Attachment 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PROPOSED BRIEF OF *AMICI CURIAE* AMERICAN HEART ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, FOODCORPS, INC., MOMSRISING EDUCATION FUND, AND NATIONAL EDUCATION ASSOCIATION

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INTORDUCTION

Lawmakers, scientists, parents, teachers, and public health advocates—including *amici curiae* American Heart Association ("AHA"), American Public Health Association ("APHA"), FoodCorps, Inc. ("FoodCorps"), MomsRising Education Fund ("MomsRising"), and National Education Association ("NEA")—have long known that school meals play a critical role in promoting children's health and academic performance, preparing them for life-long success. In 2018, the National School Lunch Program provided about 5 billion lunches to 30 million children in 100,000 schools,[1] while the School Breakfast Program provided about 2.5 billion breakfasts to 14 million children in 90,000 schools.[2] All children benefit from nutritious school meals, especially the most vulnerable. In 2018, about 75% of school lunches and 85% of school breakfasts were provided free or at a reduced price to children living in low-income households.[3]

Congress has repeatedly and unambiguously directed the U.S. Department of Agriculture ("USDA"), which administers the school lunch and breakfast programs, *see, e.g.*, 42 U.S.C. § 1753(b)(3)(A), to ensure that nutrition standards for school meals reflect up-to-date and reliable science. *See* Argument, Section I, *infra*. Nutrition science shows that most children consume too much sodium and not enough whole grains, putting them at risk of serious health problems. *See* Argument, Section II, *infra*. In addition, social science demonstrates that nutritious school meals help all children learn healthy eating habits and succeed academically. *See* Argument, Section III, *infra*. Accordingly, in 2012, USDA established nutrition standards for

[1] USDA, *National School Lunch Program* (Aug. 20, 2019), https://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/national-school-lunch-program/.
[2] USDA, *School Breakfast Program* (Aug. 20, 2019), https://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/school-breakfast-program/.
[3] *See supra* notes 1 & 2.

school meals that mandated gradual reductions in sodium content and increases in whole grains. *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088-01, 4093–94, 4097–98 (Jan. 26, 2012) ("2012 Regulation").

In 2018, USDA issued a new rule that weakened nutrition standards for school meals by extending the 2012 Regulation's timeline for sodium reduction and eliminating the final sodium reduction target, which would have brought school meals into alignment with science-backed guidelines, and allowing schools to offer fewer whole grains than experts recommend. *See* Child Nutrition Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63,775-02 (Dec. 12, 2018) (codified at 7 C.F.R. pts. 210, 215, 220, 226) ("Rollback Rule").[4] Under the Rollback Rule, school lunches could contain nearly *50% more* sodium than scientists consider safe and *only half* the recommended amount of whole grains. Because the Rollback Rule threatens children's health and wellbeing, AHA, APHA, FoodCorps, MomsRising, and NEA respectfully submit this *amicus* brief in support of Plaintiffs Center for Science in the Public Interest and Healthy School Food Maryland.

INTEREST OF *AMICI CURIAE*

Amici AHA, APHA, FoodCorps, MomsRising, and NEA are public-interest organizations that work closely with students, parents, and decision-makers to promote children's health.

Amicus **American Heart Association** is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke, the two leading causes of death worldwide. In partnership with millions of volunteers and supporters, AHA funds innovative scientific research, fights for stronger public health policies, and provides lifesaving tools and information to prevent and treat disease. AHA recognizes that strong nutrition policies are

[4] The Rollback Rule also eliminated a restriction on low-fat flavored milk. *See id*. at 63,778–80.

critical to children's health. Accordingly, AHA works with policy-makers at all levels to ensure that every child has access to nutritious school meals that include appropriate amounts of sodium and whole grains. Through these efforts, AHA seeks to help kids develop life-long healthy eating habits and reduce their risk of diet-related illnesses, including heart disease and stroke.

***Amicus* American Public Health Association** champions the health of all people and all communities, strengthens the public health profession, shares the latest research and information, promotes best practices, and advocates for evidence-based public health policies. APHA represents over 25,000 individual members, including individuals working in every discipline of public health, in every U.S. state and in countries across the globe. APHA is the only organization that combines a nearly 150-year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health. APHA recognizes that access to healthy meals—including nutritious school breakfasts and lunches—is critical for individuals to reach their full health potential. Accordingly, APHA supports policies and programs that enable and promote positive food choices, beginning at the earliest stages of life.

***Amicus* FoodCorps, Inc.** connects kids to healthy foods in schools, so they have the nourishment they need to thrive in the classroom and beyond. FoodCorps serves small rural schools, large urban school districts, and many schools in between, partnering with local leaders to provide hands-on lessons that help kids grow, cook, and taste healthy food. To build on the impact of its service in schools, FoodCorps forges networks to advance non-partisan, evidence-based policy solutions that, over time, have the potential to improve access to healthy food for all 100,000 schools in the United States.

***Amicus* MomsRising** is a grassroots multicultural organization with more than one million members, working to achieve economic security for all moms, women, and families in

the United States. MomRising and its members organize and speak out to improve public policy and change the national dialogue on critically important issues. MomsRising recognizes that children consume a significant portion of their daily calories at school, and children thrive when schools serve healthy foods. Accordingly, MomsRising educates and mobilizes parents and caregivers across the country in support of healthy school food. In particular, MomsRising has long fought—and continues to advocate—for adequate nutrition standards for school meals.

***Amicus* National Education Association** is the nation's largest professional association representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation's public schools. NEA's members interact with students throughout their school days—from the bus stop to after-school programs and everything in between—and many of NEA's members prepare and serve meals to students in our schools. NEA has long advocated for publicly funded school meals that are nutritionally sound, appealing, and affordable, because NEA and its members understand that nutritionally sound school meals are vital in fighting childhood hunger, promoting lifelong health and wellness, and preparing our students to learn. For too many of our students, school meals are the only meals they can count on, and a hungry or unhealthy child cannot learn up to his or her potential. Thus, it is critical that school meal programs be based on sound nutrition science.

ARGUMENT

Courts and agencies must adhere to Congress's unambiguous intent. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). As described below, Congress directed USDA to rely on sound science in developing nutrition standards for school meals. But the Rollback Rule directly conflicts with scientific recommendations, putting children's health at risk. Therefore, the Rule is unlawful. The Rule is also unlawful because it impedes the clear purpose of multiple laws intended to help children learn and succeed. *See id*. at 844.

I. School Nutrition Standards Must Reflect Sound Nutrition Science.

Since the mid-twentieth century, Congress has consistently required—and repeatedly reiterated—that school meals must reflect sound nutrition science.[5] In 1946, Congress enacted the National School Lunch Act ("School Lunch Act") "to safeguard the health and well-being of the Nation's children" by subsidizing school lunches. Pub. L. No. 79-396, § 9, 60 Stat. 230, 233 (1946) (codified at 42 U.S.C. § 1751). Twenty years later, in 1966, Congress established a subsidized school breakfast program through the Child Nutrition Act, "[i]n recognition of the demonstrated relationship between food and good nutrition and the capacity of children to develop and learn." Pub. L. No. 89-642, § 2, 80 Stat. 885, 885 (1966) (codified at 42 U.S.C. § 1771). Both the School Lunch Act and the Child Nutrition Act mandate that USDA prescribe minimum nutrition requirements for school meals "*on the basis of tested nutritional research*." *See* 42 U.S.C. §§ 1758(a)(1)(A), 1773(e)(1)(A) (emphasis added).

More recently, Congress has overseen USDA's approach to tracking developments in nutrition research, regularly amending the School Lunch Act to ensure that nutrition standards for school meals incorporate up-to-date scientific conclusions. In 1990, Congress mandated that USDA help publish "Dietary Guidelines for Americans" ("Dietary Guidelines") at least every five years, setting out "nutritional and dietary information and guidelines for the general public . . . based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared." National Nutrition Monitoring and Related Research Act of 1990, Pub. L. No. 101-445, § 301, 104 Stat. 1034, 1042–43 (1990) (codified at 7 U.S.C. § 5341).

[5] Through a series of appropriations riders, Congress has provided temporary "flexibilities" to help schools comply with science-backed standards. *See* 83 Fed. Reg. at 63,781.

Congress instructed USDA to "promote[]" these guidelines "in carrying out" the school lunch and breakfast programs. *Id*.

In 1994, after USDA determined that school meals contained excessive levels of sodium and other nutrients associated with chronic disease, *see* Nutrition Standards in the National School Lunch and Breakfast Programs, 76 Fed. Reg. 2494-01, 2495 (Jan. 13, 2011), Congress amended the School Lunch Act to require that school meals be consistent with the goals of the most recent Dietary Guidelines. *See* Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 106(b), 108 Stat. 4699, 4702–03 (1994) (codified as amended at 42 U.S.C. § 1758(f)(1)). Congress amended the School Lunch Act again in 2004, this time directing USDA to issue regulations with specific recommendations, "based on the most recent Dietary Guidelines," to ensure that school meals enable the increased consumption of nutritious foods. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732 (2004) (codified at 42 U.S.C. § 1758(a)(4)). To implement this requirement, USDA contracted with the National Academy of Sciences' Food and Nutrition Board, which convened a panel of experts "to undertake a review of the nutritional needs of children." 76 Fed. Reg. at 2508, 2540.[6]

In 2010, the National Academy of Sciences' Food and Nutrition Board published a report recommending that school nutrition standards be revised "[t]o align school meals with the [Dietary Guidelines] and improve the healthfulness of school meals," in part, by limiting

[6] The National Academy of Sciences is a "private, non-profit society of distinguished scholars . . . charged [by Congress] with providing independent objective advice to the nation on matters related to science and technology." Nat'l Acad. of Scis., *Mission*, nasonline.org/about-nas/mission/ (last visited Sept. 5, 2019). Among other tasks, the National Academy of Sciences' Food and Nutrition Board "establishes principles and guidelines for food nutrition." Nat'l Acad. of Scis., *Food and Nutrition Board*, http://nationalacademies.org/hmd/About-HMD/Leadership-Staff/HMD-Staff-Leadership-Boards/Food-and-Nutrition-Board.aspx (last visited Sept. 5, 2019).

children's sodium intake and encouraging their consumption of whole grains.[7] Congress endorsed these recommendations through the Healthy, Hunger-Free Kids Act of 2010, which amended the School Lunch Act to require that USDA promulgate regulations "to update the meal patterns and nutrition standards" for school lunches and breakfasts, "*based on* [the Board's] recommendations." Pub. L. No. 111-296, § 201, 124 Stat. 3183, 3214 (2010) (codified at 42 U.S.C. § 1753(b)(3)(A)) (emphasis added).

Through its prior amendments to the School Lunch Act and the Healthy, Hunger-Free Kids Act, Congress has made its mandate crystal clear: USDA must ensure that nutrition standards for school meals fully reflect sound nutrition science.[8]

II. The Rollback Rule Conflicts with Established Nutrition Science and More Recent Evidence, Including USDA's Own Findings.

The Rollback Rule weakens standards for sodium and whole grains, authorizing schools to serve meals that increase children's risk of diet-related disease. In so doing, the Rollback Rule directly conflicts with established nutrition science, including the Dietary Guidelines, and thus

[7] Ins. of Med., *School Meals: Building Blocks for Healthy Children* 121 (Virginia A. Stallings et al. eds., 2010) ("NAS 2010").

[8] USDA argues that *Hughes v. United States*, 138 S. Ct. 1765 (2018), provides support for its decision to depart from nutrition science. *See* Defs.' Br. at 13. USDA is wrong. In *Hughes*, the Supreme Court broadly interpreted a provision requiring criminal sentences to be "based on" sentencing guidelines, in an effort to ensure the fair treatment of criminal defendants. *See id.* at 1776–77. The Court carefully limited its reading, explaining that the language could not stretch to include sentences based on factors *other than* the sentencing guidelines. *See id.* at 1776. But the broad interpretation of statutory authority now urged by USDA does not implicate issues of fairness. Instead, USDA has relied on factors *other than* nutrition science in adopting the Rollback Rule. Therefore, the Rollback Rule is impermissible. Defendants' reliance on *Tackitt v. Prudential Insurance Company of America*, 758 F.2d 1572 (11th Cir. 1985), is also unavailing. There, the statute did *not* direct the agency to act in a manner consistent with the statute's goals, but instead granted the agency "very broad" authority. *Id.* at 1575. Courts imposed a consistency requirement to cabin the agency's discretion. *See id.* Thus, *Tackitt* has no bearing here, where Congress itself has repeatedly directed USDA to follow sound nutrition science.

falls short of Congress's mandates. In addition, far from supporting weaker standards, recent evidence further undermines USDA's justifications for the Rollback Rule.

A. Under the Rollback Rule, School Meals Could Exceed the Dietary Guidelines' Science-Backed Sodium Recommendations by Nearly 50 Percent.

Since 2005, the Dietary Guidelines have recommended that children control their risk of high blood pressure and other diet-related disease by consuming no more than 2,300 mg of sodium—or about one teaspoon of salt—per day, and even less for younger children.[9] To bring school meals into alignment with this recommendation, the 2012 Regulation instituted gradual sodium reductions. *See* 77 Fed. Reg. at 4097–98. As USDA explained, only "[m]eeting the final sodium targets [would] enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendations to limit sodium intake to less than 2,300 mg per day." *Id*. at 4098.

The Rollback Rule eliminated the 2012 Regulation's final sodium reduction target, *see* 83 Fed. Reg. at 63,782–83, thereby excusing schools from the obligation to offer meals that align with the Dietary Guidelines and directly conflicting with Congress' repeated mandates to establish nutrition standards for school meals that adhere to sound nutrition science. Under the Rollback Rule, school meals could exceed safe levels of sodium by up to 15% at breakfast and 47% at lunch.[10] Because children consume additional sodium *outside* of school, they will also exceed the daily recommended limit for sodium set out in the Dietary Guidelines.

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[9] *See* USDA, *Dietary Guidelines for Americans 2005*, 40 (2005) ("DG 2005") https://health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf?_ga=2.190122795.1822556684.1567715112-1367122972.1567715112; USDA, *Dietary Guidelines for Americans 2010*, 76 (2010) ("DG 2010"), https://health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf; USDA, *Dietary Guidelines for Americans 2015-2020*, App. 7, 97–8 (2015) ("DG 2015"), https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

[10] The National Academy of Sciences' Food and Nutrition Board translated the Dietary Guidelines' daily targets into school meal targets for different age groups. *See* NAS 2010, *supra* note 7. Comparing these values with the Rollback Rule's sodium limits, *see* 83 Fed. Reg. at

By eliminating appropriate limits on sodium in school meals, the Rollback Rule puts children's health at risk. The expert advisory committee that reviewed science for the 2010 Dietary Guidelines found that children with high blood pressure can experience physical changes to the heart that significantly increase their risk of heart disease later in life,[11] and people who suffer from high blood pressure as children are more likely to *continue* to suffer from high blood pressure as adults.[12] Despite widespread recognition of the importance of controlling children's sodium consumption, however, schools are unlikely to achieve significant reductions without clear direction from USDA. Indeed, USDA's own data shows that—before the 2012 Regulation took effect—more than 74% of schools served lunches with an average sodium content that exceeded recommended levels by more than 50%.[13] By eliminating the 2012 Regulation's final

63,783, shows the Rule allows schools to exceed recommended targets by about 12-15 percent at breakfast and about 47 percent at lunch.

[11] *See* USDA Dietary Guidelines Advisory Committee, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee: Advisory Report to the Secretary of Health and Human Services and the Secretary of Agriculture*, 334 (2015) ("DGAC 2015"), https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf (citing Stephen R. Daniels, et al., *Left Ventricular Geometry and Severe Left Ventricular Hypertrophy in Children and Adolescents With Essential Hypertension*, 97 Circulation 1907 (1998) & Gerald S. Berenson et al., *Association Between Multiple Cardiovascular Risk Factors and Atherosclerosis in Children and Young Adults*, 338 New Eng. J. Med. 1650 (1998)).

[12] USDA Dietary Guidelines Advisory Committee, *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans*, 2010, 330 (2010) ("DGAC 2010"), https://www.nutriwatch.org/05Guidelines/dga_advisory_2010.pdf (citing Xiaoli Chen & Youfa Wang, *Tracking of Blood Pressure From Childhood to Adulthood: A Systematic Review and Meta-Regression Analysis*, 117 Circulation 3171 (2008)). The 2015 expert advisory committee endorsed the 2010 committee's scientific review. *See* DGAC 2015 at 334.

[13] USDA Food and Nutrition Service, *School Nutrition Dietary Assessment Study-IV: Summary of Findings*, 15 (2012), https://fns-prod.azureedge.net/sites/default/files/SNDA IV_Findings_0.pdf.

sodium target, USDA's Rollback Rule almost guarantees that school meals will contain excessive amounts of sodium.

B. Under the Rollback Rule, School Meals May Contain Significantly Fewer Whole Grains than Recommended by the Dietary Guidelines.

Whole grains contain important nutrients and fiber that help to prevent chronic disease. Since 2005, the Dietary Guidelines' expert committees consistently have found that whole grains reduce the risk of heart disease and diabetes and contribute to weight maintenance.[14] Although the Dietary Guidelines, since 2005, have advised that half of the grains children eat be whole grains,[15] children continue to consume much fewer whole grains than recommended.[16] Accordingly, the 2012 Regulation required that, within two years, all grains served in schools must be "whole grain-rich." 77 Fed. Reg. at 4093, 4123. A product is whole grain-rich if at least 50% of the grain in that product is whole grain; the remaining 50% of grain in the product may be enriched refined grain. *See* 83 Fed. Reg. at 63,776.

Under the Rollback Rule, only half of all grains served must be whole grain-rich. *See id*. Since only half of all grains served must be whole grain-rich, and only half of each grain product must be whole grain for the product to qualify as whole grain-rich, schools may serve only 25% whole grains under the Rollback Rule. This is just half the recommended level; thus, the Rollback Rule directly conflicts with the Dietary Guidelines.

Children who eat more whole grains experience significant health benefits. Studies have found whole grain intake is linked to lower levels of LDL, or "bad" cholesterol, and better blood

[14] *See* DGAC 2010 at 292–3; *See also* DGAC 2015 at 188, 192, 197.
[15] *See* DG 2005 at 25; *see also* DG 2010 at 36; DG 2015 at 22.
[16] *See* DG 2015 App. 3 and 7.

sugar management, which is associated with lower risk of cardiovascular disease and diabetes.[17] The American College of Cardiology and AHA recommend a diet higher in whole grains to reduce risk of cardiovascular disease,[18] and the American Diabetes Association recommends it to protect against diabetes.[19]

Whole grains also help schoolchildren avoid critical nutrient shortfalls.[20] Unlike refined grains, which undergo processing that removes fiber and other nutrients, whole grains are good sources of many nutrients that children require.[21] Indeed, if consumed in recommended amounts, whole grains would provide 32% of recommended fiber, 35% of folate, 42% of iron, 29% of magnesium, and 16% of vitamin A.[22] Dietary fiber contributes to healthy digestion and helps to protect against heart disease, colorectal and other cancers, type 2 diabetes, and obesity.[23]

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[17] *See* Nicola A. McKeowan, et al., *Whole-grain Intake is Favorably Associated with Metabolic Risk Factors for Type 2 Diabetes and Cardiovascular Disease in the Framingham Offspring Study*, 76 Am. J. Clinical Nutrition 390 (2002); *see also* Lyn M. Steffan, *Whole Grain Intake Is Associated with Lower Body Mass and Greater Insulin Sensitivity Among Adolescents*, 158 Am. J. Epidemiology 243 (2003).

[18] *See* Dibba K, Arnett et al., *2019 AHA/ACC Guideline on the Primary Prevention of Cardiovascular Disease A Report of the American College of Cardiology/American Heart Association Task Force on Clinical Practice Guidelines* (2019), https://www.ahajournals.org /doi/pdf/10.1161/CIR.0000000000000678.

[19] *See* Am. Diabetes Ass'n, *Lifestyle Management: Standards of Medical Care in Diabetes—2019*, 42(Suppl. 1) Diabetes Care S46 (2019), https://care.diabetesjournals.org/content/42/ement_1/S46.

[20] *See* Carol E. O'Neil, et al., *Consumption of Whole Grains is Associated with Improved Diet Quality and Nutrient Intake in Children and Adolescents: The National Health and Nutrient Examination Survey 1999-2004*, 14 Pub. Health Nutrition 347 (2011); *see also* Yanni Papanikolau & Victor L. Fulgoni, *Certain Grain Foods Can Be Meaningful Contributors to Nutrient Density in the Diets of U.S. Children and Adolescents: Data from the National Health and Nutrition Examination Survey, 2009-2012*, 9 Nutrients 160 (2017).

[21] *See* NAS 2010; *see also* DG 2015 at 22.

[22] *See* DGAC 2015 at 66.

[23] *See* DGAC 2015 at 66; *see also* Sibylle Kranz et al., *What Do We Know about Dietary Fiber Intake in Children and Health? The Effects of Fiber Intake on Constipation, Obesity, and Diabetes in Children*, 3 Advances in Nutrition 47 (2012); Ins. of Med., *Dietary Reference*

C. Recent Evidence Undermines USDA's Justifications for the Rollback Rule.

The Rollback Rule also conflicts with recent evidence, which undermines USDA's purported justifications for weakening nutrition standards. In introducing the Rollback Rule, USDA explained that it sought, in part: (1) to lay the groundwork for developing new standards based on "the most current scientific recommendations," including a then-unfinished comprehensive analysis of safe sodium intake by the National Academy of Sciences' Food and Nutrition Board, *see* 83 Fed. Reg. at 63,783; and (2) to avoid the increase in food waste that, USDA claimed, could occur if students "accustomed to eating food with higher sodium content outside of school" rejected relatively low-sodium school meals. *Id*. Neither justification supports the Rollback Rule.

In March 2019, the National Academy of Sciences' Food and Nutrition Board published the analysis of safe sodium intake for which USDA had been waiting: "Dietary Reference Intakes for Sodium and Potassium."[24] This in-depth review confirmed the link between excessive sodium consumption and "interrelated chronic disease indicators," including cardiovascular disease and high blood pressure, and reaffirmed the importance of limiting children's sodium intake.[25] To control the risk of disease, the Board recommended that children cap sodium consumption at levels equal to—or, for some age groups, *lower than*—those established by the Dietary Guidelines.[26] Thus, the very study USDA identified in support of its decision to weaken

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Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids, 363–64 (2005).

[24] *See* Nat'l Academies of Sci., Engineering, and Med., *Dietary Reference Intakes for Sodium and Potassium* (Virginia A. Stallings et al. eds., 2019).

[25] *Id*. at 12, 327.

[26] *See* supra note 28.

nutrition standards actually undercuts those weakened standards, demonstrating yet again that the Rollback Rule does not reflect up-to-date, reliable science.[27]

In addition, recent evidence shows that children did not throw away more school food under the 2012 Regulation. Indeed, USDA's own 2019 School Nutrition and Meal Cost Study found that school food waste has remained relatively steady over time.[28] A separate, prior study of middle school students also found that food waste did not increase after the 2012 Regulation took effect; to the contrary, the study found that food consumption significantly *increased* in 2014.[29] While food waste is a serious problem in schools and in our society, many school food leaders have succeeded in managing waste through behavioral interventions that do not put children's health at risk. Thus, even the most recent evidence shows there is no scientific basis or justification for the Rollback Rule.

III. The Rollback Rule Makes it More Difficult for All Children to Develop Healthy Eating Habits and Succeed Academically, and the Rule Will Disproportionately Harm Vulnerable Children.

In addition to promoting children's health directly, school meals serve important educational purposes by helping children to develop healthy eating habits and providing them with the nutrition they need to succeed academically.

Congress has recognized that "eating habits and other wellness-related behavior habits are established early in life." 42 U.S.C. § 1766(a)(1)(A)(i)(I). USDA also acknowledges that

[27] In fact, the National Academy of Sciences' Food and Nutrition Board *preemptively* addressed student acceptance, among other facts, in developing nutrition recommendations. *See* NAS 2010 at 196, 199–200.

[28] USDA, *School Nutrition and Meal Cost Study, Summary of Findings*, 21 (2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/SNMCS_Summary-Findings.pdf.

[29] *See* Marlene B. Schwartz, et al., *New School Meal Regulation Increase Fruit Consumption and No Not Increase Total Plate Waste*, 11 Childhood Obesity 242 (2015) (finding that entrée consumption increased from an average of 70.9% in 2012 and 67.9% in 2013 to 83.6% in 2014).

school meals provide "nutrition education." *See* 77 Fed. Reg. at 4108; *see id*. at 4133 ("Improved school meals can reinforce school-based nutrition education and promotion efforts."). And the scientific literature confirms what all families know: children's food preferences are shaped by the foods they consume early in life.[30] Thus, children who regularly receive foods with appropriate amounts of sodium learn to enjoy and select those foods.[31] And studies show that school meals *succeed* in helping children to develop healthy eating habits: school meals generally are healthier than meals obtained from home,[32] and students who consume healthy meals at school tend to make healthy food choices outside of school.[33]

Healthy school meals also help children succeed in school. As Congress knew when it insisted on science-based standards for school food, "good nutrition and wellness are . . . essential to cognitive development." 42 U.S.C. § 1766(a)(1)(A)(i)(II). Students who regularly consume breakfast perform better on standardized tests of mathematics and reading,[34] and nutritious breakfasts have been shown to boost cognition.[35] In addition, recent evidence shows that students at schools offering healthier school meals earn higher test scores than their peers at schools serving average meals—and providing healthier meals is less expensive than other

[30] *See* Leann L. Birch, *Development of Food Preferences*, 19 Ann. Rev. of Nutrition 41, 57 (1999).
[31] *See id*.
[32] *See* Lauren E. Au, *Eating School Lunch Is Associated with Higher Diet Quality among Elementary School Students*, J. Acad. Nutrition & Dietetics 1820, 1821 (2016).
[33] *See* Juliana F. W. Cohen et al., *The Impact of 1 Year of Healthier School Food Policies on Students' Diets During and Outside of the School Day*, 118 J. Acad. Nutrition & Dietetics 2296, 2299 (2018).
[34] *See* Lindsay Turner, Opinion, *Continued Promise of School Breakfast Programs for Improving Academic Outcomes: Breakfast Is Still the Most Important Meal of the Day*, 169 J. Am. Med. Ass'n Pediatrics 13, 13 (2015) (summarizing recent studies).
[35] *See id*. at 14.

interventions that could achieve similar results, such as hiring additional teachers to reduce classroom size.[36]

The benefits of healthy school meals are especially important for vulnerable children. Although school meals improve the average quality of all children's diets, this improvement is more significant among children living in food insecure or low-income households.[37] And, as Congress and USDA have instituted stronger nutrition standards for all schools, disparities in the quality of school meals have begun to disappear.[38] Before the Healthy, Hunger-Free Kids Act and the 2012 Regulation took effect, students attending schools that are predominantly non-White were less likely to receive all components of a healthy meal, including whole grains, every day.[39] The Rollback Rule reverses this progress, making it more difficult for all children to learn healthy eating habits and succeed academically, and putting the most vulnerable children at greatest risk.

CONCLUSION

For the reasons stated above, AHA, APHA, FoodCorps, MomsRising, and NEA respectfully submit this brief in support of Plaintiffs Center for Science in the Public Interest and Healthy School Foods Maryland and join Plaintiffs in requesting that this Court vacate the Rollback Rule.

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[36] *See* Michael L. Anderson et al., *School Meal Quality and Academic Performance*, 168 J. Pub. Econ. 81, 89, 91–92 (2018).

[37] *See* Travis A. Smith, *Do School Food Program Improve Child Dietary Quality?*, 99 Am. J. Agric. Econ. 339, 352 (2016); *see also* Larry L. Howard & Nishith Prakash, *Do School Lunch Subsidies Change the Dietary Patterns of Children from Low-Income Households?*, 30 Contemporary Econ. Pol'y 362, 378 (2012) (finding that children who receive free lunches consume more nutritious foods, including fruits and vegetables).

[38] *See* Yvonne M. Terry-McElrath et al., *Foods and Beverages Offered in US Public Secondary Schools through the National School Lunch Program from 2011-2013: Early Evidence of Improved Nutrition and Reduced Disparities*, 78 Preventive Med. 52, 57 (2015).

[39] *See id*. at 55.

September 6, 2019

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