

**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

**BRIEF FOR AMICI CURIAE THE STATES OF NEBRASKA, ALABAMA,
INDIANA, KANSAS, LOUISIANA, OKLAHOMA, TEXAS, AND UTAH IN
SUPPORT OF THE DEFENDANTS**

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici are the States of Nebraska, Alabama, Indiana, Kansas, Louisiana, Oklahoma, Texas, and Utah (“The States”). The States administer the National School Lunch Program and School Breakfast Program within their jurisdictions and have an interest in the federally mandated nutrition requirements for school lunches and breakfasts administered in their states.¹ The “Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirement” Final Rule, 83 Fed. Reg. 63,775 (Dec. 12, 2018) (“2018 Rule”), directly affects those interests.

In 2012, the U.S. Department of Agriculture (“Department”) promulgated “Nutrition Standards in the National School Lunch and School Breakfast Programs” Final Rule, 77 Fed. Reg. 4,088 (Jan. 26, 2012) (“2012 Rule”). The 2012 Rule required schools participating in the school lunch and breakfast programs to meet new federally mandated nutrition requirements. Relevant here, the 2012 Rule imposed phased requirements for sodium and whole grains. For sodium, schools were required to meet Target 1 by July 1, 2014, Target 2 by July 1, 2017, and Target 3 by July 1, 2022.² 2012 Rule at 4,147. For whole grains, schools were required to offer half of all grains as whole grain-rich for fiscal years 2012 to 2014 and all grains as whole grain-rich thereafter. *Id.* at 4,123. Subsequent to the 2012 Rule, there were a number of

¹ Although this amicus brief focuses on the impact of the 2012 Rule’s sodium and whole grain requirements on the school lunch program, these impacts are also applicable to the school breakfast program.

² Target 1 required sodium reductions to 1,230 mg for kindergarten through fifth grade, 1,360 mg for sixth grade through eighth grade, and 1,420 mg for ninth grade through twelfth grade. 2012 Rule at 4,147. Target 2 required sodium reductions to 935 mg for kindergarten through fifth grade, 1,035 mg for sixth grade through eighth grade, and 1,080 mg for ninth grade through twelfth grade. *Id.* Target 3 required sodium reductions to 640 mg for kindergarten through fifth grade, 710 mg for sixth grade through eighth grade, and 740 mg for ninth grade through twelfth grade. *Id.*

administrative and legislative actions allowing flexibility from the 2012 Rule requirements. *See* 2018 Rule at 63,781.

The 2018 Rule modified the federally mandated nutrition requirements for sodium and whole grains in the 2012 Rule.³ For sodium, the 2018 Rule retained Target 1 through the end of the 2023-2024 school year, delayed the start date for Target 2 to 2024-2025 school year, and eliminated Target 3. 2018 Rule at 63,776. For whole grains, the 2018 Rule retained the requirement that half of all grains be whole grain-rich and removed the exemption or waiver process. *Id.*

The States have an interest in sustaining the 2018 Rule. Not only do the States administer the school lunch and breakfast programs within their jurisdictions, but also have responsibility for the education and nutrition of their students.⁴ The 2018 Rule reflected important policy considerations for state and local administration of school lunch programs. The changes to the sodium and whole grain requirements provide much needed operational flexibility for schools and reduce the administrative burden on school lunch programs. This operational flexibility is a paramount concern of schools that are tasked with creating a successful educational environment for their students, often in challenging budgetary circumstances. Needlessly onerous federal nutrition requirements should not stand in the way of state and local decisions about how best to educate and provide nutrition for their students.

³ The 2018 Rule also addressed the milk requirement, but it is not being challenged by Plaintiffs.

⁴ In Nebraska in 2017, 333,002 students had access to meals through the National School Lunch Program, with 68 percent of the school children to whom the program was available participating. *See* www.education.ne.gov/ns/nslp/overview.

As demonstrated below, the federal nutrition requirements in the 2018 Rule are a reasonable measure aimed at balancing state and local interests and student nutritional concerns. First, the 2012 Rule's sodium and whole grain-rich requirements created administrative and operational challenges from the state-level to the student-level. The 2018 Rule alleviates some of these challenges, especially those associated with reducing sodium beyond Target 1 and offering the all whole grain-rich items. Second, as the 2018 Rule recognizes, the federally mandated nutrition standards are a floor, not a ceiling. States may impose nutrition requirements over and above the federally mandated standards. Likewise, schools are free to make similar decisions within their school lunch programs. Third, the Department properly recognized and accounted for these challenges in promulgating the 2018 Rule. The Department is free to change policy from a prior administration provided it has good reasons for its decision to do so. Because the Department properly considered and responded to the challenges created by the 2012 Rule, this Court should uphold the 2018 Rule.

ARGUMENT

I. The 2018 Rule Properly Provides Flexibility for School Lunch Programs.

The 2018 Rule struck a reasonable balance between providing flexibility to States administering and schools operating the school lunch and breakfast programs and maintaining important nutrition requirements for students. Proper nutrition is an essential component of creating a successful educational environment. Nutritional efforts are ineffective, however, if students will not accept the food. The flexibility

provided by the 2018 Rule was necessary for schools that experienced difficulties with sodium and whole grain requirements in the 2012 Rule, including food preparation challenges, decreased student acceptance of compliant foods, and increased administrative burden. These difficulties would be exacerbated if sodium Target 2, and especially Target 3, were implemented and the all whole grain requirement was continued. The 2018 Rule properly took into account these difficulties for schools caused by in the 2012 Rule's sodium and whole grain requirements.

The 2018 Rule properly recognizes that the sodium and whole grain requirements in the 2012 Rule created on-the-ground difficulties in applying the requirements in the lunchroom. The requirement that half of all grains must be whole grain-rich has made menu planning challenging because some foods are simply difficult to make in a lunchroom setting with whole grain-rich ingredients.⁵ In addition, schools have faced substantial obstacles in getting students to accept the whole grain-rich foods. *See School Nutrition Association, 2019 School Nutrition Trends Report*, at iii (“Student acceptance remains the most significant barrier by a wide margin across all segments, even among districts with 100% [whole grain-rich] content.”).⁶ Although some schools have had success gradually adapting whole grain-rich recipes, considerable challenges persist in finding acceptable whole grain options

⁵ MGS-004551 (Emily Hanlin, Private Citizen, commenting: “In addition to student preference, there are issues with the ability of whole grain products to retain quality when having to be hot held for service. Whole grain pasta is a great example of this which is a main reason why there are a high number of exemption waivers for this product. Even when slightly undercooked and cooked in batches it can become a sticky mess by the time meal service is complete. It cannot be reheated and therefore causes increased kitchen waste for noodles not selected by students.”).

⁶ Available at: http://schoolnutrition.org/uploadedFiles/6_News_Publications_and_Research/8_SNA_Research/2019-school-nutrition-trends-summary.pdf (last accessed Sept. 6, 2019).

for some popular foods. *See, e.g.*, U.S. Gov’t Accountability Office, GAO-15-656, USDA Has Efforts Underway to Help Address Ongoing Challenges Implementing Changes in Nutrition Standards, at 20 (Sept. 2015) (“GAO Report”) (discussing school efforts to use white whole wheat flour and to mix whole grains with other foods). For example, waivers were sought for several years in a row for pizza crust, flour tortillas, and pasta in Nebraska.⁷ Whole grain pasta is not popular among students because of its dark color and because it does not hold its shape well.⁸ Other common foods like biscuits have not worked well with whole grains either.⁹

Regional preferences are also a challenge for schools complying with the whole grain requirement. *See* 2018 Rule at 63,780 (describing comments stating difficulties in creating whole grain versions of regional products, such as “grits in the South”); Comment of School Nutrition Association, January 19, 2018 (MGS-003227), (“A majority of school meal programs struggle with students’ regional and cultural

⁷ In Nebraska, waivers were granted for “Pasta, buns, dinner rolls, sandwich bread, flour tortillas, pizza crust” (2016, MGS-003147); “Pizza Crust, Crackers, Pasta, Cinnamon Rolls, Flour Tortillas, Brown Rice,” (2017, MGS-003153); “Pizza Crust, Crackers, Pasta, Cinnamon Rolls, Flour Tortillas, Brown Rice,” (2018, MGS-003158). Other states granted schools waivers for the same or similar items. *See* MGS-003133 to 003159.

⁸ *See, e.g.*, Kelsey Stewart, *What’s for Lunch at school? Metro area districts emphasize fresh food, letting students choose*, Omaha World-Herald, August 6, 2017, https://www.omaha.com/livewellnebraska/nutrition/what-s-for-lunch-at-school-metro-area-districts-emphasize/article_e7e40152-df22-5b6f-b8c6-10e702f2d6d0.html (“[T]he district is axing whole-grain pasta, which drew complaints from students. The main gripe was its dark coloring,” Yarmon said.); Margaret Reist, *Nebraska schools complying with first lady’s school lunch standards*, Lincoln Journal Star, June 17, 2014, https://journalstar.com/news/local/education/nebraska-schools-complying-with-first-lady-s-school-lunch-standards/article_26a12879-c67d-597b-8e9f-fb301da750e4.html (“Everyone agrees on this, that the manufacturers really need to work on a recipe where the pasta doesn’t disintegrate,” she said. “It just doesn’t hold its shape.”).

⁹ MGS-004528 (Sharon Robertson, School Personnel, commenting: “I have tried in vain to find a whole grain rich biscuit that is acceptable to students, but they just toss them in the garbage.”); MGS-004888 (Jenny Bethel, Director of Child Nutrition, commenting: “I highly doubt a whole grain biscuit will ever be acceptable by a student.”).

preferences for specific refined grains such as [sushi] rice, pasta, grits or tortillas.”). Considering the difficulties with preparation, student acceptance, and the variable impact on regional cuisine, the all whole grain-rich requirement under the 2012 Rule would be particularly difficult to implement as a blanket rule.

Similarly, schools have had considerable difficulty implementing the sodium requirements in the lunchroom. Although many schools are now compliant with sodium Target 1, even Target 1 caused problems with student acceptance. See GAO Report, at 22. Implementing Target 2 and Target 3 sodium reduction requirements would exacerbate this problem considerably. See School Nutrition Association, 2017 School Nutrition Trends Report, at iii (finding many school districts are “concerned” or “very concerned” about meeting future sodium limits and still providing food acceptable to students); Margaret Reist, *School lunches may get tastier after rules eased*, Lincoln Journal Star, December 18, 2014 (In Nebraska, Dr. John Skretta noted that, “Your food school people want to be able to offer students a range of choices that include healthy alternatives that are also tasteful. . . . That can be a challenge if you almost entirely eliminate salt.”).¹⁰ Moreover, Target 2 and Target 3 would be difficult for schools to implement because sodium is simply hard to reduce in some products, particularly when the products contain natural sodium levels or products for which sodium is an important component. See, e.g., National Restaurant Association Summary, May 2015 (MGS-007865) (describing the function of sodium in common

¹⁰ School Nutrition Association report available at: http://schoolnutrition.org/uploadedFiles/Resources_and_Research/Research/2017-Trends-Report-Summary.pdf (last accessed Sept. 6, 2019); Lincoln Journal Star article available at: https://journalstar.com/news/local/school-lunches-may-get-tastier-after-rules-eased/article_3c448019-5c97-5aab-96e5-938aa285530c.html.

foods); Comment of School Nutrition Association, January 19, 2018 (MGS-003227-003228) (“Naturally occurring sodium present in meat, milk and other low-fat dairy foods will force schools to take nutritious choices off the menu, and drive more students away from healthy school meals.”).

The 2018 Rule also recognizes difficulties of implementing the increased nutrition requirements at an administrative level. In addition to the difficulties described above in preparing whole grain-rich and low sodium meals (which is more demanding on staff), product availability remains a concern. School Nutrition Association, 2019 School Nutrition Trends Report, at iii (“[P]roduct availability is . . . a significant barrier: 30% of the 100% [whole grain-rich] content districts cite it as their most significant barrier, versus fewer than 10% among the districts with a lower [whole grain-rich] content. Product availability also shows heightened importance among the smallest districts where it is cited by 18.7% as the most significant barrier.”). In addition, some schools identified increased costs as a result of the increased nutrition requirements.¹¹ Although the waiver process sought to ease some of the operational challenges, the waiver process itself was burdensome for schools and states and caused regulatory uncertainty.¹² Across the country, many schools

¹¹ Higher costs were identified for both future increased sodium limits and for the all whole grain-rich requirement. See School Nutrition Association, 2017 School Nutrition Trends Report, at iii (“Higher costs were identified as a challenge [in meeting future sodium limits] by over 63.6% of districts [surveyed]. Smaller sized districts tended to identify this challenge more frequently.”); *id.* at iv (“Higher costs are a strong secondary factor with more than half [of the districts surveyed] identifying it as a challenge [to meeting the all whole grain-rich requirement].”).

¹² See 2018 Rule at 63,780 (“Commenters noted that they found the exemption process too burdensome, and felt that a more flexible regulatory requirement would be simpler than extending the existing process.”); see also MGS-004539 (Jonathan Padia, Colorado Department of Education, Office of School Nutrition, commenting: “However, the current waiver process, which requires SFAs

sought waivers from the whole grain requirement if the waiver was allowed in their state.¹³ See MGS-003159 (4,124 waivers for whole grains in 2017-2018 school year); MGS-003149 (2,765 waivers for whole grains in 2016-2017 school year); MGS-003143 (2,487 waivers for whole grains in 2015-2016 school year). In Nebraska, a significant number of waivers have been requested since 2015. See MGS-003158 (132 waivers for whole grains in the 2017-2018 school year); MGS-003147 (204 waivers for whole grains in the 2016-2017 school year); MGS-003141 (190 waivers for whole grains in the 2015-2016 school year). By retaining the half whole grain-rich requirement, the 2018 Rule provided regulatory certainty and alleviated the burden on schools and states created by the waiver process.

Moreover, the challenges created by the 2012 Rule were foreseeable. As the Institute of Medicine Report noted, “Decreased student acceptance could lead to the consumption of poorer quality diets by students, either by switching from school meals to a la carte meals, food from vending machines or school stores, off-campus meals, or food from home.” Institute of Medicine Report – School Meals, Building Blocks for Healthy Children (MGS-008079). To the extent the 2012 Rule envisioned solving student palatability concerns by phasing in the requirements, particularly

[school food authorities] to demonstrate hardship due to the service of whole grain-rich products, creates an administrative burden for both SFAs and SAs [state agencies].”); MGS-004426 (Michelle Martucci, RD, LDN, commenting: “The waiver is cumbersome and confusing to keep track of.”); MGS-00424 (Kristen Brewer, School Personnel, commenting: “Currently SFA’s having to fill out a waiver request to our state agencies in order to provide non whole grain rich products in their schools. We are required to provide documentation on these items. Many school districts in our area are receiving rejection letters because they have not provided enough documentation. This is quite a burden on our school districts to require us to do this, and we will be required to refile every year.”).

¹³ Some jurisdictions did not allow waivers from the whole grain requirement, such as Guam, Montana, Rhode Island, and Vermont for the 2017-2018 school year. See MGS-003155 to 003159.

the sodium reduction requirements, the effort has been hindered because it does not account for the foods that students regularly consume outside of school.¹⁴ If students are used to eating higher sodium foods at home, phasing in sodium reductions at school will not change their perceptions of the food as bland.¹⁵ Given palatability concerns with the Target 1 sodium requirement and in some whole grain products, implementing the Target 2 and Target 3 sodium limits and the all whole grain-rich requirement would threaten to decrease student acceptance further, increase waste, and potentially decrease school lunch participation, often for less healthy options.

These challenges demonstrate a key point recognized by the 2018 Rule – decisions about the particulars of school lunches should be made by the schools responsible for those students as part of their broader obligation to create a successful educational environment. The 2012 Rule needlessly spiked nutrition requirements and took leeway away from the States and schools who are in the best position to understand the dietary needs of a given student population, the administrative capacity necessary to operate the lunch program, and the place of nutrition in the

¹⁴ Grant Gerlock, *A Matter of Taste: Why Congress May Back Off New School Lunch Standards*, KCUR, May 2, 2016, <https://www.kcur.org/post/matter-taste-why-congress-may-back-new-school-lunch-standards#stream/0> (“Unfortunately, the thing that makes an impact on [acceptance of low sodium foods] is what we’re doing at home,” Maendele said. “So until the industry can catch up and get the at-home food that people buy to be on the same wavelength, then I think that’s going to be a challenge.”); see also Kate Murphy, *Why Students Hate School Lunches*, New York Times, September 26, 2015, <https://www.nytimes.com/2015/09/27/sunday-review/why-students-hate-school-lunches.html> (“We lost 15 percent of our revenue when we started putting the Healthy, Hunger-Free Kids Act into place,’ said Chris Burkhardt, director of child nutrition and wellness at the Lakota Local School District in southwestern Ohio. ‘I talk to P.T.O. and P.T.A. groups and ask how many serve only whole grains and low sodium foods at home and maybe one hand goes up,’ adding that he’s not convinced that person was telling the truth.”).

¹⁵ See, e.g., Murphy, *supra* note 14 (“It’s harder to change preferences than to form them,’ said Leann Birch, a development psychologist at the University of Georgia in Athens. ‘The reality is kids learn to eat what their parents eat, and if kids are getting something different at school, then it’s not surprising they aren’t eating it.”).

broader context of the educational environment. For these reasons, as explained in the 2018 Rule, keeping Target 1 and the half whole grain-rich requirements, postponing Target 2, and removing Target 3 and the all whole grain-rich requirements were reasonable and an informed effort to respond to challenges that became evident when schools began implementing the 2012 Rule's sodium and whole grain requirements. This Court should uphold the 2018 Rule and thereby preserve the State and schools' interests in the education and nutrition of their students.

II. The 2018 Rule is a Nutritional Floor, Not a Ceiling.

The 2018 Rule establishes reasonable minimum nutrition requirements for schools participating in the school lunch program. As the Department recognizes, states and schools are free to exceed these standards, and many of them do. *See* 2018 Rule at 63,777 (“It is important to note that schools are not required to change their menus and can choose whether or not to use the flexibilities this rule provides.”); *id.* at 63,781 (“Schools already offering all grains as whole grain-rich do not have to change their menus as a result of this final rule.”). States and schools are in the best position to understand the needs of their student populations and the operational constraints that make some options more onerous than others. The 2018 Rule allows schools to continue to use the reduced sodium and whole grain-rich foods that have been successfully implemented without being subjected to the onerous increased requirements that have caused problems.

Some schools are already exceeding the minimum nutrition requirements. For example, according to the Student Nutrition Association’s 2019 School Nutrition

Trends Report, 91% of districts surveyed “will exceed the one-half minimum mandate for the upcoming school year,” more than 70% of districts “report[] that about three-quarters or more of the grains offered with school meals will be whole grain-rich,” a “plurality of districts (38.6%) report their [whole grain-rich] proportion will be greater than three-quarters, but not all of their grains,” and “15.4% report all of their grains will be [whole grain-rich].” School Nutrition Association, 2019 Student Nutrition Trends Report, at iii. In the schools exceeding the minimum requirements, it is likely that they will continue to use the whole grain-rich products that they have found to be successful.

In addition, schools regularly seek ways to expose their students to nutritious food. School lunch programs often strive, regardless of federal mandates, to educate students about how to make healthy dietary choices on their own. In Lincoln, Nebraska, for example, Lincoln Public Schools has recently begun promoting healthier eating habits by instituting a MealViewer program that provides nutritional information about meals served, allowing parents and students to make informed decisions about their school lunches, as well as meals outside of school. *See* Ellis Wiltsey, *LPS nutritional services aims to make meal planning easier*, 10/11 News, August 13, 2019.¹⁶ Popular programs also seek to educate students about healthy products produced locally, with an aim toward helping students make healthy dietary decisions outside school. In Nebraska, many schools take advantage of the Nebraska Department of Education’s “Nebraska Thursdays” initiative, a

¹⁶ Available at: <https://www.1011now.com/content/news/LPS-nutritional--539220821.html>.

statewide program where schools serve a meal with Nebraska-sourced ingredients to students on the first Thursday of each month.¹⁷ Other schools similarly source local products through separate initiatives.¹⁸

The 2018 Rule establishes a nutritional floor for schools across the nation, allowing States and schools to voluntarily exceed Target 1 (and Target 2 when implemented) and the half whole grain-rich requirements. Many schools already do. Additionally, the 2018 Rule allows States and schools to continue their own efforts to increase student nutrition and to equip students with the skills to continue those healthy eating habits. Onerous federal requirements are not necessary to ensure that students receive proper nutrition at school.

III. The Department Provided A Reasoned Explanation For Its Change In Policy.

Because the 2012 Rule has caused significant operational difficulties for schools, the Department properly considered these concerns in formulating the 2018 Rule. “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In changing policy, a federal agency “need not demonstrate to a

¹⁷ See, e.g., Niyah Gonzalez, *A Healthier Generation: Nebraska Thursdays teach kids to make healthy food choices*, KETV, September 6, 2018, www.ketv.com/article/nebraska-Thursdays-teach-kids-to-make-healthy-food-choices/23013547 (“The program brings locally grown food from Nebraska farms to school lunch tables around the metro.”); “Nebraska Thursdays: Eating Local Foods,” home.lps.org/ns/meal-promotion-activities/ (“Each month the LPS menu features NEBRASKA THURSDAY with items produced in or around Nebraska, including fresh chicken, seasonal produce such as watermelons or cantaloupe, whole grain flour, and GMO-free milk. Nutrition Services works year round to find locally grown products from Nebraska or surrounding states.”).

¹⁸ See, e.g., Andy Raun, *More area schools gaining beef boosters*, Hastings Tribune, April 3, 2019, http://www.hastingstribune.com/news/more-area-schools-gaining-beef-boosters/article_d09a8886-5a36-11e9-a845-4f0092665e6c.html (discussing a Beef in Schools program used in several schools).

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 causes for it, and that the agency believes it to be better which the conscious change of course adequately indicates.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Even where an agency contradicts prior factual findings which underlay a policy, only “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.* By acknowledging the operational difficulties that have become manifest since the 2012 Rule went into effect, the Department has met this burden.

The Department’s action in this case is within the scope of the guidelines set forth by the Supreme Court for changing course. The Department engaged in reasoned decision-making based on information about administrative and operational challenges with implementation of the 2012 Rule. The Department was within its power to consider the feasibility of the prior phased nutrition requirements and modifying those requirements in response to the information about implementation. The 2018 Rule is replete with explanations for why the Department was making the changes therein, including program flexibility and policy predictability. *See, e.g.*, 2018 Rule at 63,781 (half whole grain requirement is “highly achievable, supported by the School Nutrition Association, and provides exceptional flexibility for local operators in planning wholesome and appealing meals”); *id.* (“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.* at 63,786-63,787 (explaining why flexibility is necessary for the sodium and whole grain requirements). The Department also considered the Dietary Guidelines when formulating the 2018 Rule. *See, e.g.*, 2018 Rule at 63,781 (discussing the Dietary Guidelines’ emphasis on whole grains consumption); *id.* at 63,783 (discussing extending the Target 1 sodium requirements to allow for the 2020 Dietary Guidelines to be published). Importantly, the 2018 Rule recognized that the amendments merely altered the minimum nutrition requirements and that “schools are not required to change their menus and can choose whether or not to use the flexibilities this rule provides.” 2018 Rule at 63,777.

It is also important to note that there are few reliance interests at issue in this matter. In the case *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), the Supreme Court emphasized the importance of a full explanation when there are substantial reliance interests at stake. In that case, a Department of Labor regulation threatened to impact car dealership employees who had “negotiated and structured their compensation plans” under the prior rule, potentially causing “systemic, significant changes to the dealerships’ compensation arrangements.” *Id.* at 2126. Contrary to the claims of the Plaintiffs, reliance interests like those described in *Encino Motorcars* are not implicated here. As described above, because the 2018 Rule changes the minimum nutrition requirements, any states that have imposed stricter standards or schools that have exceeded the minimum levels are free to continue to

do so. Changing the minimum nutrition requirements will not affect the nutritional efforts in those schools. It merely provides additional flexibility to schools that need it and regulatory predictability to the process.

The Department is free to change its policy and has met the Supreme Court's guidelines for doing so. In departing from past policy, the Department provided sufficient reasons for making the changes and thus the 2018 Rule should be upheld as a proper agency action.

CONCLUSION

The 2018 Rule properly addressed and alleviated some of the challenges stemming from implementation of the 2012 Rule, including difficulties with food preparation, decreased student acceptance, problems with product availability, cost, and administrative burden on schools. By setting a reasonable nutritional floor, the 2018 Rule strikes a proper balance between ensuring that students receive nutritious food and ensuring that schools are able to meet the requirements even where the size, budget, or setting of the school may present unique challenges. The Department's change in policy was thoroughly explained and supported by the record. In sum, the 2018 Rule was properly promulgated, reflects important policy considerations for States and schools, and should be upheld.

DATED this 6th day of September 2019.

Respectfully submitted,

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**Pro hac vice* motion pending

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I filed the foregoing document with the Clerk of the Court by CM/ECF, which automatically sent notice of the filing to all counsel of record.

/s/ John R. Garza
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