

**COMMENTS OF ATTORNEYS GENERAL OF NEW YORK,  
CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA,  
ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,  
MINNESOTA, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA,  
RHODE ISLAND, VERMONT, VIRGINIA AND WISCONSIN**

**Via Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov)**

April 22, 2020

Tina Namian  
Chief  
School Programs Branch  
Policy and Program Development Division  
Food and Nutrition Service  
1320 Braddock Place, 4th Floor  
Alexandria, VA 22314

Re: Notice of Proposed Rulemaking – Simplifying Meal Service and Monitoring  
Requirements in The National School Lunch and School Breakfast Programs,  
Docket No. FNS-2019-0007

Dear Ms. Namian:

The Attorneys General of New York, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Wisconsin (“State AGs”) write to voice their strong objections to the United States Department of Agriculture’s (“USDA”) proposed rule to amend regulations governing USDA’s Child Nutrition Programs.<sup>1</sup> USDA has proposed loosening the nutrition standards for the National School Lunch and Breakfast Programs, on which millions of children in this country rely.<sup>2</sup> Over 85 percent of the school breakfasts and over 73 percent of the school lunches in the Attorneys General’s States are served free or at reduced prices based on families’ income.<sup>3</sup> Those numbers are likely to increase as a result of the contraction of the U.S. economy due to the COVID-19 pandemic, meaning that when schools in the Attorney General’s States reopen, even more children will be dependent on school meals as their primary source of nutrition.

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<sup>1</sup> USDA’s “Child Nutrition Programs” include the National School Lunch Program, the School Breakfast Program, and the Child and Adult Care Food Program. See <https://www.fns.usda.gov/cn>.

<sup>2</sup> *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs*, 85 Fed. Reg. 4,094 (Jan. 23, 2020) (Proposed Rule).

<sup>3</sup> Food Research and Action Center, *State of the States*, [https://frac.org/research/resource-library/state-of-the-states-profiles?post\\_type=resource&p=4483&state](https://frac.org/research/resource-library/state-of-the-states-profiles?post_type=resource&p=4483&state); USDA Food and Nutrition Service, NSLP Monthly Participation, <https://fns-prod.azureedge.net/sites/default/files/resource-files/36slmonthly-4.pdf> (data table as of Apr. 10, 2020); USDA Food and Nutrition Service, SBP Monthly Participation, <https://fns-prod.azureedge.net/sites/default/files/resource-files/35sbmonthly-4.pdf> (data table as of Apr. 10, 2020).

USDA’s own research provides powerful evidence that the science-based nutrition standards that USDA established in 2012, as it had been directed to do by Congress, have demonstrably improved the nutritional quality of the school breakfasts and lunches on which so many children in this country rely.<sup>4</sup> Yet, with the Proposed Rule, USDA—frequently invoking “operational ease,” but not offering meaningful justification based on nutrition science—proposes to weaken many of those standards. The State AGs oppose the Proposed Rule to the extent it would substantially weaken the 2012 nutrition standards without sound basis in nutrition science. In these comments, the State AGs focus in particular on the proposals to: (1) reduce the required minimum weekly servings of the “red/orange” and “other” vegetable subgroups in school lunches; (2) cut in half the required minimum daily serving of fruit in school breakfasts served in non-cafeteria settings; (3) eliminate the prohibition on synthetic *trans* fats from any food available in schools; (4) allow smaller school districts to, in effect, serve their youngest students meals with calorie and sodium levels appropriate only for older students; and (5) allow schools to offer “calorie-free, noncarbonated naturally-flavored water” to meet the potable water requirement.

The State AGs oppose these changes to USDA’s 2012 science-based nutrition requirements because they are likely to harm the health of children and adolescents, particularly those for whom school meals are a major source of nutrition. The adoption of the changes in a final rule would not be consistent with the findings that USDA made when it adopted the 2012 standards, would violate the statutory requirements for nutrition standards for school meals—which require that the standards be based on tested nutritional research, the Dietary Guidelines for Americans, and a 2009 study by the National Academy of Sciences’ Food and Nutrition Board—and would not be based on the factual record. Further, public health experts have assessed that “students from low-income families attending schools in majority black or Hispanic and in rural neighborhoods are most likely to be affected” by the Proposed Rule’s weakening of nutrition standards.<sup>5</sup> The State AGs thus urge USDA not to make these changes to the school meals requirements.

In addition, while the State AGs appreciate USDA’s actions to facilitate the distribution of school meals while schools have been closed due to the COVID-19 pandemic, and the extension of the comment period on the Proposed Rule,<sup>6</sup> the State AGs oppose USDA moving forward with discretionary rulemaking like the Proposed Rule while the national COVID-19 emergency continues. Indeed, most of the State AGs signed a March 31, 2020 letter to the Office of Management and Budget (OMB) requesting that OMB and federal executive agencies generally “freez[e] all new and pending regulations other than those that address emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or that are required by statutory or judicial deadlines.”<sup>7</sup>

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<sup>4</sup> See generally, USDA FNS, *School Nutrition and Meal Cost Study, Final Report*, April 2019, <https://www.fns.usda.gov/school-nutrition-and-meal-cost-study>.

<sup>5</sup> Letter dated April 2, 2020 from Robert Wood Johnson Foundation to USDA regarding the Proposed Rule, at p.4, available at <https://www.regulations.gov/document?D=FNS-2019-0007-34913>.

<sup>6</sup> See 85 Fed. Reg. 85, 273 (Extension of Comment Period, March 23, 2020).

<sup>7</sup> See Letter dated March 31, 2020 from 21 State Attorneys General to Acting Director of O.M.B., available at <https://www.nj.gov/oag/newsreleases20/COVID-19-Rule-Delay-Letter-Final.pdf>

The State AGs also note that, if USDA intends to promulgate any other revisions to the 2012 nutrition standards, USDA must publish a notice of proposed rulemaking regarding those revisions and provide time for public comments before issuing final revisions.

### **The School Meals Programs**

Nutrition standards for breakfasts and lunches served pursuant to the National School Lunch Act and the Child Nutrition Act (“school breakfasts” and “school lunches” or together, “school meals”) must meet three sets of requirements. First, “minimum nutritional requirements prescribed by [USDA]” are required to be based on “tested nutritional research.”<sup>8</sup>

Second, standards for school meals are required to be “consistent with the goals of the most recent Dietary Guidelines for Americans.”<sup>9</sup> Jointly issued by USDA and the U.S. Department of Health and Human Services (“HHS”), the Dietary Guidelines for Americans (“Dietary Guidelines”) are “nutritional and dietary information and guidelines for the general public” that are “based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared.”<sup>10</sup> The current edition of the Dietary Guidelines (2015-2020) was promulgated in December 2015.<sup>11</sup> The Dietary Guidelines emphasize the importance for children and adolescents “to maintain calorie balance to support normal growth and development without promoting excess weight gain”: “[c]hildren and adolescents who are overweight or obese should change their eating and physical activity behaviors to maintain or reduce their rate of weight gain while linear growth occurs, so that they can reduce body mass index (BMI) percentile toward a healthy range.”<sup>12</sup>

Third and most recently, the Healthy, Hunger-Free Kids Act passed by Congress in 2010 (the “Healthy Kids Act”) directed USDA to promulgate nutrition standards for school meals based on the recommendations of an extensive 2009 study by the National Academy of Sciences’ Food and Nutrition Board (the “2009 Nutrition Board Study”).<sup>13</sup>

Accordingly, in 2012 USDA issued the rule *Nutrition Standards in the National School Lunch and School Breakfast Programs* (the “2012 Rule”)<sup>14</sup> that updated the nutritional requirements for the school meals programs based on the 2009 Nutrition Board Study as well as the then-applicable Dietary Guidelines. State agencies implement and enforce the nutritional

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<sup>8</sup> 42 U.S.C. §§ 1758(a)(1), 1773(e)(1).

<sup>9</sup> 42 U.S.C. §§ 1758(a)(4), 1758(f)(1).

<sup>10</sup> 7 U.S.C. §§ 5341(a)(1), (2).

<sup>11</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2015 – 2020 Dietary Guidelines for Americans*. 8th Edition. December 2015. Available at <https://health.gov/our-work/food-and-nutrition/2015-2020-dietary-guidelines/>

<sup>12</sup> *Id.* p. 20.

<sup>13</sup> Pub. L. No. 111-296, § 201, 124 Stat. 3183, 3214-15 (2010) (codified at 42 U.S.C. § 1753(b)(3)(A)); Institute of Medicine, *School Meals: Building Blocks for Healthy Children*. Washington, DC: The National Academies Press, available at: <https://www.fns.usda.gov/sites/default/files/SchoolMealsIOM.pdf>.

<sup>14</sup> 77 Fed. Reg. 4,088 (Jan. 26, 2012).

requirements of the school meals programs and some states provide program operators with state-funded reimbursements for school meals.<sup>15</sup>

### **The State AGs Oppose USDA’s Proposals to Weaken the Nutrition Standards for School Meals.**

The State AGs have strong interests in the health and welfare of the children in their States and thus in the maintenance of science-based nutrition standards for school meals that promote children’s health and welfare. The Attorneys General’s States also pay for health care provided to millions of children and adolescents who participate in the school meals programs, through Medicaid and other public health insurance programs.<sup>16</sup> Many of the State AGs defended those interests by bringing a legal challenge in 2019 under the Administrative Procedure Act, 5 U.S.C. § 706(2) (“APA”), to USDA regulations that weakened science-based sodium and whole grain standards in school meals.<sup>17</sup>

Under the APA, an agency may not issue a rule or regulation that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency rulemaking must be “based on a consideration of the relevant factors” and “examin[ation of] the relevant data.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). A regulation is arbitrary and capricious if the agency “has relied on factors which Congress has not intended it to consider” or “if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency.” *Id.* And when an agency proposes to suspend, revise, or revoke an existing rule, it may not “ignore[ ] or countermand[ ] its earlier factual findings without reasoned explanation for doing so.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009). Further, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.* at 513-15. Although an agency need not show that a new rule is “better” than the rule it replaced, it must always demonstrate that “it is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *Id.* (emphases omitted).

USDA’s proposals to weaken the 2012 nutrition standards would, if finalized, violate the APA because they are not in accordance with the statutory requirements for nutrition standards and are not based on the factual record, and because USDA has not offered a reasoned explanation for ignoring the factual findings that it made when it issued the 2012 standards nor

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<sup>15</sup> See Congressional Research Service, *School Meals Programs and Other USDA Child Nutrition Programs: A Primer* (Feb. 11, 2019), at p.9, <https://fas.org/sgp/crs/misc/R43783.pdf>.

<sup>16</sup> Over 36 million children throughout the United States were enrolled in Medicaid or the Children’s Health Insurance Program (CHIP) as of December 2018. See Georgetown University Health Policy Institute, May 2009, *Medicaid and CHIP Enrollment*, p. 17, <https://ccf.georgetown.edu/wp-content/uploads/2019/06/Enrollment-Decline.pdf>.

<sup>17</sup> See *New York et al. v. USDA et al.*, No. 19 Civ. 2956 (ALC), Amended Complaint dated Sept. 16, 2019, Dkt. 44, (S.D.N.Y.). On April 16, 2020, the Southern District of New York denied USDA’s motion to dismiss, holding that “Plaintiff States alleged an injury in fact to their proprietary interests and thus, have established standing.” See *id.* Dkt. 71, Opinion & Order dated April 16, 2020, Slip Op. p. 19, 2020 WL 1904009, at \*9.

has USDA provided the requisite “good reasons,” *see Fox*, 556 U.S. at 515, for departing from its prior policy. Accordingly, the State AGs urge USDA not to make these changes to the school meals nutrition standards.

**A. USDA Should Not Reduce the Required Minimum Weekly Servings of Certain Vegetable Groups.**

The Proposed Rule would diminish requirements for certain vegetable groups in school lunches.<sup>18</sup> The modification of those requirements is inconsistent with the findings that USDA made when it issued the 2012 nutrition standards, is not based on the current Dietary Guidelines or tested nutritional research, as required by the National School Lunch Act and the Child Nutrition Act, and is not based on the 2009 Nutrition Board Study, as required by the Healthy Kids Act. In addition, the reasons that USDA gives for the modifications are not supported by the factual record.

In the 2012 Rule, USDA established five vegetable subgroups for school lunches: dark green, red/orange, beans and peas (legumes), starchy, and “other” vegetables. The “other” category includes “all other fresh, frozen, and canned vegetables, cooked or raw” and “may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups”—but not the starchy vegetable subgroup.<sup>19</sup> Based on the recommendations of the Dietary Guidelines and the 2009 Nutrition Board Study, the 2012 Rule prioritized two of the vegetable subgroups—red/orange vegetables and “other vegetables”—by requiring that children be served greater weekly quantities of those two subgroups.<sup>20</sup>

The Proposed Rule would modify the required minimum lunch servings of red/orange and “other” vegetables under the 2012 Rule, as shown in the following table:

	<b>2012 Rule: Required Minimum Weekly School Lunch Program Servings Weekly (Cup Equivalents)</b>			<b>Proposed Rule Cup Equivalents)</b>
	<b>Grades K-5</b>	<b>Grades 6-8</b>	<b>Grades 9-12</b>	
<b>Red/Orange Vegetables</b>	¾	¾	1¼	½ (For all grades)
<b>“Other” Vegetables</b>	½	½	¾	½ (For all grades)

<sup>18</sup> Proposed Rule, 85 Fed. Reg. at 4,102. The regulations that would be impacted by this proposal are at 7 C.F.R. §§ 210.10(c)(2)(iii), 210.10(m)(4)(ii).

<sup>19</sup> *See* 7 C.F.R. § 210.10(c).

<sup>20</sup> *See* 2012 Rule, 77 Fed. Reg. at 4,102.

Thus, the Proposed Rule would reduce the required minimum weekly serving of red/orange vegetables from 1¼ cup to ½ cup for high school students and from ¾ cup to ½ cup for elementary and middle school students. It would also reduce the required minimum of “other vegetables” (which includes all vegetables except starchy vegetables) from ¾ cup to ½ cup for high school students.<sup>21</sup>

The modifications of the weekly requirements for both the red/orange vegetables category and the “other vegetables” category are inconsistent with USDA’s finding in the 2012 Rule that “[c]onsumption of vegetables and fruits is also associated with reduced risk of many chronic diseases, including obesity, heart attack, stroke, and cancer. By providing more and *a variety of vegetables* in a nutrient-dense form (without added solid fats, sugars, refined starches, and sodium), schools help students obtain important nutrients and maintain a healthy weight.”<sup>22</sup> USDA offers no reasoned explanation for its departure from those findings.

The modification of the red/orange vegetable requirements is also inconsistent with the 2015-2020 Dietary Guidelines, which find that red/orange vegetables—such as tomatoes, carrots, tomato juice, sweet potatoes, red peppers, winter squash, and pumpkin—provide the most Vitamin A relative to other vegetable subgroups.<sup>23</sup> Vitamin A “is critical for vision” and “supports cell growth and differentiation, playing a critical role in the normal formation and maintenance of the heart, lungs, kidneys, and other organs.”<sup>24</sup> As a result, the Dietary Guidelines prioritize red/orange vegetables and recommend weekly intakes of 5½ cups of red/orange vegetables for an individual with a typical 2,000 calorie/daily diet.<sup>25</sup> At the daily calorie levels recommended for children and adolescents ages 6-18 (ranging from 1,400 daily calories to 3,200 daily calories), the quantity of weekly red/orange vegetables recommended by the Dietary Guidelines is 3 – 7 ½ cups.<sup>26</sup> The Guidelines also find that children in the age groups of 4-8, 9-13, and 14-18 currently do not consume sufficient quantities of red/orange vegetables, falling far short of the bottom of the ranges of recommended weekly intake.<sup>27</sup> The Proposed Rule’s red/orange vegetable requirement, which reduces the minimum required weekly serving of red/orange vegetables in school lunches to ½ cup, the same weekly minimum quantity as the four other vegetable subgroups, for all age groups, is plainly inconsistent with those guidelines. Additionally, USDA does not cite any “tested nutritional research,” as required by the National School Lunch Act, to support the proposed reduction.

The modification of both the red/orange and “other” vegetables requirements is also not based on the 2009 Nutrition Board Study, as required by the Healthy Kids Act, because the modification would allow schools to serve more starchy vegetables. The Study recommends that “starchy vegetables [be] served less often,”<sup>28</sup> but the proposed modifications would allow school

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<sup>21</sup> See Proposed Rule, 85 Fed. Reg. at 4,102.

<sup>22</sup> 2012 Rule, 77 Fed. Reg. at 4092 (emphasis added).

<sup>23</sup> Dietary Guidelines, pp. 21, 47.

<sup>24</sup> National Institutes of Health, Vitamin A Fact Sheet for Health Professionals, <https://ods.od.nih.gov/factsheets/VitaminA-HealthProfessional/#h3>.

<sup>25</sup> See Dietary Guidelines, at 18.

<sup>26</sup> See *id.* at 84.

<sup>27</sup> *Id.* at 45.

<sup>28</sup> 2009 Nutrition Board Study, at 374 (Table P-1).

districts to serve a greater proportion of less nutritionally-beneficial starchy vegetables (*e.g.*, french fries) to meet the weekly vegetable totals. Effectively, this would constitute a 75 percent increase in the less healthy vegetables, like white potatoes and corn, that could be served to high school students in school lunches. In fact, the Proposed Rule concedes that “children could be offered less vegetable variety.”<sup>29</sup>

USDA offers two reasons for its proposal to lower the minimum weekly requirements for the red/orange and “other” vegetable subgroups: (1) “to eliminate confusion caused by requiring different quantities of different vegetable subgroups for different age/grade groups” and (2) to reduce food waste by allowing schools to offer “more vegetables that students prefer.”<sup>30</sup> A departure from the 2012 standards based on confusion or food waste would violate the National School Lunch Act and the Child Nutrition Act, which require school nutrition standards to be based on tested nutritional research, the Dietary Guidelines, and the 2009 Nutrition Board Study.<sup>31</sup>

In addition, neither of these rationales is supported by the factual record. The Proposed Rule itself observes that “[b]etween 92 and 95 percent of weekly menus met the quantity requirements for the dark green vegetables, red/orange vegetables, starchy vegetables, and ‘other’ vegetables”—belying USDA’s reasoning that “confusion” is a material issue when it comes to compliance with the existing vegetable subgroup requirements.<sup>32</sup> In addition, the concern about confusion is not supported by USDA’s 2019 *School Nutrition And Meal Cost Study* (the “2019 USDA Study”), which USDA frequently invokes in the Proposed Rule. The 2019 USDA Study, which is co-authored by a nationally-recognized expert in nutrition, childhood obesity, and school food environments and an experienced pediatric nutritionist, shows that directors of school meal programs rank “understanding the updated nutritional standards” as their lowest concern out of 8 topics presented.<sup>33</sup>

As for food waste, the 2019 USDA Study finds that “student satisfaction rates were . . . generally higher for weekly menus that offered red or orange vegetables more than half of the days” and for middle schools students, this association was especially stark: 40 percent of middle school students responded that they were satisfied with their school lunch when their school’s weekly menus offered red or orange vegetables on more than half of the school days, versus a 20% percent satisfaction rate when students’ middle school offered red or orange vegetables less often.<sup>34</sup> And strikingly, the Study found that “offering red or orange vegetables on more than half of daily lunch menus was associated with a significantly higher [school lunch] participation

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<sup>29</sup> Proposed Rule, 85 Fed. Reg. at 4118.

<sup>30</sup> *Id.* at 4118.

<sup>31</sup> 42 U.S.C. §§ 1753(b)(3)(A), 1758(a)(4), 1758(a)(1), 1758(f)(1), 1773(e)(1).

<sup>32</sup> Proposed Rule, 85 Fed. Reg. at 4118.

<sup>33</sup> *See id.* Moreover, the Study suggests that for middle schools, “not offering French fries or similar potato products on any daily lunch menus was associated with a significantly higher mean HEI-2010 [Healthy Eating Index based on the 2010-2015 Dietary Guidelines] score (1.5 points higher).” 2019 USDA Study, Volume 2, p. 98, <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNMCS-Volume2.pdf>.

<sup>34</sup> 2019 USDA Study, Volume 4, p. 68; Vol. 4 Appendix at D.56, <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNMCS-Volume4-Appendix-A-H.pdf>.

rate” (60 percent) versus a lower participation rate (53 percent) when red or orange vegetables were served on less than half of daily lunch menus.<sup>35</sup> Further, “[a]mong elementary schools, schools that offered a median of 5 vegetable choices per day had a significantly higher level of student satisfaction than a reference category of schools that offered a median of 2 or fewer vegetable choices per day” (79 percent student satisfaction with greater vegetable variety versus 42 percent student satisfaction with less vegetable variety).<sup>36</sup> Nor does USDA appear to have considered the Study’s findings that plate waste can be reduced by in-school nutrition education, later lunch times, less reliance on cycle menus, and greater use of “Offer Versus Serve” in elementary and middle schools.<sup>37</sup>

Thus, USDA’s proposals to reduce the required weekly servings of red/orange vegetables for all age groups and reduce the required weekly servings of other vegetables for high school students are flawed for several reasons. The proposed modifications are inconsistent with the findings that USDA made when it issued the 2012 standards and USDA does not give a reasoned explanation for departing from those findings. The proposals are also not in accordance with the statutory requirements that nutrition standards be based on the Dietary Guidelines, tested nutritional research, and the 2009 Nutrition Board Study. Finally, the reasons that USDA gives for the proposals are not supported by the factual record. If finalized, those modifications to the nutrition standards would not be in accordance with law and would be arbitrary and capricious, in violation of the APA. *See Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43.

#### **B. USDA Should Not Halve the Required Minimum Daily Serving of Fruit in Non-Cafeteria School Breakfasts.**

Since the 2014-2015 school year, the fruit requirement in school breakfasts has been set at 5 cups per week and a minimum of 1 cup per day, for all ages and grades.<sup>38</sup> The Proposed Rule would allow schools that serve breakfast in non-cafeteria settings to offer only ½ cup of fruit per day.<sup>39</sup> The modification of this requirement is inconsistent with the findings that USDA made when it issued the 2012 nutrition standards, is not based on the current Dietary Guidelines or tested nutritional research, as required by the National School Lunch Act and the Child Nutrition Act, and is not supported by the factual record.

This modification is inconsistent with the findings that USDA made when it issued the 2012 Rule and USDA offers no explanation for departing from those findings. The 2012 Rule described the 1 cup per day fruit requirement as “double” that of pre-2012 Rule school breakfast meal patterns.<sup>40</sup> The Rule recognized that “increased . . . fruit intake is a key recommendation of the Dietary Guidelines” that “applies to the [school meals programs] because these programs are intended to nourish children but also help them develop healthy eating patterns. By requiring

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<sup>35</sup> *See* 2019 USDA Study, Volume 4, p. 56.

<sup>36</sup> *Id.* at 68.

<sup>37</sup> 2019 USDA Study, Volume 4, pp. 109-110.

<sup>38</sup> *See id.* at 4103.

<sup>39</sup> Proposed Rule, 85 Fed. Reg. at 4120. The regulations that would be impacted by this proposal are at 7 C.F.R. §§ 220.8(c)(2), 220.8(m)(1).

<sup>40</sup> *See id.* at 4111.

students to take a fruit or a vegetable, schools emphasize food choices that are high in nutrients and low in calories.”<sup>41</sup> USDA also found that “[c]onsumption of . . . fruits is also associated with reduced risk of many chronic diseases, including obesity, heart attack, stroke, and cancer.”<sup>42</sup>

The modification is also not consistent with the goals of the current Dietary Guidelines. The Dietary Guidelines recommend a minimum daily 1½ cup-equivalents of fruit for diets of 1,400 to 2,200 daily calories, approximately the caloric ranges for 6-11 year-olds, and 2 or 2½ cup-equivalents of fruit for older children and adolescents.<sup>43</sup> The Dietary Guidelines recommend fruit, “especially whole fruits,” as a key component of a healthy eating pattern. They also find that adolescents on average consume fruit in quantities well below the recommended ranges—in fact, less than half the recommended daily fruit consumption.<sup>44</sup>

The Proposed Rule also does not identify any basis in nutrition science for allowing less fruit to be served at breakfast in non-cafeteria settings. As a result, USDA’s proposal to lower the fruit requirement is without a basis in tested nutritional research.<sup>45</sup> In addition, because USDA makes clear that it “does not propose any changes to the average weekly minimum calorie requirements” in school breakfasts,<sup>46</sup> schools opting to reduce fruit servings may be substituting less healthy breakfast options in order to meet minimum calorie requirements for school breakfasts.

Moreover, the expansion of whole fruit consumption in school breakfasts is one of the proven successes of the 2012 Rule’s nutritional updates. According to the 2019 USDA Study, 83 percent of daily breakfast menus met the daily quantity fruit requirement. In addition, the mean score on the Healthy-Eating Index-2010 (based on the 2010-2015 Dietary Guidelines) for whole fruit increased from 50 to 89 percent of the maximum score when comparing the 2009-2010 school year with the 2014-2015 school year (when the school breakfast fruit requirement was first implemented). This was the second-largest increase in the health score of any aspect of the school breakfast program.<sup>47</sup>

The Proposed Rule explains that there are two reasons for the change to the minimum fruit requirement in school breakfasts provided in non-cafeteria settings: to (1) “help reduce food waste and (2) “encourage breakfast service outside the cafeteria.”<sup>48</sup> A departure from the 2012 standard based on food waste and a preference for breakfasts to be served outside the cafeteria would violate the National School Lunch Act and the Child Nutrition Act, which require school nutrition standards to be based on tested nutritional research, the Dietary Guidelines, and the 2009 Nutrition Study.<sup>49</sup>

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<sup>41</sup> 2012 Rule, 77 Fed. Reg. at 4099.

<sup>42</sup> *Id.* at 4092.

<sup>43</sup> Dietary Guidelines, p. 80. A healthy Mediterranean-style diet requires an even greater quantity of daily fruit. *See id.* p. 85.

<sup>44</sup> *See id.* p. 41.

<sup>45</sup> 42 U.S.C. §§ 1758(f)(1), 1773(e)(1).

<sup>46</sup> *Id.* at 4106.

<sup>47</sup> 2019 USDA Study, Summary of Findings, pp. 16, 19.

<sup>48</sup> Proposed Rule, 85 Fed. Reg. at 4106

<sup>49</sup> 42 U.S.C. §§ 1753(b)(3)(A), 1758(a)(4), 1758(a)(1), 1758(f)(1), 1773(e)(1).

These reasons are also not supported by the factual record. With respect to food waste, the Proposed Rule reasons that school cafeterias that provide “Offer Versus Serve (OVS)” — which allows children to decide how much food they want—give children the option of taking only half a cup of fruit. However, the Proposed Rule would not provide children the same option in non-cafeteria settings because it would not require schools to provide additional fruit to children who wanted more than half a cup. Instead, the Proposed Rule merely “encourage[s]” local program operators “to have additional fruits, such as a basket of whole fruits, available for students to select if additional fruit is desired.”<sup>50</sup>

In addition, USDA overlooks the findings that it made regarding food waste in the 2019 USDA Study. The 2019 USDA Study found that, while OVS at breakfast “was associated with lower percentages of waste for . . . fruits (14 percent versus 23 percent),” lengthening the school breakfast period was a stronger factor in preventing fruit waste. Breakfast periods in elementary schools that were 26-39 minutes were associated with significantly lower levels of plate waste for fruits (17 percent waste) than breakfast periods that were less than 25 minutes (28 percent waste), and among high schools, breakfast periods that were 40 minutes or longer were associated with a significantly lower level of plate waste (18 percent) for fruits than those lasting less than 25 minutes (27 percent).<sup>51</sup> It should also be noted that the 2019 USDA Study examined only school breakfasts in the 2014-2015 school year—the first school year when the 1 cup of fruit requirement under the 2012 Rule was implemented. Since then, schools have had 5 more school years to acclimate to the breakfast fruit requirement.

As for encouraging breakfast in non-cafeteria settings, there is nothing in the factual record showing that the current fruit requirement for breakfasts discourages schools from serving breakfast in those settings.

Thus, the proposal to cut in half the required servings of fruit in school breakfasts in non-cafeteria settings—from a full cup daily to a half cup daily—is flawed for several reasons. It is inconsistent with the findings that USDA made when it issued the 2012 nutrition standards and USDA offers no reasoned explanation for departing from those findings. Second, the proposal does not comply with the statutory requirements that nutrition standards be consistent with the goals of the Dietary Guidelines and based on tested nutritional research. Third, the reasons for the modified standard are not supported by the factual record. If finalized, that proposal would not be in accordance with law and would be arbitrary and capricious, in violation of the APA. *See Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43.

### **C. USDA Should Not Prematurely Eliminate the Prohibition on Synthetic *Trans* Fats in Schools.**

USDA also has proposed that, beginning in the 2021-2022 school year, “local program operators would not have to comply with, or monitor, synthetic *trans* fats in school meals or

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<sup>50</sup> *Id.*

<sup>51</sup> 2019 USDA Study, Volume 4, p. 114.

competitive foods.”<sup>52</sup> The elimination of this key safeguard in the school meals nutrition standards would not be consistent with the Dietary Guidelines, as required by the National School Lunch Act and the Child Nutrition Act, and is premature because it anticipates a change in FDA’s regulations that has not yet occurred.

The 2012 Rule provides that “[f]ood products and ingredients used to prepare school meals must contain zero grams of *trans* fat (less than 0.5 grams) per serving.”<sup>53</sup> The proposed elimination of that requirement would not be consistent with the Dietary Guidelines, which advise that *trans* fats should be avoided: “[i]ndividuals should limit intake of trans fats to as low as possible by limiting foods that contain synthetic sources of trans fats, such as partially hydrogenated oils in margarines, and by limiting other solid fats. A number of studies have observed an association between increased intake of *trans* fats and increased risk of [cardiovascular disease] . . . due, in part, to its LDL-cholesterol-raising effect.”<sup>54</sup> The Guidelines also caution that “[a]lthough food manufacturers and restaurants have reduced the amounts of artificial *trans* fats in many foods in recent years, these fats can still be found in some processed foods, such as some desserts, microwave popcorn, frozen pizza, margarines, and coffee creamers.”<sup>55</sup>

The reason that USDA gives for its *trans* fat proposal is that “FDA’s regulations are removing *trans* fats from the United States food supply, and thus “it is unnecessary for USDA to prohibit synthetic *trans* fats in school meals.”<sup>56</sup> However, as stated in the Proposed Rule, the “FDA originally established the compliance deadline as June 18, 2018, for all [*trans* fat] products, but has extended the deadline due to the shelf life of some products,” permitting “old inventory” to “exist in the food supply until January 1, 2021.”<sup>57</sup> Given that *trans* fats are not yet prohibited and that FDA’s current compliance deadline for removal of *trans* fats from the U.S. food supply is still nearly a year away, USDA should not remove this important safeguard from the school meals programs until it is clear that the FDA will not provide any further extensions for removing *trans* fats from the U.S. food supply.

Thus, the proposal to remove the *trans* fat requirement from the nutrition standards is not consistent with the statutory requirement that nutrition standards be based on the Dietary Guidelines and would remove the requirement before FDA has prohibited *trans* fats. If finalized, that proposal would not be in accordance with law and would be arbitrary and capricious, in violation of the APA. *See Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43.

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<sup>52</sup> Proposed Rule, 85 Fed. Reg. at 4106. The regulations that would be impacted by this proposal are at 7 C.F.R. §§ 210.10(f)(4), 210.11(g), 220.8(f)(4). The italics in the word *trans* is commonly used to distinguish synthetic *trans* fats from naturally-occurring trans fats.

<sup>53</sup> 2012 Rule, 77 Fed. Reg. at 4147. “Meats that contain a minimal amount of naturally-occurring trans fats are allowed in the school meal programs.” *See id.*

<sup>54</sup> *Id.* p. 32.

<sup>55</sup> *Id.*

<sup>56</sup> Proposed Rule, 85 Fed. Reg. at 4106, 4120.

<sup>57</sup> *Id.* at 4106.

#### **D. USDA Should Not Allow Schools to Use Only One or Two Meal Patterns For All Students Rather Than Offering Age-Appropriate Meals**

USDA proposes to allow school districts, referred to in the school meals programs as School Food Authorities (“SFAs”), that are relatively small (i.e., those with fewer than 2,500 students) and to allow schools with “unique grade configurations” to “use one or two meal patterns to plan meals for students in all grades.”<sup>58</sup> USDA notes this proposal would apply to roughly 80 percent of all SFAs participating in the school lunch program.<sup>59</sup> This proposed change would allow younger children to be served meals that do not meet the 2012 nutrition standards, including the standards for calories and sodium. For example, kindergarten children could be served meals that are appropriate for 7<sup>th</sup> and 8<sup>th</sup> graders.<sup>60</sup> This is contrary to the requirements of the National School Lunch Act and the Child Nutrition Act, which require the proposal to be based on the current Dietary Guidelines or tested nutritional research, and the Healthy Kids Act, which requires the proposal to be based on the 2009 Nutrition Board Study.

The 2012 Rule provides distinct nutritional requirements (including limits on calories and sodium) for three defined grade groups: K-5, 6-8 and 9-12.<sup>61</sup> The 2012 Rule also provides a measure of flexibility in the use of meal patterns by elementary and middle schools with unique grade configurations, but with an important safeguard to prevent younger children from being served an excess of calories and sodium: “If an unusual grade configuration in a school prevents the use of these established age/grade groups, students in grades K-5 and grades 6-8 may be offered the same food quantities at lunch *provided that the calorie and sodium standards for each age/grade group are met.*”<sup>62</sup> That safeguard provides adequate flexibility to schools with unique grade configurations while ensuring consistency with the Dietary Guidelines as well as the 2009 Nutrition Board Study and Dietary Reference Intakes that help form the basis for the Dietary Guidelines, all of which prescribe specific limits on sodium and calories based on the age range of children/adolescents and the range of their daily caloric diet. The 2019 USDA Study found that the nutritional quality of school lunches served in SFAs with fewer than 2,500 students was essentially equivalent to the nutritional quality of larger SFAs.<sup>63</sup>

Because younger children could be served meals that are not consistent with the 2012 nutrition standards under the proposed change, the proposal is not consistent with the Dietary Guidelines or 2009 Nutrition Board Study. USDA claims that the Dietary Guidelines “would continue to be the foundation for meal pattern requirements”<sup>64</sup> but does not explain how serving meals with, for example, excessive sodium and calories, is consistent with the Guidelines. USDA also does not attempt to justify its proposal based on any “tested nutritional research.”

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<sup>58</sup> Proposed Rule, 85 Fed. Reg. at 4104.

<sup>59</sup> *Id.* at 4119.

<sup>60</sup> *Id.*

<sup>61</sup> *See* 2012 Rule, 77 Fed. Reg. at 4147.

<sup>62</sup> 7 C.F.R. § 210.10(c)(1) (emphasis added).

<sup>63</sup> 2019 USDA Study, Volume 2, p. 106.

<sup>64</sup> Proposed Rule, 85 Fed. Reg. at 4104.

Indeed, USDA, in its Proposed Rule, concedes that “[u]sing a single meal pattern may overfeed younger students and underfeed older students, therefore, schools would have the option of offering additional food (e.g., larger portions, additional choices) to older students to ensure they receive age-appropriate meals.”<sup>65</sup> But while USDA offers that suggestion to mitigate underfeeding of older students, it offers no solution to the problem of overfeeding younger students with meals that have excessive calories and sodium for their ages.<sup>66</sup> USDA only adds that “SFAs that choose to exercise this flexibility would work with their State agency to identify which meal pattern(s) best balance operational ease and offering children age-appropriate meals.”<sup>67</sup> The District of Columbia raises an additional concern that meals served under this proposal may not be developmentally appropriate for younger students (e.g., whole fruit is recommended to be cut for younger students, food should be modified to avoid choking hazards) and the amount of food and calories served may be too much for younger students or too little for older students.

Thus, this proposal does not meet the statutory requirements that nutrition standards be based on tested nutritional research, the Dietary Guidelines, and the 2009 Nutrition Board Study. As a result, if finalized, it would not be in accordance with law, in violation of the APA. *See Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43.

#### **E. USDA Should Not Allow Schools to Offer “Calorie-Free, Noncarbonated Naturally-Flavored Water” to Meet the Potable Water Requirement**

Under the Healthy Kids Act of 2010, Congress established a non-discretionary potable water requirement: all schools offering school lunches “shall make available to children free of charge, *as nutritionally appropriate*, potable water for consumption in the place where meals are served during meal service.”<sup>68</sup> In 2013, USDA issued a rule providing that schools “must make potable water available and accessible without restriction to children at no charge in the place(s) where lunches are served during the meal service.”<sup>69</sup> USDA now proposes to allow “schools to offer calorie-free, naturally flavored, noncarbonated water” to meet the potable water requirement.<sup>70</sup> This proposal violates the statutory directive that potable water be provided only “as nutritionally appropriate.” It is also environmentally unsound because it would increase the use of plastic bottles and other beverage containers.

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<sup>65</sup> Proposed Rule, 85 Fed. Reg. at 4104.

<sup>66</sup> In a comment letter on the Proposed Rule submitted to USDA, the American Academy of Pediatrics cautions that “[b]ecause energy requirements vary greatly as children age, we are concerned that creating meal patterns intended to cover such a broad age range could result in scenarios of potential over or under feeding of students.” Letter from American Academy of Pediatrics to USDA dated April 21, 2020, at p .5, *available at* <https://www.regulations.gov/document?D=FNS-2019-0007-36764>.

<sup>67</sup> *Id.* at 4104.

<sup>68</sup> 42 U.S.C. §§ 1758(a)(5) (emphasis added).

<sup>69</sup> National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 39,068, 39,091 (June 28, 2013) (Interim Final Rule); 7 C.F.R. §§ 210.10(a)(1)(i). The potable water requirement in school breakfasts applies when breakfasts are served in the cafeteria. *See* 7 C.F.R. § 220.8(a)(1).

<sup>70</sup> Proposed Rule, 85 Fed. Reg. at 4109.

Serving artificially flavored water would not be nutritionally appropriate, as required by the Healthy Kids Act, for two reasons. First, USDA itself recognizes that this proposal, while purportedly designed to “encourage water consumption,” may “impact the consumption of milk” if students choose flavored water instead of milk.<sup>71</sup> That conflicts with USDA’s September 2019 guidance to state agencies and program operators emphasizing that “water made available to students in the [school meals programs] shall not compete with the milk requirement.”<sup>72</sup> That guidance was consistent with the Dietary Guidelines, which recommend greater consumption of dairy products because most Americans are “far below recommendations” for dairy intake and that “age-related decline in dairy intake begins in childhood.”<sup>73</sup>

Second, the proposal would allow schools to make available to children bottled beverages containing calorie-free artificial sweeteners like sucralose (along with other artificial additives) to meet the potable water requirement. Excessive consumption of “naturally flavored water” drinks containing artificial sweeteners would not meet the Healthy Kids Act mandate that water offered to children be nutritionally appropriate.<sup>74</sup>

The proposal would allow drinks with artificial sweeteners because USDA intends to rely on FDA’s definition of “naturally flavor” or “natural flavoring.” Federal courts have interpreted that definition to allow “artificial, non-flavoring coloring or preservatives, as long as the ‘characterizing flavor’ is, in fact natural.”<sup>75</sup> Thus, children who today are consuming plain water during school meals may be offered, under USDA’s proposal, water containing artificial sweeteners along with other artificial additives including artificial coloring and preservatives.

The Dietary Guidelines advise that artificial sweeteners are “many times sweeter than table sugar (sucrose).” In 2014, the National Institutes of Health discussed research suggesting “that the intensely sweet taste of artificial, low-calorie sweeteners can lead to a ‘sweet tooth,’ or a preference for sweet things,” and also noted that “[w]hen kids grow up eating a lot of sweet foods, they tend to develop a preference for sweets.”<sup>76</sup> A 2015 paper published in *Appetite* (a peer-reviewed scientific journal on nutrition) concludes that “exposing children to highly-sweetened beverages, even if they do not provide calories themselves, can contribute to negative

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<sup>71</sup> Proposed Rule, 85 Fed. Reg. at 4121-22.

<sup>72</sup> USDA, Memo SP-39-2019, *Clarification of the Milk and Water Requirements in the School Meals Programs*, available at <https://fns-prod.azureedge.net/sites/default/files/resource-files/SP39-2019os.pdf>. USDA also stated that “commercially packaged water should not be made available on the serving line in any manner that interferes with, or appears to be a substitute for, the selection of reimbursable meal components, including low-fat or fat-free milk.” USDA, Memo SP-38-2019, *Meal Requirements: Questions and Answers for Program Operators*, available at <https://fns-prod.azureedge.net/sites/default/files/resource-files/SP38-2019os.pdf>.

<sup>73</sup> Dietary Guidelines, at pp. 42, 49.

<sup>74</sup> The State AGs do not oppose permitting schools to add slices of fresh fruits, vegetables or herbs to plain water that is offered to students to satisfy the potable water requirement.

<sup>75</sup> See 21 C.F.R. § 101.22(i) (similar FDA definition of “natural flavor” as the FDA regulation referred to in the Proposed Rule); *Ivie v. Kraft Foods Global, Inc.*, No. 12-CV-2554, 2013 WL 685372, at \*9 (N.D. Cal. Feb. 25, 2013); *Lam v. General Mills, Inc.*, 859 F.Supp.2d 1097, 1102-03 (N.D. Cal. 2012) (holding that “a product may be labeled as ‘fruit flavored’ or ‘naturally flavored,’ even if it does not contain fruit or natural ingredients”).

<sup>76</sup> National Institutes of Health, News in Health (Oct. 2014), *Sweet Stuff: How Sugars and Sweeteners Affect Your Health*, p.2, available at <https://newsinhealth.nih.gov/sites/nihNIH/files/2014/October/NIHNiHOct2014.pdf>.

outcomes. First, exposure to artificial sweeteners could persistently alter sweet preferences, leading to enhanced intake of sugars throughout adulthood. Second, exposure to artificial sweeteners could interfere with learning of basic relations between sweet tastes and the delivery of calories, which in turn could negatively affect regulation of metabolic processes. Third, artificial sweeteners could alter the composition of the gut microbiota, which in turn can contribute to metabolic dysregulation.”<sup>77</sup>

Artificial sweeteners have also been linked to other health issues. In November 2019, the American Academy of Pediatrics published a statement pertaining to children’s intake of “non-nutritive sweeteners” (also known as artificial sweeteners or sugar substitutes), finding “that observational studies show that [nonnutritive sweetener] intake is associated with higher rates of metabolic syndrome.”<sup>78</sup> “Metabolic syndrome” refers to “a group of risk factors that raises your risk for heart disease and other health problems, such as diabetes and stroke.”<sup>79</sup> The Centers for Disease Control and Prevention (CDC) has also advised that water served in schools should only be plain (i.e., no flavoring, additives, or carbonation).<sup>80</sup> Thus, allowing drinks with artificial sweeteners to be offered to children would not be nutritionally appropriate, in violation of the Healthy Kids Act.<sup>81</sup>

The proposal would also be detrimental to the environment. The CDC has recognized that among the “key messages” that schools should convey to students about water are the “environmental benefits of drinking tap water instead of bottled beverages, including bottled water.”<sup>82</sup> The National Ocean Service (part of the National Oceanic and Atmospheric Administration) stresses that single-use plastic items such as water bottles often end up in oceans, and because plastic does not decompose, such debris can “wreak[] havoc on marine ecosystems.”<sup>83</sup> USDA’s proposal can be expected to increase consumption of single-use plastic bottles and thus plastic pollution as well as other single-use beverage containers, and it is detrimental to the environment.

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<sup>77</sup> Swithers, S.E., *Artificial Sweeteners are Not the Answer to Childhood Obesity*, APPETITE. 2015 Oct;93:85-90, available at <http://www.appstate.edu/~steelekm/classes/psy5300/Documents/Swithers2015-obesity.pdf>

<sup>78</sup> Baker-Smith, et al. *The Use of Nonnutritive Sweeteners in Children*. PEDIATRICS. 2019;144(5), available at <https://pediatrics.aappublications.org/content/144/5/e20192765/tab-e-letters>. The studies upon which the American Academy of Pediatrics premised this finding were conducted on adults; the Academy observed that “the long-term safety of [nonnutritive sweeteners] in childhood has not been assessed in humans.”

<sup>79</sup> National Institutes of Health, *Metabolic Syndrome*, <https://www.nhlbi.nih.gov/health-topics/metabolic-syndrome>.

<sup>80</sup> Centers for Disease Control and Prevention. *Increasing Access to Drinking Water in Schools* (hereinafter, “CDC 2014”). Atlanta GA: US Dept. of Health and Human Services; 2014, at 7, [https://www.cdc.gov/healthyschools/npao/pdf/water\\_access\\_in\\_schools\\_508.pdf](https://www.cdc.gov/healthyschools/npao/pdf/water_access_in_schools_508.pdf).

<sup>81</sup> In addition to artificial sweeteners, flavored drinks often contain artificial food coloring that the American Academy of Pediatrics has found play a “role in exacerbating attention-deficit/hyperactivity disorder symptoms” in children. See Trasande, L. et al., *Food Additives and Child Health*, PEDIATRICS, 2018;142(2):e20181410, p. 4, available at <https://pediatrics.aappublications.org/content/pediatrics/142/2/e20181410.full.pdf>.

<sup>82</sup> *Id.* at 29.

<sup>83</sup> N.O.A.A., National Ocean Service, *A Guide to Plastic In the Ocean*, <https://oceanservice.noaa.gov/hazards/marinedebris/plastics-in-the-ocean.html>

Because USDA's proposal would allow schools to meet the potable water requirement by offering bottled water containing nonnutritive sweeteners, it is not nutritionally appropriate for children, as the Healthy Kids Act requires. It is also detrimental to the environment. As a result, if finalized, the proposal would not be in accordance with law and arbitrary and capricious.<sup>84</sup> See *Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43.

**Conclusion**

For these reasons, the State AGs urge USDA not to weaken the 2012 nutrition standards, including the five standards discussed above.

Sincerely,



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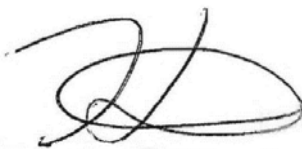
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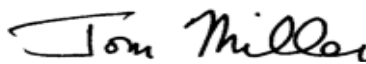
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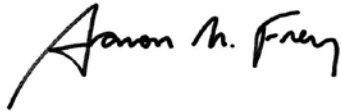
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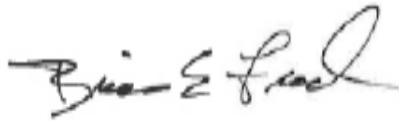
Tom Miller  
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<sup>84</sup> The nutrition and environmental concerns that the State AGs have raised with respect to offering flavored drinks to meet the potable water requirement apply equally to selling those drinks to elementary and middle school students.



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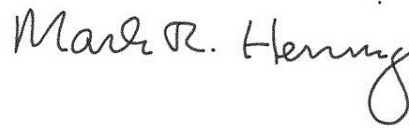
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