what it means to be "consistent" with the Guidelines, Pls.' Br. at 14-15, they never attempt to discuss the meaning of the different phrase "consistent with *the goals*" of the Guidelines. Accordingly, Congress did not require that the nutrition standards be consistent with the Guidelines – or at least it did not unambiguously do so.

[1] The Dietary Guidelines, of course, include more specific recommendations (such as quantity measures). But this only illustrates the distinction between the "goals" of the Guidelines, and the Guideline recommendations themselves – Congress chose the former, not the latter, in governing the statutory requirements.

Similarly, USDA is required to "promulgate rules, *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) (emphasis added); *see also* 42 U.S.C. § 1753(b)(3)(A) (requiring USDA to issue regulations for school lunch and breakfast programs "based on recommendations made by the Food and Nutrition Board of the National Research Council of the National Academy of Sciences").

The phrase "based on" does not require a particularly close connection between the Dietary Guidelines and National Academy recommendations, on one hand, and the school meal regulations, on the other, let alone the sort of strict equivalency that Plaintiffs suggest. As the Supreme Court explained only last year, in interpreting the phrase "based on" with respect to the Sentencing Guidelines, "[t]o base means '[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.* ("a 'base' is '[t]he starting point or foundational part of something,' or '[a] point, part, line, or quantity from which a reckoning or conclusion proceeds.'" (quoting Black's Law Dictionary 180 (10th ed. 2014)). Accordingly, the Supreme Court held, a criminal sentence would still be "based on" the Sentencing Guidelines, so long as those Guidelines are the "starting point and initial benchmark." *Id.* All that is required is that the basis be "a relevant part of the analytic framework" used by the decision-maker. *Id.* at 1776. Therefore, even though USDA must use the Dietary Guidelines or National Academy recommendations as the first part of the analytical framework, it need not actually adopt them – just like a district judge may consider the Sentencing Guidelines but may still deviate from them. And here, the 2018 Rule, like the 2012 Rule before it, considered

the Guidelines in analyzing the need for additional flexibility. *E.g.*, 83 Fed. Reg. at 63,777 ("this final rule seeks to ensure that school meal regulations work for all operators, while reflecting the recommendations of the Dietary Guidelines").

Plaintiffs' arguments to the contrary are unavailing. They recognize *Hughes*, Pls.' Br. at 15 n.6 (acknowledging that the phrase "based on" "may permit a less exacting correspondence"), but do not persuasively distinguish the import of the Supreme Court's interpretation in this closely analogous context. They first note that "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." *Id.* (quoting 42 U.S.C. § 1758(f)(1)A)). But, as discussed *supra*, this is an incomplete citation: the actual requirement is that schools serve lunches and breakfasts that "are consistent with *the goals* of the most recent Dietary Guidelines for Americans." 42 U.S.C. § 1758(f)(1)(A) (emphasis added). Whatever the meaning of the former, courts have recognized that the latter conveys significant discretion on the agency. *See, e.g.*, *Tackitt*, 758 F.2d at 1575; *Exxon*, 802 F.2d at 1402. Plaintiff also posit that "if *Hughes'* definition of 'based on' were appropriate here," the agency would have to show a connection between the Dietary Guidelines and the final rule. Pls.' Br. at 16 n.6. But this argument concedes that USDA's statutory *interpretation* is correct, it calls into question the validity of USDA's substantive actions.

Plaintiffs' other arguments with respect to this provision similarly fail. They cite *McDaniel v. Chevron Corporation*, 203 F.3d 1099, 1111 (9th Cir. 2000), for the proposition that "based on" refers to a "foundation." *See* Pls.' Br. at 15. But this case supports *USDA*'s interpretation, not their own – as the cases cited by the Ninth Circuit recognize that "based on" does *not* require a precise fit between the issued standards and their source material; merely that the final standards be used as the "starting point." *See McDaniel*, 203 F.3d at 111 (citing *Nevada v. Hutchings*, 106

Nev. 453 (1990)) and characterizing the case as "holding that salaries would be 'set based upon' prevailing rates did not mean that salaries would be set 'at' prevailing rates"). They also cite *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 (7th Cir. 2013), for the proposition that "based on" means "substantially similar." Pls.' Br. at 15. But this holding depended on the specific congressional purpose of a *qui tam* statute, 31 U.S.C. § 3730(e)(4), which does not apply here. *Leveski*, 719 F.3d at 828. In any event, even if there are different views about the meaning of "based on," that indicates that Congress has not spoken clearly to the issue, and so the agency's reasonable construction should be deferred to.

Finally, Plaintiffs state that the "Department has long understood the statutory scheme to function just this way," i.e. to require that meals be" consistent" with the Guidelines. *See* Pls.' Br. at 15. They selectively paraphrase the 2012 Rule to say that the "statute 'requires' meals to be consistent with the Guidelines." *Id.* (quoting 77 Fed. Reg. at 4132). But the 2012 Rule actually said that the statute requires that schools "ensure that those meals are consistent *with the goals* of the most recent Dietary Guidelines for Americans." 77 Fed. Reg. at 4132 (emphasis added). By omitting "goals," Plaintiffs suggest a far closer relationship than Congress had required or that USDA had explained. Indeed, even in the 2012 Rule, USDA did not immediately align the school meal standards to the Dietary Guidelines – the whole-grain requirement was to take effect over several years, and the sodium requirements over many more years. *See generally* 77 Fed. Reg. at 4088. If Plaintiffs' interpretation was correct – that the standards needed to be "consistent" with the Dietary Guidelines – this delay would have been impermissible. *See also infra* § III.A.

B. Even if Congress' Language Were Ambiguous, USDA's Construction of the 2018 Rule at *Chevron* Step Two is Reasonable

Defendants believe that Congress has spoken clearly in favor of the Government's position – that the school meal standards need not be "consistent with the Nutritional Standards," but need

only be consistent with the *goals* of those standards and based on those standards. *See Hughes*, 138 S. Ct. at 1775-76. But even if the Court finds that the statutory requirements are ambiguous, Defendants' position – which better tracks the specific, deferential language of the statute and accords with the Supreme Court's recent, closely analogous *Hughes* decision – is certainly "reasonable."[2] *Chevron*, 467 U.S. at 844.

As discussed above, "consistent with the goals of the most recent Dietary Guidelines for Americans," 42 U.S.C. § 1758(f)(1)(A), is a broad, deferential phrase that requires consistency with the ultimate objectives of the Guidelines – in this case, increasing whole-grains and reducing sodium – but which leaves room for USDA to depart from those specific requirements. *See, e.g.*, *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989) (applying a deferential standard when determining whether an ERISA "interpretation is consistent with the 'goals of the plan'") The phrase says nothing about the means by which the agency accomplishes those objectives. That deference is entirely rational in light of the numerous competing priorities that USDA must apply in setting these standards (from student acceptance to technical considerations to the state of the industry, etc.), which may at times conflict.[3] Similarly, "*based on* the most recent Dietary

[2] Plaintiffs also state that the 2018 Rule's standards violate the statute. *See* Pls.' Br. at 17-18. This argument largely rises and falls based on the statutory interpretation discussed above – because Plaintiffs' construction is wrong, their argument that USDA violated that statutory construction is also, necessarily wrong. But Plaintiffs also state that the 2018 Rule is improper because it does not "reflect" the Dietary Guidelines. *See id.* at 17 (quoting 77 Fed. Reg. at 4098). But "reflect the Dietary Guidelines" is not the statutory standard.

[3] The Guidelines themselves recognize that their objectives and goals are broadly and flexibly defined: to support "easy, accessible, affordable, and normative" eating patterns. AR 7738; *see also id.* at 7741 ("ensure the accessibility of safe, affordable, and health food choices"); *id.* ("Healthy eating patterns are designed to be flexible in order to accommodate traditional and cultural foods"). Indeed, even the National Academies recognized the need for these competing considerations. *See, e.g.*, AR 7919 ("The [IOM] committee recognizes that there are barriers to reducing the sodium content of meals to the recommended levels without having long-term adverse effects on student acceptance and participation, safety, practicality, and cost.").

Guidelines for Americans" 42 U.S.C. § 1758(a)(4)(B) (emphasis added), does not require a close degree of linkage, *see supra*, and USDA's determination about the best way to accomplish the reduction in sodium and increase in whole-grain consumption stated in the Guidelines is consistent with that expansive statutory language. *See, e.g.*, 83 Fed. Reg. at 63,781 ("The whole grain-rich requirement in this final rule is a minimum standard, not a maximum, and reflects in a practical and feasible way the Dietary Guidelines' emphasis on whole grains consumption."); *id.* at 63,783 ("Our intention is to ensure that the sodium targets reflect the most current Dietary Guidelines for Americans . . . , are feasible for most schools, and allow them to plan appealing meals that encourage consumption and intake of key nutrients that are essential for children's growth and development.").

The resolution of these competing concerns is the type of technical judgment to which an agency is typically entitled to considerable deference. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 981, 994 (9th Cir. 2014) ("This traditional deference to the agency is at its highest where a court is reviewing an agency action that required a high level of technical expertise."). In light of the flexible language Congress provided in the statute, the agency's conclusion that it had the authority to require standards that are based on and consistent with the goals of the Dietary Guidelines – but do not necessarily adopt the specific Guidelines requirements without modification – is reasonable and ought to be sustained.

II. The 2018 Final Rule Reflects Reasoned Agency Decisionmaking

Plaintiffs next argue that the 2018 Rule "reflects arbitrary decisionmaking," citing the Supreme Court's seminal decision in *Motor Vehicle Manufacturers Association of United States v. State Farm Mutual Auto Insurance Company* ("*State Farm*"), 463 U.S. 29, 43 (1983). Pls.' Br. at 18. "Agency action is arbitrary and capricious if the agency relies on factors that Congress did

not intend for it to consider, entirely ignores important aspects of the problems, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a difference in view." *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 753 (4th Cir. 2019) (quoting *Bedford Cty. Mem'l Hosp. v. HHS*, 769 F.2d 1017, 1022 (4th Cir. 1995)). "[R]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *Id.* (quoting *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 182 (4th Cir. 2009)); *see also Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2012) ("our review under the APA is ultimately narrow") (citation omitted). Although Plaintiffs raise several specific objections to USDA's rulemaking, none have merit.

A. USDA's Consideration of Taste and Operational Flexibilities Was Appropriate

First, Plaintiffs argue that USDA "arbitrarily elevated" certain factors – specifically "student taste preferences and operational flexibilities" – over other factors such as "nutrition science, children's health, and the goals of the Dietary Guidelines" in issuing the 2018 Rule Pls.' Br. at 18. In essence, they assert that USDA relied on improper factors in promulgating the Rule. *Id.* But there is no support for such a claim. Plaintiffs twist a requirement that USDA consider *some* factors into a requirement – nowhere to be found in the statutes – that USDA can consider *only* those factors and no others.

There is no dispute that USDA must consider certain factors in establishing school meal standards. *See* Pls.' Br. at 19 (citing 42 U.S.C. §§ 1758(a)(1)(A) (lunches "shall meet minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research"); 1758(f)(1) (lunches and breakfasts shall be "consistent with the goals of the most recent Dietary Guidelines for Americans"); and 1773(e)(1) (breakfasts "shall meet the minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research"). But

Plaintiffs do not seriously dispute that the Secretary has considered these factors; they never argue, for example, that the 2018 Rule's standards are not based on "tested nutritional research," 42 U.S.C. §§ 1758(a)(1)(A), 1773(e)(1), and as discussed, the standards are "consistent with the goals" of the Dietary Guidelines.

Rather, their argument appears to be that USDA should not have considered taste and operational flexibilities at all. *See* Pls.' Br. at 18-20. But there is no basis for this argument, *i.e.*, the claim that because Congress enumerated factors that must have been considered (nutritional research and the Dietary Guidelines), it necessarily excluded other such factors (taste and administrability). *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). Arguments similar to plaintiffs' are routinely rejected. *See, e.g.*, *FTC v. Tarriff*, 584 F.3d 1088, 1091 (D.C. Cir. 2009) (rejecting argument "that the term 'shall' is a mandate not only to do one thing but to cease and refrain from doing all others" as a claim that "borders on sophistry"); *Otsuka Pharm. Co. v. Burwell*, No. 15-852, 2015 WL 1962240, at *7 (D. Md. Apr. 29, 2015) ("[Plaintiff] ignores the critical fact that [the statutory provision] sets forth circumstances where FDA cannot *deny* approval for a labeling carve-out; it does not, as [plaintiff] contends, address situations where FDA can or cannot *grant* approval.").

Moreover, to the extent Plaintiffs claim that USDA "elevated" one set of concerns over another, *see* Pls.' Br. at 19, they provide no authority by which to judge how an agency improperly "elevated" different concerns, much less how such an action violates *State Farm*. After all, the requirement to consider certain factors is just that – a minimum requirement, which says nothing about how to weigh other considerations. Indeed, under the APA, "[t]he court is not empowered to substitute its judgment for that of the agency," *Ohio Valley Envtl. Coal*, 556 F.3d at 192, and

that review is "particularly deferential" when the case involves "substantial agency expertise," and "the agency is tasked with balancing often-competing interests," *Am. Whitewater*, 770 F.3d at 1115.[4] USDA properly did so here.

B. USDA Properly Considered the Role of Product Innovation

Next, Plaintiffs fault the 2018 Rule's assessment of food product innovation. They say:

> [T]he 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 [2012 Rule]) was 'essential to incentivize the food industry's efforts to support the service of wholesome and appealing school meals.'

83 Fed. Reg. at 63,783." Pls.' Br at 20. Although Plaintiffs fault USDA for "ma[king] no effort to reconcile these two inconsistent positions," *id.*, read in context, there is no contradiction between these statements.

USDA first stated that "we do not anticipate this final rule will deter the significant progress made to date by State and local operators, USDA, and industry manufacturers to achieve healthy, palatable meals for students," because "[t]he certainty this rule provides around the changes to these standards will provide industry the ability to commit to reformulating products and work towards innovative solutions." 83 Fed. Reg. at 63,784-85. It also stated it "recognize[s] that regulatory certainty is essential to incentivize the food industry's efforts to support the service of wholesome and appealing school meals." *Id.* at 63,783. These two statements are consistent: regulatory certainty (as in the 2018 Rule) will promote progress and industry development.

[4] *Kravitz v. U.S. Department of Commerce*, 366 F. Supp. 3d 681, 748-49 (D. Md. 2019), upon which Plaintiffs rely, Pls.' Br. at 19-20, addressed whether the agency "failed to consider appropriate factors," not whether it also considered other factors, as here. Because USDA considered health and nutritional standards, *Kravitz* has no bearing on the present dispute.

Plaintiffs also cite a comment by several food manufacturers that it says constitutes "evidence in the record that federal nutrition standards created the incentive for industry to develop and manufacture Guidelines-complaint products." Pls.' Br. at 20 (citing AR 4916). This comment, however, simply says that "[h]aving these standards thwarted is a great disappointment and not only has economic consequences to the food industry, but also blunts our nation's ability to address its nutritional health." AR 4916. The agency acknowledged this and other similar comments. *See* 83 Fed. Reg. at 63,781 ("Other commenters expressed concern that extending the Target I flexibility could lead industry to halt reformulation and innovation efforts."). Nonetheless, USDA concluded that in light of an ongoing review of sodium levels by the National Academies, it was important to provide "schools and the food industry the regulatory certainty they need to conduct food procurement and product reformulation activities," despite the concern expressed by the commenter. *Id.* at 63,783. And there were comments in the record by food manufacturers that commended the retention of sodium standards. *E.g.*, AR 3538. This is precisely the type of balancing that the APA commands. Moreover, although Plaintiffs state without citation that USDA "left unaddressed the concern that rolling back federal standards would likely halt industry's progress on developing new, or reformulating existing, food products," Pls.' Br. at 20, it offers no evidence in the record that this would occur, much less that it would be "likely" to do so.

C. Plaintiffs Misstate the 2018 Rule's Discussion of Health Standards

Next, Plaintiffs say that USDA "made no effort to reconcile the [2018 Rule] with the [2012 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.'" Pls.' Br. at 20 (quoting 77 Fed. Reg. at 4107). But, again, that misunderstands the record in its full context. That sentence

in the 2012 Rule was related to the *entirety* of the Rule, which addressed a number of standards not at issue here (such as fruit and vegetables). In the 2018 Rule, USDA stated that it "expects the health benefits of the meal standards, *which are mainly left intact*, to be similar to the overall benefits of improving the diets of children cited in the 2012 meal standards rule." 83 Fed. Reg. at 63,784 (emphasis added). USDA further noted that "[p]rogram operators may exceed these minimum requirements and must continue to meet the same caloric and fat limits specified in the 2012 rule." *Id.* Far from being a "flatly inconsistent position," Pls.' Br. at 21, USDA recognized and responded to a changed context, exactly as the APA requires.

D. USDA Explained The Basis For Nationwide Standards

Finally, Plaintiffs argue that USDA did not "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." Pls.' Br. at 21. However, USDA explained that, for school year 2017-2018, "a total of 4,297 school food authorities (about 23 percent of school food authorities operating the school meal programs) submitted whole grain-rich exemption requests based on hardship, and nearly all (4,124) received exemption approval from their State agency." 83 Fed. Reg. at 63,781. Far from being a "small percentage" of operators, Pls.' Br. at 21, this constituted a significant issue, which is why "USDA recognizes that it is not feasible to operate these nationwide programs in an ad hoc fashion, with recurrent exemptions, without giving operators and the food industry a workable regulatory solution that provides the long-term certainty they need for food procurement and product reformulation." *Id.* USDA's conclusion – that a national standard was better than an ad hoc exemption system addressing a quarter of all school food authorities – was reasonable, and was certainly not unaddressed, as Plaintiffs posit.

Importantly, USDA also made clear that these requirements are *minimum* requirements that "set a floor and not a ceiling." 83 Fed. Reg. at 63,781. State agencies are free to "impose additional requirements" that are not inconsistent with the minimum standards for school meals, 7 C.F.R. § 210.19(e); *see also* 83 Fed. Reg. at 63,781 ("[T]he whole grain-rich requirement in this final rule is a minimum standard, not a maximum"); *id.* at 63,784 ("Program operators may exceed these minimum requirements"). Thus, entities that wish to maintain the 2012 requirements may continue to do so.

III. The 2018 Final Rule Does Not Represent An Unacknowledged and Unexplained Change in Position.

As Plaintiffs accurately recite, Pls.' Br. at 22, an agency may change a policy, so long as it provides a "reasoned explanation" for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This is not a demanding standard: the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* Contrary to Plaintiffs' claims, USDA did not change its legal position, and, to the extent it changed its policy position, it provided an adequate reason for doing so.

A. USDA did not change its legal interpretation

Plaintiffs' first *FCC v. Fox* argument follows from their primary statutory argument: they argue that USDA previously interpreted its underlying statutes to require that school meals had to correspond directly to the Dietary Guidelines; but now interprets those same authorities to require a much less precise fit. *See* Pls.' Br. at 22-24. Although they point to several instances in previous USDA regulatory filings that they claim represent a change in USDA's position, a closer examination of these materials reveals no such inconsistency.

First, Plaintiffs posit that the 2012 Rule interpreted the governing statutes as "requiring that [the school meal] standards be consistent with the Dietary Guidelines." Pls.' Br. at 23. But the 2012 Rule simply stated that 42 U.S.C. § 1758(a)(4) "requires that school meals *reflect* the latest 'Dietary Guidelines for Americans.'" 77 Fed. Reg. at 4088 (emphasis added). And that is the same language in the 2018 Final Rule. *See* 83 Fed. Reg. at 63,777 ("This rule will help Program operators provide wholesome and appealing meals that *reflect* the Dietary Guidelines and meet the needs and preferences of their community.") (emphasis added); *see also id.* ("As a key part of USDA's regulatory reform agenda, this final rule seeks to ensure that school meals regulations work for all operators, while *reflecting* the recommendations of the Dietary Guidelines for Americans, as Section 9(a)(4), 42 U.S.C. 1758(a)(4) requires.") (emphasis added).

Indeed, USDA was cognizant of the same considerations in 2012 as it was in 2018. Then, as now, it considered "student preferences and operational complexity," as Plaintiffs concede. Pls.' Br. at 23 n.8. This interpretation makes perfect sense with a requirement that the standards be consistent with the goals of the Guidelines, as the current text of 42 U.S.C. § 1758(f)(1) provides, but not one that requires absolutely consistency. Indeed, had USDA truly believed that the meal standards must "meet" the Dietary Guidelines, as Plaintiffs claim, *see* Pls.' Br. at 23, then the 2012 standards – which involve a long implementation process for sodium and a shorter implementation period for whole-grains – would have been improper, since the school standards would not be in compliance for years. USDA did not take that position back then, and nor has it changed its statutory interpretation now.

Second, Plaintiffs point out that in 2000 and 1995, USDA apparently did take the position that the school meal rules must correspond to the Dietary Guidelines. *See* 65 Fed. Reg. 26,904, 26,904 (May 9, 2000) (Since 1995, school lunches and breakfasts "must meet the Dietary

Guidelines"); 60 Fed. Reg. 31,188, 31,199 (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); *id.* at 31,192 (statutes "mandate compliance with the Dietary Guidelines"); *see also* Pls.' Br. at 23. But the reason for this different perspective was that the statutory landscape was different then. At that time, pursuant to the Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, 108 Stat. 4699 (1994), schools were required to "serve lunches and breakfasts under the programs that are *consistent with the Guidelines*." *Id.* § 106(b) (amending 42 U.S.C. § 1758(f)(2)(A)) (emphasis added). The current, operative statutory language requires that those schools serve meals that "are consistent *with the goals* of the most recent Dietary Guidelines for Americans." 42 U.S.C. § 1758(f)(1) (emphasis added); *see also* 60 Fed. Reg. at 31,193 (discussing legislative context). As discussed previously, these are two entirely different statutory standards. Accordingly, USDA did not change its interpretation of the same statutory language, rather, the statutory scheme itself changed, and USDA modified its interpretation, apparently well before 2012. *FCC v. Fox* does not prohibit such an action.

B. USDA Adequately Justified Its Change in Policy Position

While USDA's legal position about the requirements of the statute has not changed, USDA has recognized that, because of operational and other considerations, school authorities required additional flexibilities, and it thus modified the school meal requirements in the 2018 Rule. But USDA adequately justified its changed policy positions in the 2018 Rule. *Contra* Pls.' Br. at 24-25; *see also FCC v. Fox*, 556 U.S. at 515.

First, with respect to sodium, USDA "provide[d] schools . . . more time for gradual sodium reduction." 83 Fed. Reg. at 68,782. It justified this change based on several considerations: (1) the ongoing review of the DRIs for sodium undertaken by the National Academies, as well as the

imminent publication of the 2020 Dietary Guidelines, "which will inform the public on goals for long-term sodium reduction," (2) the concomitant need to "ensure that USDA has the time necessary to make any regulatory adjustments based on the most current scientific recommendations, including providing adequate notice to stakeholders of any such adjustments, (3) the benefits of providing "regulatory certainty [that] is essential to incentivize the food industry's efforts to support the service of wholesome and appealing school meals," (4) "practical reasons," including the fact that "many schools are not equipped for scratch cooking, which makes further sodium reduction challenging," as well as the need to "allow[] more time for product reformulation, school menu adjustments, food service changes, personnel training, and changes in student preferences." *Id.* at 63,783. These are sufficient reasons, grounded in the record, to justify the changes in policy position. *See FCC v. Fox*, 556 U.S. at 515.

Indeed, Plaintiffs have little specific objections to these explanations. First, they say that "the Department did not provide a reasoned explanation for the decision 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." Pls.' Br. at 24 (citing 77 Fed. Reg. at 4098). But, as discussed above, USDA provided multiple reasons for modifying the standards. Nor is "consistency" the relevant standard, *see supra*, and in any event, USDA's conclusion that schools needed more time to meet these standards is reasonable, and Plaintiffs offer no reason why it was flawed.

Plaintiffs also fault USDA for waiting until the then-ongoing review of sodium by the National Academies is complete and the 2020 Dietary Guidelines have been issued. *See* Pls.' Br. at 24. But this, too, is reasonable: "In retaining Target 2, USDA is recognizing the need for further sodium reduction," but wants to base any future adjustments on the "most current scientific

recommendations," which is certainly reasonable considering that Target 3 was not even intended to take effect until school year 2022. 83 Fed. Reg. at 63,783. Given the need for "certainty" in "food procurement and product reformulation agencies," *id.*, the agency's choice to wait until those scientific recommendations are complete before making disruptive changes in school meal standards was reasonable, and was certainly reasonably explained, as *FCC v. Fox* requires. Nor is *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018), to the contrary. *See* Pls.' Br. at 25. There, the D.C. Circuit stated that the EPA could not delay a rule based only on its stated desire to reconsider the rule. *Air Alliance*, 906 F.3d at 1067 ("[T]he mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated dates specifically chosen by EPA on the basis of public input and reasoned explanation.") Here, rather, USDA delayed the sodium standards – not the entire rule – based on the need to consider new scientific evidence, among other factors.

USDA similarly explained its whole grain policy. The agency justified the change based on the fact that nearly a quarter of school food authorities "submitted whole grain-rich exemption requests based on hardship," and that "it is not feasible to operate these nationwide programs in an ad hoc fashion, with recurrent exemptions, without giving operators and the food industry a workable regulatory solution that provides the long-term certainty they need for food procurement and product reformulation." 83 Fed. Reg at 63,781. Plaintiffs raise no objection to this conclusion. Instead, in a repeat of their statutory argument, they say that the 2012 Rule "characterized the 100 percent whole grain-rich standard as 'reflect[ing] the Dietary Guidelines' recommendation,'" and the "Department failed to explain how halving that requirement to only 50 percent could also be consistent with the Dietary Guidelines." Pls.' Br. at 25 (quoting 77 Fed. Reg. at 4094). But the 2012 Rule simply said that the grains requirement "still reflects the Dietary Guidelines' recommendation to *increase consumption of whole grains*," 77 Fed. Reg. at 4094 (emphasis

added), a goal consistent with USDA's 2018 language. *See* 83 Fed. Reg. at 63,781 ("USDA is mindful of commenters; concerns about the health and dietary habits of children, and agrees that schools should provide the healthiest foods possible. The whole grain-rich requirement in this final rule is a minimum standard, not a maximum, and reflects in a practical and feasible way the Dietary Guidelines' emphasis on whole grains consumption.").

C. USDA Has Neither Arbitrarily Relied on Factual Findings That Contradicted Previous Determinations Nor Has It Failed to Consider Reliance Interests

Next, Plaintiffs state that the USDA has relied on "contradictory factual findings." Pls.' Br. at 26. As support, Plaintiffs first argue that USDA had concluded in 2012 that the sodium Target 3 "will enable schools to offer meals that reflect" the 2010 Dietary Guidelines, while in 2018 it "suggest[ed] that Target 3 was not necessary for school lunches to 'reflect' the Dietary Guidelines." Pls.' Br. at 26. Not so – in 2018, USDA stated that "[o]ur intention is to ensure that sodium targets reflect the most current Dietary Guidelines for Americans and DRIs, are feasible for most schools, and allow them to plan appealing meals that encourage consumption and intake of key nutrients that are essential for children's growth and development." 83 Fed. Reg. at 63,783. It is entirely consistent to say that the 2012 Rule would reflect the 2010 Dietary Guidelines, but that USDA would take action (in the form of the 2018 Rule) to ensure that future standards would reflect the yet-to-be-published 2020 Guidelines. That is why it wanted to "refrain from setting sodium reduction goals beyond Target 2 until the DRI report and 2020 Dietary Guidelines are published and USDA has the opportunity to assess their impact on school meals." *Id.* Similarly, while Plaintiffs paraphrase the 2012 Rule as having "found that the 100 percent whole grain-rich requirement would 'reflect[] the Dietary Guidelines' recommendation . . . as . . .. all grains must be whole-grain,'" Pls.' Br. at 26 (quoting 77 Fed. Reg. at 4094), the focus of the 2012 Rule was "*to increase consumption of whole grains*," 77 Fed. Reg. at 4094 (emphasis added). That, too, is

consistent with the 2018 Rule, which also emphasizes increasing whole grain consumption: "The whole grain-rich requirement in this final rule is a minimum standard, not a maximum, and reflects in a practical and feasible way the Dietary Guidelines' emphasis on whole grain consumption." 83 Fed. Reg. at 63,781.

Finally, Plaintiffs fault USDA for not considering Plaintiffs' own "reliance interests" as advocacy organizations. Pls.' Br. at 26-27. They correctly note that an agency must provide a more detailed description "[w]hen its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox*, 556 U.S. at 515. But that doctrine normally applies to reliance by regulated parties that could be subject to new liability by a change in agency position. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see also MetLife, Inc. v. Financial Stability Oversight Council*, 177 F. Supp. 3d 219, 236 n.18 (D.D.C. 2016) ("serious reliance interests" are at play where a regulated party has relied on agency position "for years"). This makes sense, as a way of avoiding retroactivity concerns with respect to burdens imposed on such parties. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 746-47 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part) ("I take *Fox*'s position on reliance interests to be addressed to both fairness and efficiency. If a regulatory switch will significantly undercut the productivity and value of past investments, made in reasonable reliance on the old regime, rudimentary fairness suggests that the agency should take that into account in evaluating a possible switch."). But Plaintiffs are not regulated parties with respect to these rules, nor does it claim reliance interests of the nature discussed in *Encino* or *FCC v. Fox*. Indeed, their position is remarkable – that an agency must consider the impact on *advocacy organizations*, who might advocate differently, when the agency changes a policy. They offer no support for this position. Moreover, as a matter of fact, USDA did consider reliance interests, noting, for example, that

"[s]chools already offering all grains as whole grain-rich do not have to change their menus as a result of this final rule," thus addressing concerns for organizations who have already complied with the 2012 standards. 83 Fed. Reg. at 63,781.

IV. USDA Provided Adequate Notice and Opportunity to Comment on the 2018 Rule.

In the 2017 IFR and request for comments, USDA provided sufficient notice and opportunity to comment as to comply with the requirements of notice-and-comment rulemaking.

Under the APA, an agency is permitted to revise a Final Rule after initial publication of the proposed rule, so long as two criteria are met: "the changes in the original rule must be 'in character with the original scheme,' and a 'logical outgrowth' of the notice and comment already given." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (citation omitted). This doctrine does not require perfect alignment: an agency cannot publish a "final rule that finds no roots in the agency's proposal" or "was surprisingly distant from the agency's proposal." *Envt'l Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citations, quotation marks, and brackets omitted); *see also id.* (logical outgrowth is intended to prove agency from "us[ing] the rulemaking process to pull a surprise switcheroo on regulated entities."); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) ("[O]ur cases finding that a rule was not a logical outgrowth have often involved situations where 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."). The 2018 Rule satisfied these requirements.

A. Eliminating Sodium Target 3 Was a Logical Outgrowth of the 2017 IFR.

Plaintiffs first argue that the 2018 Final Rule's elimination of the Sodium Target 3 was not a logical outgrowth of the 2017 IFR. Pls.' Br. at 28-30. But the elimination of this target was

consistent with the IFR's recognition of the need for sodium flexibility, and thus the agency provided the notice and opportunity for comment that the APA requires.

The 2017 IFR stated that even though "nearly all schools have begun the process of reducing the sodium content of school meals," and "reaching this objective will likely require a more gradual process than the planned 10 years to accommodate the individual challenges of [school food authorities] and their access to new products lower in sodium." 82 Fed. Reg. at 56,708. The IFR went on to note that it would retain Sodium Target 1 for an additional year, and "[w]hile USDA anticipates retaining Sodium Target 1 as the regulatory limit in the final rule through at least the end of SY 2020-2021, the Department seeks public comments on the long-term availability of this flexibility and suggestions on how to best address the overall sodium requirement in school meals." *Id.* at 56,708-09. Finally, USDA noted that it will "reevaluate the sodium and other school meal requirements in light of the 2020 Dietary Guidelines." *Id.* at 56,709.

Plaintiffs' claim that the elimination of Target 3 was unforeseeable, given this disclosure, lacks merit. The agency made clear in the IFR that it did not consider the 2022 date for Target 3 standards to be workable. *See* 82 Fed. Reg. at 56,708. Thus, the public would have been on notice of the fact that the agency was considering altering those standards. The final determination therefore "[found] . . . roots in the agency's proposal." *Envt'l Integrity Project*, 425 F.3d at 996. Similarly, USDA said that it was open to "suggestions on how to best address the overall sodium requirement," and that it would reevaluate these requirements in light of the to-be-issued Guidelines. 82 Fed. Reg. at 56,708; *see also id.* at 56,705 (USDA stated that it would be guided by "the need for clarity and certainty regarding key requirements and flexibilities for the near term."). In light of these facts, eliminating Target 3, at least pending the issuance of the 2020 Dietary Guidelines, was foreseeable. It certainly was "in character with the original scheme," *i.e.*,

it delayed the implementation of certain requirements in light of the need for certainty, *Chocolate Mfrs.*, 755 F.2d at 1105, and it is not a situation where the final rule "finds no roots" or is "surprisingly distant" from the agency's original proposal. *Envt'l Integrity Project*, 425 F.3d at 996. USDA has been clear throughout about the need for delay, and why that delay was needed.

Indeed, USDA received comments about the elimination of Target 3 from both proponents of such an elimination *and* opponents. *See* AR 3534, 3538, 3582, 3609 (comments stating that Target 3 is unattainable); *see also* AR 3613 (commenter stating that "we reiterate our concern that the delay contemplated in this IFR may be used to effectuate an eventual, unacceptable rollback or elimination of the third and final phase of sodium reduction for school meals (Target 3) which is supposed to go into effect School Year 2022-2023."). Courts regularly find that a rule is a "logical outgrowth" when "[c]ommentators clearly understood" that a matter was under consideration, as seen by the fact that "the agency received comments on [the matter] from several sources." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004).

The case upon which Plaintiffs chiefly rely, the Fourth Circuit's decision in *Chocolate Manufacturers Association of United States v. Block*, 755 F.2d 1098 (4th Cir. 1985), illustrates how the 2018 Rule was a logical outgrowth of the 2017 IFR. There, USDA published a proposed rule specifying a maximum sugar content for cereal and juice that would be covered by certain federal programs, but "[n]either the rule nor the preamble discussed sugar in relation to flavoring in milk." *Id.* at 1101. The final rule, however, eliminated flavored milk from those federal programs, despite the fact that "[t]he proposed rule eliminated certain foods with high sugar content but specifically authorized flavored milk as part of the permissible diet." *Id.* at 1103. In other words, in *Chocolate Manufacturers* the agency had performed a "surprise switcheroo,"

Envt'l Integrity, 425 F.3d at 996, stating in the proposal that flavored milk was acceptable, and then changing course completely in the final rule. *See also CSX Transp.*, 584 F.3d at 1081 (final rule cannot reveal that the agency had "completely changed its position"). But here, by contrast, USDA had been explicit throughout the process about the need to delay sodium standards, including the final standards, and the reasons why it was doing so. Rather than a complete reversal, as in *Chocolate Manufacturers*, USDA's actions have been consistent, and "in character" throughout. That is all the APA requires.

B. The 2018 Final Rule's Treatment of the Whole Grain Rich Requirement Was a Logical Outgrowth of the 2017 IFR.

Similarly, the 2018 Final Rule's adoption of the fifty percent whole grain rich requirement (as opposed to extending state agency "discretion to grant an exemption from the whole grain-rich requirements," 82 Fed. Reg. at 56,708) was a logical outgrowth of the original IFR. In that IFR, USDA discussed the need to "offer whole grain-rich flexibility," so as to enable schools "to more effectively develop menus and procure foods that are acceptable to students." *Id.* It discussed the need for manufacturers and students to adapt to the whole-grain requirements. *See id.* The agency also made clear that it would be open to further consideration of the whole-grains requirement: "USDA will evaluate school and food industry progress over time and consider public comments in order to develop a final rule that address the whole-grain rich exemptions." *Id.*

Again, the public was on notice that USDA was considering changes to the whole-grain requirements in light of these operational considerations – of which the Final Rule's fifty percent requirement, which also responded "to challenges . . . with the purchase, preparation, or service of products that comply with the whole-grain rich requirement," was in character. *Id.* at 56,704; s*ee Envt'l Integrity*, 425 F.3d at 996. Indeed, in light of the premise that schools are having difficulties with the existing standards, made explicit in the IFR, and in light of the corollary premise that

flexibilities are necessary, also made explicit, the agency's conclusion that a permanent change to the standard (as opposed to continuing to allow for case-by-case exemptions, with the administrative difficulties such a process entails), is a reasonable derivation of the original proposal. And, like with the sodium modifications, commentators suggested the fifty-percent requirement, *see, e.g.*, AR 4497, 4501, 4525, 4537, 4944, indicating that they understood the change as a logical outgrowth of the IFR. *See Ne. Md. Waste Disposal Auth*, 358 F.3d at 952.

V. USDA Appropriately Responded to Public Comments

Finally, Plaintiffs fault USDA for allegedly failing to respond to public comments. Although agencies must respond to "significant comments," *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015), this obligation is "not 'particularly demanding.'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C. Cir. 2012) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)) "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Pub. Citizen, Inc.*, 988 F.2d at 197 (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)); *cf. Simpson v. Young*, 854 F.2d 1429, 1435 (D.C. Cir. 1988) ("The agency need only state the main reason for its decision and indicate that it has considered the most important objections."). Plaintiffs raise four specific objections, but the agency adequately responded to all of these comments.

First, Plaintiffs argue that USDA ignored the health consequences caused by "delaying or weakening nutrition standards." *Id.* But USDA acknowledged and responded to these concerns. With respect to whole-grains, it stated explicitly that it "is mindful of commenters' concerns about the health and dietary habits of children, and agrees that schools should provide the healthiest foods possible," and that "[t]he whole grain-rich requirement in this final rule is a minimum

standard, not a maximum, and reflects in a practical and feasible way the Dietary Guidelines' emphasis on whole grains consumption." 83 Fed. Reg. at 63,781. And with sodium, USDA explicitly acknowledged the "concern that sodium flexibility will lead to negative health effects in children," *id.* at 63,782, but balanced those concerns against the need to "ensure that sodium targets reflect the most current Dietary Guidelines for Americans and DRIs, are feasible for most schools, and allow them to plan appealing meals that encourage consumption and intake of key nutrients that are essential for children's growth and development." *Id.* at 63,783; *see also id.* ("The final rule balances nutrition science, practical application of requirements, and the need to ensure that children receive wholesome and appealing meals.").

Second, Plaintiffs point out that USDA received comments about whether the rule would have a disproportionate impact on low-income and minority students. Pls.' Br. at 33-34. But as they acknowledge, USDA reviewed the rule for precisely those concerns in a fourteen-page Civil Rights Impact Analysis and concluded that "this rule is not expected to limit or reduce the ability of protected classes of individuals . . . or have a disproportionate adverse impact on the protected classes." 83 Fed. Reg. at 63,788; *see also* AR 3172-3185. The Impact Analysis also considered the impact on low-income students. *See* AR 3178-79. Plaintiffs, notably, raise no objection to that Impact Analysis's conclusion, despite the fact that it is part of the administrative record. *See* Pls.' Br. at 34.

Third, Plaintiff states that USDA ignored suggestions for alternate approaches, such as training and technical assistance, that could be used instead of changing the whole-grain and sodium standards. Pls.' Br. at 34. But USDA acknowledged those suggestions, *e.g.*, 83 Fed. Reg. at 63,781 ("Rather than exemptions, several commenters recommended that USDA provide

additional training and technical assistance."), and, indeed, stated that it "will continue to provide training and technical assistance," *id.*, as a supplement to the policy choices.

Finally, Plaintiffs say that USDA disregarded comments that schools and manufacturers did not need additional time to comply or create new foods. Pls.' Br. at 34-35. Again, however, USDA considered that such time *was* required, particularly in light of comments by the School Nutrition Association, the number of whole grain-rich exemption requests it received, as well as comments from state agencies themselves. 83 Fed. Reg. at 63,781, 63,783; *see also* AR 3227. USDA therefore complied with the limited burden the APA imposes here. *See Ass'n of Private Sector Colls. & Univs*, 681 F.3d at 441-42.

CONCLUSION

This Court should grant Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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