

**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

**AMICUS CURIAE BRIEF OF THE SCHOOL NUTRITION ASSOCIATION
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The School Nutrition Association ("SNA") is a nationwide nonprofit professional organization comprised of more than 58,800 members that provide high-quality, low-cost school meals to students across the United States.¹ Forty-nine (49) state affiliates have joined SNA to support its core purpose—for America's students to be well-nourished and prepared to succeed.² SNA's vision is for all students to have access to nutritious school meals to ensure their optimal health and well-being, and its mission is to "empower and support school nutrition professionals in advancing the accessibility, quality and integrity of school nutrition programs."³ Its mission therefore compels SNA to support the USDA's efforts to implement regulations that strike a balance that allows the provision of nutritious school meals while considering students' acceptance of those meals and operators' ability to provide them at affordable cost. SNA respectfully submits

¹ See School Nutrition Association 2017-2018 Annual Report, *available at* <http://schoolnutrition.org/about/>.

² *Id.*

³ *Id.*

this *amicus curiae* brief in support of the Defendants' motion for summary judgment in this case [Doc. No. 28].

I. SNA's Public Comment Letter

One of the strategies SNA employs to achieve its goal of having a well-nourished student populace is advocating with policymakers and lawmakers to facilitate a national public school meals program that allows the operators to provide nutritious meals that students in K-12 will actually eat. To that end, SNA has been actively involved in the rulemaking surrounding the sodium and whole grain content requirements of student meals from the beginning of these evolving issues. SNA is uniquely positioned to comment on the operational challenges that providers of school meals were facing throughout the rulemaking process because its membership is representative of the vast majority of operators who actually provide the meals in America's public schools. On January 29, 2018, SNA submitted its public comment letter on behalf of its membership to the USDA as the Department considered how to balance the goals of the *Dietary Guidelines* with the practical challenges of the availability of compliant foods that students would not reject and that operators of school meal programs could afford to provide. *See* SNA Comment Letter, MGS-003227-003228. SNA's Comment Letter notably impacted the USDA's rulemaking, as the Final Rule states that the USDA's decision to require that at least half of all grains provided in school meal programs be whole-grain rich was "recommended by the School Nutrition Association, representing 57,000 school nutrition professionals, [and] is consistent with the USDA's commitment to alleviate difficult regulatory requirements, simplify operational procedures, and provide school food authorities ample flexibility to address local preferences." 83 Fed. Reg. 63,781; MGS-000028.

A. SNA Recommended Restoration of Initial Grain Requirement That At Least Half of Grains Offered at School be Whole Grain Rich.

The SNA Comment Letter addressed the concerns of its membership pertaining to the whole grain and sodium requirements addressed in the Interim Rule ("SNA Comment Letter"). Regarding whole grains, SNA reported that 65% of school nutrition directors who responded to an SNA survey indicated that they were experiencing continued challenges with the current whole grain requirements, which at the time required that all grain products in student meals be whole grain rich unless the school district obtained a hardship exemption from the state that permitted only half of the school's grain products be whole grain rich. 2017 Interim Rule, 82 Fed. Reg. 56,703-704 (Nov. 30, 2017).

More specifically, students' regional and cultural preferences for specific refined grains, including white rice, pasta, grits, or tortillas, continued to cause school meal administrators to "struggle" with meeting the whole grain mandate. SNA Comment Letter at 1. Although the regulatory flexibility of the state-administered waiver program was helpful in some cases, in several other cases State Agencies either did not readily offer the waiver program to schools struggling to meet the whole grain mandate or made the waiver application process so arduous that some schools were discouraged from even applying for the waivers at all. *Id.* Indeed, in some instances, states required schools to provide documentation to obtain a whole grain waiver that schools had no means to obtain, severely limiting (or eliminating) the regulatory relief that Congress intended to provide through the waiver program. *Id.* SNA also informed the USDA that the waiver program required the redirection of limited State Agency resources that should be utilized to provide technical assistance and training to school districts to support their meal

programs. *Id.*⁴ For these reasons, SNA recommended that "[t]he most effective solution is to restore the initial requirement that at least half of grains offered with school meals be whole grain rich."

B. SNA Recommended That The USDA Maintain Target 1 Sodium Levels and Eliminate Targets 2 and 3.

SNA informed the USDA that while school districts demonstrated significant progress in reducing sodium to meet the Target 1 level, 92% of surveyed school districts were concerned about the availability of foods that could meet Targets 2 and 3 and whether students would ultimately accept such foods. SNA quoted the Institute of Medicine's admonition that "reducing the sodium content of school meals as specified and *in a way that is well accepted by students* will present major challenges and *may not be possible.*" SNA Comment Letter at MGS-003227 (quoting School Meals: Building Blocks for Healthy Children, 2010) (emphasis added).

Indeed, SNA explained that Targets 2 and 3 would cause schools to remove healthy food choices from their menus, as sodium naturally occurs in meat, milk, and other low-fat dairy foods at levels that would not meet Targets 2 and 3. SNA Letter at 2-3. Thus, implementing Targets 2 and 3 would further alienate students from healthy school meal choices, thereby effectively driving down participation in school meal programs. *Id.* at MGS-003228.

SNA further commented to the USDA that nutritional science is unsettled regarding whether students' sodium levels should be further reduced. SNA cited the lack of scientific evidence to support reducing sodium levels to Targets 2 and 3 for children and explained that the

⁴ USDA's website aptly describes the role of State Agencies: "State agencies are responsible for the administration of the National School Lunch Program (NSLP). State agencies are the link between FNS and local program operators, ensuring the programs are managed according to the federal requirements. State agencies facilitate communication between the program operators and FNS, guaranteeing the success of the NSLP." See <https://www.fns.usda.gov/nslp/state-agency> (last visited Sept. 4, 2019).

scientific and medical communities have differing opinions as to the appropriate sodium levels for children, and the long-term effects of further reducing sodium intake on child development and health are yet to be determined. *Id.*⁵ Based on all of these reasons, SNA recommended that the USDA retain the Target 1 sodium level and eliminate Targets 2 and 3. *Id.*

II. The 2018 Final Rule

Ultimately, the USDA adopted the 2018 Final Rule that struck a balance between the *Dietary Guidelines'* goal of providing nutritious meals to students and the barriers to providing those meals, such as student acceptance and the cost of the meals that school systems provide. More specifically, regarding the proposed sodium limits, the 2018 Final Rule extended the current sodium level, Target 1, through the 2023-24 school year, postponed implementation of Target 2 to 2024-25, and eliminated Target 3. 83 Fed. Reg. 63,776, 63,782-83, 63,787-88.

Regarding whole grains, the 2018 Final Rule requires that at least half of grain products be whole grain rich but eliminated the requirement that all schools serve only whole grain rich products, essentially codifying the exemption status provided under the Interim Rule and applying it to all schools without the need to demonstrate a hardship waiver. 83 Fed. Reg. 63,776, 63,780-81, 63,786.

The 2018 Final Rule's sodium and whole grain rich requirements are in congruence with Congress' multiple actions to forestall full implementation of the 2012 Rule so that the USDA could evaluate additional scientific evidence regarding sodium intake and so that states could

⁵ Indeed, the USDA recognized that nutritional science is not settled as to the appropriate sodium intake levels for children and acted accordingly by implementing flexibilities in the 2018 Final Rule that "allow for any adjustments to be made, including regulatory changes, to incorporate any updated scientific information regarding sodium." 83 Fed. Reg. 63,787; *see also id.* at 63,782-83 (discussing need to assess the National Academies of Sciences, Engineering and Medicine's review of the Dietary Reference Intakes for sodium intake and the 2020 *Dietary Guidelines for Americans* to further inform USDA's sodium restrictions); Defendants' Br. at 13-14.

provide a hardship exemption to the 2012 Rule's whole-grain requirements to address student acceptance and the availability of compliant meals. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 751, 128 Stat. 2130, 2171 (2015); 2017 Interim Rule, 82 Fed. Reg. at 56,703, 56,703-04 (Nov. 30, 2017).

The wisdom of the 2018 Final Rule is further supported by the results of a subsequent publication, the "School Nutrition and Meal Cost Study: Summary of Findings," that the USDA published in April 2019 ("Meal Cost Study").⁶ For example, the Meal Cost Study shows that the change in the sodium levels of student meals to Target 1 following the 2012 Rule was associated with a 10% decrease in student participation in the National School Lunch Program, dropping from 64% to 54%. Meal Cost Study at 38. Additionally, according to the USDA's Economic Research Service ("ERS"), participation in school lunch by students paying full-price or reduced-price for lunches has declined in correlation with the 2012 Rule: "Since [2011], declining participation of children receiving reduced- and full-price lunches has led to a drop in overall participation."⁷

Moreover, "[t]he greatest challenge [school food authorities] faced in implementing or maintaining compliance with the updated nutrition standards was the cost of foods that need to be incorporated into menus in order to meet the standards" *Id.* at 10. Therefore, student rejection of compliant school meals and the operators' cost in providing such meals were factors the USDA was correct to consider in developing the 2018 Final Rule.

⁶ *See* Meal Cost Study, available at <https://www.fns.usda.gov/school-nutrition-and-meal-cost-study>, last visited Sept. 5, 2019.

⁷ *See* "Decline in school lunch participation driven by drops in full- and reduced-price participation," USDA Economic Research Service, last updated Aug. 28, 2019, last visited Sept. 5, 2019, available at <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=93781>.

III. The School Lunch Act

The palatability and cost of school meals has historically been a factor that the USDA appropriately considers when making school meal decisions. In fact, in 1946, Congress expressed its intention to encourage students to actually consume nutritious foods offered in the school lunch program:

It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and *to encourage the domestic consumption of nutritious agricultural commodities and other food*, by assisting the States, *through grants-in-aid and other means*, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.

42 U.S.C. § 1751 (Richard B. Russell National School Lunch Act, June 4, 1946, ch. 281, § 2, 60 Stat. 230; Pub. L. 101–147, title III, § 312(1), Nov. 10, 1989, 103 Stat. 916) (emphasis added); *see also* 42 U.S.C. § 1758(a)(4)(B) ("[By June 30, 2006], the Secretary shall promulgate rules, based on the most recent *Dietary Guidelines for Americans*, that reflect specific recommendations, expressed in serving recommendations, *for increased consumption of foods and food ingredients offered in school nutrition programs* under this chapter and the Child Nutrition Act of 1966.") By appropriately considering the palatability and cost of providing compliant foods to students, among other factors, the USDA encourages the consumption of nutritious food by the Nation's children, as students' ultimate rejection of nutritious meals offered to them, or the schools' inability to offer them in the first place, thwarts the goals of the School Lunch Act and the *Dietary Guidelines*.⁸

⁸ The Dietary Guidelines acknowledge that the palatability of nutritious foods is a factor to consider when considering healthy eating patterns: "There is room for Americans to include limited amounts of added sugars in their eating patterns, including *to improve the palatability of some nutrient-dense foods*, such as fruits and vegetables that are naturally tart (e.g., cranberries and rhubarb)." MGS-007705 (emphasis added).

IV. The *Dietary Guidelines*

The crux of Plaintiffs' substantive argument is that Congress required the USDA to adopt and implement the *Dietary Guidelines* as the standards for school meals, and the USDA's consideration of factors outside of the *Guidelines* renders the 2018 Final Rule invalid. [Plaintiffs' Br. at 12-26.] In so arguing, Plaintiffs improperly elevate the *Dietary Guidelines*' recommendations into having the force of law. (*Id.* at 13-17.) However, the *Guidelines* themselves indicate that their purpose is not to provide mandates but to provide an informative resource: "[The Guidelines are] used to *inform* USDA and HHS food programs, such as USDA's National School Lunch Program and School Breakfast Program, which feed more than 30 million children each school day" *Dietary Guidelines* at MGS-007679; *see also id.* at MGS-007664 ("*The Dietary Guidelines for Americans* is an essential resource for health professionals and policymakers as they design and implement food and nutrition programs that feed the American people, such as USDA's National School Lunch Program and School Breakfast Program, which feed more than 30 million children each school day.").

As the USDA correctly argues, Congress did not require strict adherence to the *Dietary Guidelines*' recommendations, but rather intended for the USDA to use the *Dietary Guidelines* as goals. [Defendants' Br., Doc. No. 27, at 10-11.] "The goal of the *Dietary Guidelines* is for individuals throughout all stages of the lifespan to have eating patterns that promote overall health and help prevent chronic disease." *Dietary Guidelines* at MGS-007688. To meet that goal for school-aged children, the USDA properly balanced the *Dietary Guidelines*, the IOM Report, and barriers to the ultimate consumption of nutritious foods in school meals such as palatability, cost, and availability of compliant foods. It is axiomatic that the goals of the National School Lunch

Act and the *Dietary Guidelines* would be thwarted if students do not actually eat nutritious meals because of the palatability, cost, or unavailability of such meals.

Plaintiffs' argument that the USDA is bound to follow the precise recommendations of the *Dietary Guidelines* simultaneously exaggerates both the strength of Congressional intent regarding the USDA's use of those *Guidelines* and the legal authority Plaintiffs use to support that argument. For example, Plaintiffs cite *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000), as citing cases that show that the term "based on" in statutory construction means "be the 'foundation' for." [Plaintiffs' Br. at 15 ("[T]he command that nutrition standards be '*based on* the most recent Dietary Guidelines,' *id.* § 1758(a)(4)(B); *accord id.* § 1753(b)(3)(A), requires that the Guidelines be the 'foundation' for such standards.") However, judicial interpretation of "based on" is not as rigid as Plaintiffs lead the Court to believe, as the *McDaniel* Court cited cases that indicate that "based on" can mean "foundation" *or* "a starting point" *or* "arising from."

Moreover, as the USDA correctly argues, the *McDaniel* case supports the USDA's position, not Plaintiffs' argument. [USDA Br. at 13-14.] The *McDaniel* Court found that where a pension plan stated that benefits would be calculated "based on" or "in accordance with" a specific mortality table, that table was the "starting point" or "foundation" for determining mortality factors and the plan "[did] not reasonably preclude an interpretation that sets the table forward or backward" based on the number of females in a plan. 203 F.3d at 1111. Accordingly, the statutes that state that the USDA's school meal programs must be "based on" the *Dietary Guidelines* do not require strict adherence to those *Guidelines* but instead "[do] not reasonably preclude an interpretation" that adjusts school meals considering other factors, such as student palatability and operational challenges.

V. The IOM Report

Congress has directed that the USDA's regulations regarding the nutritional standards for school meal programs be based on the "IOM Report," a publication of the Institute of Medicine of the National Academies of Science, Engineering, and Medicine and the Food and Nutrition Board of the National Research Council of the National Academy of Sciences. MGS-007893-8287.

The IOM Report addresses the need to strike a balance among several factors when planning school meals, including nutrition, student palatability, cost, and practicality of providing compliant meals to students. Indeed, the IOM Report devotes an entire section to discuss that necessary balancing of these multiple factors. IOM Report at MGS-8014-8022 ("Iterations—Achieving the Best Balance of Nutrition, Student Acceptance, Practicality, and Cost"). The IOM Report also dedicates substantial attention to the implications of food cost and market effects. IOM Report at MGS-8038-8062 ("Food Cost Implications and Market Effects").

More specifically, the IOM Report recommends consideration of student taste and costs of foods in the context of sodium and whole grain rich standards:

Recommendation 5. USDA should work cooperatively with Health and Human Services, the food industry, professional organizations, state agencies, advocacy groups, and parents to develop strategies and incentives to reduce the sodium content of prepared foods and to increase the availability of whole grain-rich products *while maintaining acceptable palatability, cost, and safety.*

IOM Report at MGS-007919 (emphasis added). Elaborating on the reduction of sodium in school meals, the IOM Report "recognize[d] that there are barriers to reducing the sodium content of meals to the recommended levels without having *long-term adverse effects on student acceptance and participation, safety, practicality, and cost*" before recommending some flexibility in the timing of the implementation of the sodium targets. *Id.* (emphasis added).

The IOM Report further recommends that the USDA and others conduct research regarding, among other things:

topics related to the implementation of the new Meal Requirements, *children's acceptance of and participation in school meals*, and children's health—especially . . . [i]mpacts of various approaches to reducing the sodium content of school meals and *student acceptance of reduced-sodium foods* [and the] *[i]mpacts of various approaches to increase the acceptance of whole grain-rich products*.

MGS-0023-24; *see generally* MGS-007915 ("*To achieve a reasonable balance* between the goals of reducing waste and preserving the nutritional integrity of school meals"); MGS-7917 ("*Foods need to be appealing to students* to encourage selection and consumption.") Therefore, Plaintiffs' contention that the USDA has acted arbitrarily or capriciously for considering student palatability and operational challenges runs directly counter to the way the Dietary Guidelines and IOM Report treat those factors.

* * * * *

Therefore, the School Lunch Act, the *Dietary Guidelines*, and the IOM Report all show that the USDA did not act arbitrarily or capriciously when it considered factors such as student palatability and the cost of compliant meals when it developed the 2018 Final Rule.

VI. The USDA Followed Its Fundamental Mandate When It Considered *The Dietary Guidelines* And The Best Interests Of Students And School Food Authorities When It Promulgated The 2018 Final Rule.

Plaintiffs' argument that the USDA's promulgation of the 2018 Final Rule was arbitrary and capricious because the Department considered factors other than the *Dietary Guidelines* when implementing the Final Rule relies on *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983). [Plaintiffs' Br. at 18-21.] The *State Farm* Court explained that "[n]ormally, an agency rule would be arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider,

[or] *entirely failed to consider an important aspect of the problem.*" 463 U.S. at 43 (emphasis added). Plaintiffs cite *State Farm* to argue that the USDA "arbitrarily elevated its consideration of student taste preferences and operational flexibilities over those of nutrition science, children's health, and the goals of the *Dietary Guidelines*." [Plaintiffs' Br. at 18.] Without question, Congress intended for the USDA to consider the *Dietary Guidelines* when implementing the federal school meal programs. Plaintiffs argue, however, that the USDA could not consider other relevant factors—such as student rejection of food and operational challenges—whose impact led the Department to promulgate its school meal requirements that differ from the specific recommendations of the *Dietary Guidelines*. *Id.* As shown above, however, by passing legislative flexibilities that forestalled full implementation of the 2012 Rule and by referencing the IOM Report, Congress has expressed the intention that all the factors considered therein—including student rejection and school districts' cost of compliant foods—are relevant to setting school meal standards.

In fact, if the USDA had acted as Plaintiffs argue they should have and wholly adopted the *Dietary Guidelines'* recommendations while entirely ignoring other factors relevant to determining the appropriate levels of sodium and whole grain rich foods for school meals—such as student preference, the cost and availability of compliant meals, and developments in nutritional science—then the USDA would have acted arbitrarily and capriciously because it would have "entirely failed to consider [] important aspect[s] of the problem." 463 U.S. at 43.

Further, USDA's rulemaking discretion is simply not as limited as Plaintiffs represent it to be. The *State Farm* Court explained the Court's role in determining whether a regulation is arbitrary or capricious:

While the scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency, ***the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action.*** In reviewing that explanation, ***a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.***

463 U.S. 29, 30-31 (1983) (emphasis added); *see also* Defendants' Br. at 15-16, 24-25.] Indeed, the Supreme Court expressly acknowledged the flexibility agencies have in their rulemaking:

It is not infrequent that the available data does not settle a regulatory issue ***and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.*** Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms “substantial uncertainty” as a justification for its actions. The agency must explain the evidence which is available, and must offer a “rational connection between the facts found and the choice made.”

State Farm, 463 U.S. at 52 (emphasis added); *see also id.* at 50 (“Nor do we broadly require an agency to consider all policy alternatives in reaching decision.”) and *id.* at 53 (defending NHTSA's decision not to extrapolate findings of seatbelt usage study when setting car safety standards because “it is within the agency's discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude.”). So, the USDA must employ its judgment and expertise when studying an issue such as the sodium and whole grain requirements of school meals.

Here, the USDA appropriately exercised its rulemaking discretion when it considered the *Dietary Guidelines* in conjunction with other relevant factors when issuing the 2018 Final Rule. Although Plaintiffs do not agree with the USDA's ultimate conclusion, the text of the 2018 Final Rule itself demonstrates that when it deliberated the Rule, the USDA considered relevant factors such as student acceptance and the cost and availability of foods that would comply with the 2012 Rule in conjunction with the *Dietary Guidelines*, and there is no allegation that the USDA ignored any relevant considerations. *See, e.g.*, 83 Fed. Reg. at 63,787 (noting that the 2018 Final Rule's

sodium limits "balance[d] the needs for strong nutrition standards with the operational concerns and student acceptance of school meals" and allowed more time for the food industry to develop compliant food products that students would accept and for the development of updated scientific information regarding children's sodium intake). Therefore, Plaintiffs' argument that the USDA's promulgation of the 2018 Final Rule is arbitrary and capricious fails.

VII: The USDA Followed Correct Procedures When Promulgating The 2018 Final Rule.

Plaintiffs challenge the adequacy of the USDA's debate and comment period regarding the 2018 Final Rule. [Plaintiffs' Br. at 27, 31-35.] The USDA decisively defends the procedural soundness of its rulemaking. [Defendants' Br. at 29, 33-35.] Nonetheless, SNA has a unique perspective pertaining to the debate and comment surrounding the 2018 Final Rule. SNA's members are the working professionals who plan, procure, prepare, serve, and manage the costs of school meals and who are situated directly inside the programs that the USDA administers by regulation. SNA has participated in the ongoing debate surrounding sodium and whole grains in student meals since October 2008 and can attest to the thoroughness of that debate.

Plaintiffs challenge the adequacy of the USDA's rulemaking because it recorded 86,247 comments on the Interim Rule, and less than 1 percent of those comments favored delaying implementation of the Target 2 sodium limit or retention of the whole grain rich exemption. [Plaintiffs' Br. at 7.] However, "[t]he vast majority of the total public submissions were form letters." 83 Fed. Reg. 63,777. In fact, there were 16 form letter writing campaigns, resulting in the USDA's receipt of 84,453 form letter copies. *Id.* So, 98% of the public comment letters were form letters. The USDA thoroughly analyzed the remaining unique 1,738 letters (which included one copy of each of the form letters). 83 Fed. Reg. 63,777-82.

SNA respectfully submits that the quality—not sheer quantity—of public comments matters most.⁹ Indeed, the USDA is not required to side with the majority of the public comments it received but instead must thoughtfully consider the comments it received, and the Department did so. 83 Fed. Reg. 63,777-82. Because SNA is recognized as the lead authority on school nutrition and as the national forum for professionals working in school food authorities who have direct experience inside the NSLP and SBP, SNA's comment letter provided the valuable perspective of its more than 58,000 members for the USDA during its deliberations. The USDA accordingly gave SNA's comment appropriate weight, particularly when considered against multiple form letter campaigns. 83 Fed. Reg. 63,778 (MGS-000025), 63,781 (MGS-000028).

The USDA provided the opportunity for public comment regarding the Interim Rule, received thousands of public comments, analyzed those comments, and determined that SNA's comments were particularly useful in its decision-making. Plaintiffs argument that the Department's rulemaking was inadequate because there were more comment letters against the 2018 Final Rule than supporting it ignores the relative quality of the comments and the USDA's discretion and expertise in deciding how to respond to public comment. The USDA's procedures in promulgating the 2018 Final Rule were comprehensive and legally appropriate.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

⁹ See *Am. Wild Horse Campaign v. Zinke*, 353 F.Supp.3d 971, 978 n.5 (D. Nev. Dec. 18, 2018) ("Although the BLM received almost 5000 comments during the public comment period, the Court notes that 97% of those submissions . . . were form letters sent from an environmental activist website simply opposing the concept of the preliminary gather plan.").

Dated: September 5, 2019.

Respectfully submitted,

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