

December 9, 2019

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

**Re: Chartering and Field of Membership, Proposed Rule and Supplemental Statement,
84 Federal Register 59,989 (Nov. 7, 2019)**

Dear Mr. Poliquin:

The National Credit Union Administration (NCUA) has published a Notice of Proposed Rulemaking and Supplemental Statement (NPRM) proposing to adopt two amendments to the chartering and field of membership rules with respect to federal community credit unions.¹ *First*, NCUA proposes to re-adopt a recently repealed provision of its rules that defines any “Combined Statistical Area” (CSA), or contiguous portion of such an area, as a single local community so long as the chosen area has a population of 2.5 million or less. *Second*, NCUA proposes to provide a further explanation of its decision to eliminate the requirement that community credit unions serving a “Core-Based Statistical Area” (CBSA), or a portion of such an area, must serve residents of the urban core of the community, and to modify its rules to address concerns about the provision of financial services to low-income and minority residents in urban areas. The American Bankers Association (ABA)² believes that both these proposals are seriously flawed and urges that they be withdrawn, unless significant modifications resolve the problems with the proposals.

NCUA’s proposed amendments depart from core concepts requiring credit union members to share a “common bond.” By proposing to re-adopt measures to define CSAs as single local communities (SLCs), ABA believes that the NCUA makes an inferential leap that is unreasonable and unlawful. Furthermore, NCUA’s proposal concerning service to core urban areas suggests that credit unions do not have the same obligation as tax-paying banks to meet the needs of low-income and minority neighborhoods because credit unions are not being expressly covered under statutes like the Community Reinvestment Act (CRA). But Congress granted tax-

¹ NCUA, Chartering and Field of Membership: Proposed Rule and Supplemental Statement, 84 Federal Register 59,989 (Nov. 7, 2019).

² The American Bankers Association represents banks of all sizes and charters and is the voice for the nation’s \$18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard more than \$14 trillion in deposits, and extend \$10.4 trillion in loans. Learn more at www.aba.com.

exempt status to credit unions in view of their special mission to serve those of modest means. It is the responsibility of the Board to ensure that credit unions deliver on this mission, including to those that might call a low-income neighborhood home.

The proposal raises several concerns, which have significant consequences. Specifically, as to re-adoption of the provision defining CSAs as SLCs, the D.C. Circuit has not issued its mandate, and therefore the district court's decision remains in effect. It would be inappropriate for the Board to re-issue a rule that the district court held unlawful in a decision that has not been vacated. Concerning the proposal that credit unions not be required to serve the urban core of a "local community" defined as a CBSA, we believe the NCUA should expressly state in plain language that credit unions have a special mission of serving persons of modest means and that it is the Board's responsibility to see that credit unions carry out this mission.

We further describe ABA's concerns below, with recommendations on how these concerns can be readily addressed. For the reasons set forth below and in its briefs to the district court and the court of appeals, which are attached and incorporated into these comments, ABA reiterates its position that the NCUA should withdraw its proposals unless significant modifications resolve the problems with them.

NCUA Should Not Adopt an Irrebuttable Presumption that Every CSA, and Every Contiguous Portion of a CSA With Population of Up to 2.5 Million, Is a "Local Community."

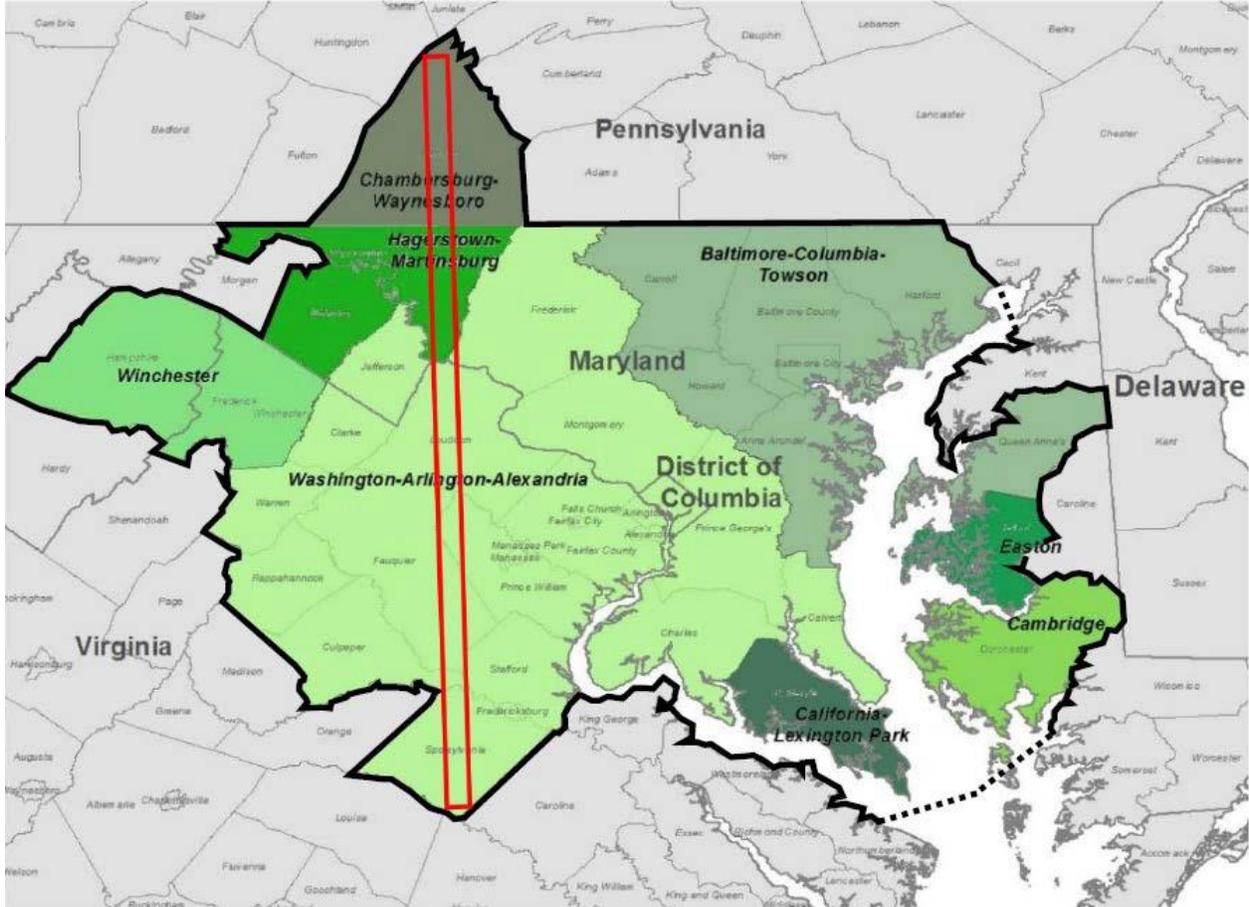
NCUA proposes to re-adopt a recently repealed provision of its rules defining any CSA, or contiguous portion of a CSA, as a single local community, so long as the population of the chosen area is 2.5 million or less. For several reasons, NCUA should not re-adopt this proposal.

1. A federal district court held, in a published decision, that NCUA's proposed definition of the statutory term "local community" "is not anywhere near the term's standard meaning."³ As the district court noted, CSAs "sometimes stretch across vast regions that include multiple separate urban centers with suburban and rural communities, and residents of peripheral towns may have no common bond at all beyond regional proximity."⁴ The district court gave as an example an area stretching from Doylestown, Pennsylvania, to Partlow, Virginia:⁵

³ *ABA v. NCUA*, 306 F. Supp. 3d 44, 61 (D.D.C. 2018).

⁴ *Id.*

⁵ *Id.* at 60.



Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Combined Statistical Area

This area is located within a single CSA, contiguous, and has a population of less than 2.5 million, but it cannot reasonably be defined as a single local community. The district court observed that “[a]ny number of less extreme examples make the same point,” and therefore held that a rule “which requires the NCUA to accept a service area based on a Combined Statistical Area as part of a *local community* no matter how geographically dispersed and unconnected its 2.5 million or fewer members may be” — is unreasonable.⁶ For this reason, the federal district court invalidated the provision that NCUA proposes to re-adopt as “manifestly contrary to the statute.”⁷

The NPRM states that the court of appeals “reversed the lower court’s decision on this issue and upheld the CSA provision.”⁸ This is an incomplete, and therefore not completely accurate, description of the court of appeals’ decision. Far from expressing across-the-board approval of NCUA’s definition of “local community”, the court of appeals stated that it “might well agree with the District Court that the approval of [a geographical area including Doylesburg,

⁶ *Id.* at 61.

⁷ *Id.*

⁸ 84 Fed. Reg. at 59,993.

Pennsylvania, and Partlow, West Virginia,] would contravene the Act.”⁹ Although the court of appeals rejected ABA’s *facial* challenge to the CSA provision, it expressly held that *as-applied* challenges remain fully available, and it specifically noted that ABA has successfully brought such challenges in the past.¹⁰ In addition, the court of appeals stated that ABA’s objection that CSAs may consist of “a mere ‘daisy chain’ of urban centers ‘that are linked to their neighbors but have nothing to do with those at the other end of the chain,’” is “deserving of sustained consideration.”¹¹

In short, two federal courts have reviewed the repealed CSA provision. One concluded that the provision is “manifestly contrary to the statute.” The other concluded that particular applications of the rule may well contravene the statutory language. As a responsible federal agency, NCUA should not simply re-adopt, without change, a rule that four out of four federal judges have concluded is, or is likely to be, flawed in at least some of its applications.

2. In its briefs to the district court and the court of appeals, ABA presented several arguments that NCUA’s CSA rule is inconsistent with the statutory text, and is, in addition, arbitrary and capricious. Those briefs, as well as the district court’s decision invalidating the CSA provision, are attached to these comments and incorporated herein in their entirety.¹² To the extent that NCUA did not consider or discuss arguments advanced in these briefs when it first adopted the CSA provision, it is obligated to do so now, since it has repealed the rule and is proposing to re-adopt it.¹³

3. According to the Office of Management and Budget (OMB), CSAs are “larger regions.”¹⁴ A CBSA will be included in a CSA if it has as little as a 15% employment interchange with a *single* adjacent CBSA.¹⁵ This is far too little commuting activity to ensure the “meaningful affinity and bond among [credit union] members, manifested by a commonality of routine interaction ... or the maintenance of an otherwise well-understood sense of cohesion or identity”

⁹ *ABA v. NCUA*, 934 F.3d 649, 667 (D.C. Cir. 2019).

¹⁰ *Id.* at 668 (citing *Am. Bankers Ass’n v. NCUA*, No. 1:05-CV-2247, 2008 WL 2857678, at *1 (M.D. Pa. July 21, 2008); *Am. Bankers Ass’n v. NCUA*, 347 F. Supp. 2d 1061, 1074 (D. Utah 2004)).

¹¹ *Id.* at 667 (citing Brief for the American Bankers Association, *ABA v. NCUA*, 934 F.3d 649, 667 (D.C. Cir. 2019) at 36).

¹² See Apps. A-D, *infra*.

¹³ See *Louisiana Federal Land Bank Ass’n v. FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (agency action is likely arbitrary and capricious if the agency fails to respond to comments that, if true, would require a change in the rule).

¹⁴ 84 Fed. Reg. at 59,991 (quoting OMB, Exec. Office of the President, OMB Bull. No. 15-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas*, Appendix at 2 (2015), <https://perma.cc/G5G7-TN3B>).

¹⁵ See 75 Fed. Reg. 37,246, 37,247 (June 28, 2010).

that Congress as found to be “essential to the fulfillment of the public mission of credit unions.”¹⁶

As a result of the way in which OMB has defined CSAs, a CBSA that is included in a CSA may have *no* employment interchange at all — indeed, no demonstrated ties of any kind — with other CBSAs that are also included in the CSA. CSAs thus have a “daisy chain” nature: they can, and do, include multiple metropolitan areas “that are linked to their neighbors but have nothing to do with those at the other end of the chain.”¹⁷ ABA’s briefs provide examples of such “daisy chain” CSAs.¹⁸ These are not isolated examples. Indeed, almost half of all CSAs include three or more CBSAs, and more than a quarter include from four to nine such areas.¹⁹

A CSA, or a portion of a CSA, may not meet a single one of the criteria NCUA has identified as indicia of a local community. Specifically, a CSA may lack a single economic hub and population center, include isolated areas, and lack public services, facilities, and colleges and universities that serve the entire area.²⁰ Accordingly, it is unreasonable to presume that all CSAs, and all portions of CSAs, are single local communities so long as their population does not exceed 2.5 million. NCUA itself previously recognized that it is “difficult for a major metropolitan city . . . or an area covering multiple counties with significant population to have significant interaction and/or common interests, and therefore to demonstrate that these areas meet the requirement of being ‘local.’”²¹ Yet CSAs frequently encompass *multiple* metropolitan areas and numerous counties.

4. For the reasons explained above and in ABA’s briefs filed with the district court and the court of appeals, the term “local community” is not reasonably defined to include CSAs. Were NCUA nevertheless to decide to re-adopt the CSA provision, it would be in great error were it not to make clear that it has authority to consider whether a particular CSA, or portion of a CSA, is reasonably defined as a single “local community”, and make clear that it would exercise that authority by rejecting unreasonable applications. In other words, any “presumption” that every CSA, and every contiguous portion of a CSA, is a single local community so long as it has a population of 2.5 million or less should be rebuttable. This approach would be consistent with the approach NCUA is proposing to take with respect to applications to exclude the urban core of a CBSA from the service area of a community credit union. It would also be generally consistent

¹⁶ 12 U.S.C. § 1751 note.

¹⁷ *ABA v. NCUA*, 306 F. Supp. 3d 44 at 60.

¹⁸ See Brief for the American Bankers Association, *ABA v. NCUA*, 934 F.3d 649, 667 (D.C. Cir. 2019) at 37-38.

¹⁹ See OMB, Exec. Office of the President, OMB Bull. No. 15-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas*, Appendix at 98-114 (2015), <https://perma.cc/G5G7-TN3B>.

²⁰ See 81 Fed. Reg. 88,412, 88,440-41 (Dec. 7, 2016).

²¹ 63 Fed. Reg. 71,998, 72,037 (Dec. 30, 1998).

with an existing provision of the Chartering Manual, cited in the NPRM, providing that NCUA may consider other factors in unusual cases.²² Case-by-case review would be particularly appropriate in “daisy chain” situations, where there may be very little interaction, and even no interaction at all, among residents of different CBSAs included in a community credit union’s proposed service area.

5. Although ABA opposes re-adoption of the CSA provision, it agrees that any such provision should expressly require that a local community defined as a portion of a CSA must be a single contiguous area. NCUA’s rules provide that a rural district must have “contiguous geographic boundaries,”²³ but this language was omitted from the now-repealed provision concerning CSAs.²⁴ Moreover, a prior version of the rule that had limited community credit unions to serving a “contiguous portion” of a single political jurisdiction was amended to delete the term “contiguous” and substitute the term “individual.”²⁵ The now-repealed provision concerning CSAs referred simply to “a portion” of a CSA, without using the terms “contiguous” or “individual.”²⁶ Applying standard rules of interpretation, the now-repealed provision did not require community credit unions to select a contiguous area within a CSA.²⁷ ABA agrees that any provision allowing a community credit union to serve a portion of the community should correct this problem by expressly stating that the service area must be a single contiguous area.

6. As noted above, the court of appeals expressly held that as-applied challenges to the CSA rule are fully available to potential challengers.²⁸ In order to allow for such challenges in appropriate cases, NCUA must provide ABA and other interested parties with adequate advance notice and an opportunity to participate in administrative proceedings concerning applications to serve a local community defined as all or part of a CSA. Absent such procedures, interested parties will not have an adequate opportunity to submit relevant evidence to the administrative record and present arguments in support of as-applied challenges. Without an opportunity for public comment, the agency may simply act as a “rubber stamp,” approving applications without any meaningful oversight or public transparency.²⁹

²² See 84 Fed. Reg. at 59,998-99 (noting that Chapter 1 of the Chartering Manual provides that NCUA “may examine other factors in unusual cases”).

²³ 84 Fed. Reg. at 60,000.

²⁴ *Id.*

²⁵ Compare 84 Fed. Reg. at 60,000 with 80 Fed. Reg. 76,748, 76,772 (Dec. 10, 2015).

²⁶ 81 Fed. Reg. at 88,440.

²⁷ See *Russello v. United States*, 464 U.S. 16, 23 (1983) (when language is included in one section of a statute or rule but omitted in another, it is presumed that the drafter acted intentionally).

²⁸ *ABA v. NCUA*, 934 F.3d at 668.

²⁹ See *ABA v. NCUA*, 347 F. Supp. 2d 1061, 1069-70 (D. Utah 2004) (“NCUA must have some gatekeeping responsibility to ensure that the ‘local’ requirement is satisfied,” and “cannot act as a rubber stamp or cheerleader for any application brought before it.”).

7. The district court issued a final decision holding that the now-repealed CSA provisions are invalid. To date, the district court's decision has not been vacated and remains in effect. Although a panel of the D.C. Circuit has issued an opinion concluding that a facial challenge to the CSA provisions is inappropriate, ABA has filed a petition for rehearing that remains pending before the court of appeals, and that court has not issued its mandate.³⁰ The court of appeals' opinion directs the district court to issue summary judgment in favor of NCUA with respect to the CSA provision,³¹ but the district court lacks authority to take that action unless and until the court of appeals issues its mandate and returns jurisdiction to the district court.³² Accordingly, it would be inappropriate for NCUA to re-promulgate a rule that the district court has held unlawful unless and until the court of appeals issues its mandate and the district court enters summary judgment for NCUA on the CSA provision. Moreover, even if the court of appeals denies the ABA's petition for rehearing and issues its mandate, the court of appeals' decision will remain subject to challenge in the U.S. Supreme Court by way of a petition for a writ of certiorari. For these reasons, NCUA should not re-adopt the repealed CSA provision while the litigation remains pending.

NCUA Should Not Permit Community Credit Unions Serving a CBSA to Exclude the Urban Core of the CSA From Their Service Area.

NCUA proposes to reaffirm its elimination of the requirement that community credit unions serving a CBSA must serve the urban core of the community. NCUA should retain this requirement, which plays an important role in helping to ensure that credit unions fulfill their special mission of serving persons of modest means. NCUA rules should ensure that, whenever a community credit union proposes to exclude all or part of the urban core of a CBSA from its service area, doing so advances the goal of making available financial services to people of modest means.

1. The court of appeals agreed with ABA that NCUA's rule would allow community credit unions to engage in "unconventional redlining practices" by "'gerrymander[ing] to create its own community of exclusively higher-income members.'"³³ The court of appeals agreed with ABA that NCUA's explanation for eliminating the requirement of service to the urban core "fail[s] to address the redlining issue."³⁴ Specifically, the court held that NCUA's annual evaluation

³⁰ See Petition for Rehearing En Banc, *ABA v. NCUA*, 934 F.3d 649 (D.C. Cir. 2019) (Nos. 18-5154, 18-5181).

³¹ *ABA v. NCUA*, 934 F.3d at 674-75.

³² See *Kusay v. United States*, 62 F.3d 192, 195-96 (7th Cir. 1995).

³³ *ABA v. NCUA*, 934 F.3d at 674-75. (quoting Letter from James Chessen, Exec. Vice President & Chief Economist, Am. Bankers Ass'n, to Gerard S. Poliquin, Sec'y of the Board, Nat'l Credit Union Admin. (Feb 5, 2016), *ABA v. NCUA*, No. 1:16-cv-02394-DLF (D.D.C. filed Aug. 23, 2017), ECF No. 26-1 at 228).

³⁴ *Id.* at 670.

process does not address gerrymandering or a potential discriminatory impact on urban residents, because the process “does not come into effect until NCUA has already approved the charter, business plan, and proposed local community.”³⁵ In addition, NCUA’s complaint process “does not work,” because “complaints are raised by the membership, which would not include the affected urban residents.”³⁶

NCUA now proposes to offer further explanation and support for reaching the same result, but its additional explanation and supplemental information do not adequately address potential gerrymandering.

2. The NPRM suggests that elimination of the core-service requirement is justified by “historical distinctions between the chartering of [federal credit unions] and banks,” including the fact that the CRA does not apply to federal credit unions.³⁷ To the extent that NCUA is suggesting that federal credit unions have a lesser obligation to serve low-income and minority individuals, as compared to banks and other financial institutions, that suggestion is plainly incorrect. Congress assigned federal credit unions a special mission of serving persons of modest means.³⁸ It is the responsibility of the NCUA to ensure that credit unions are carrying out this mission. In particular, contrary to the suggestion in the NPRM,³⁹ nothing about the member-based, cooperative nature of federal credit unions addresses the problem of potential gerrymandering. If a credit union draws the lines of its service area to disproportionately exclude low-income and minority individuals, those individuals will be ineligible to become members. The credit union will not only lack an “organic incentive” to serve them,⁴⁰ it will be legally prohibited from serving them.

At times the NPRM appears to suggest that it is sufficient for NCUA to evaluate whether credit unions are intentionally discriminating against low-income or minority individuals and neighborhoods.⁴¹ While intentional discrimination is a very serious issue, it is far from the only issue. In order to ensure that credit unions fulfill their special mission of serving people of limited means, NCUA must consider whether approval of a proposed service area that excludes the urban core of the community will have a discriminatory *effect*. In particular, given the obligation of credit unions to serve persons of modest means, it is not sufficient to consider whether the credit union’s “business needs support its selection.”⁴² Instead, NCUA must

³⁵ *Id.*

³⁶ *Id.*

³⁷ 84 Fed. Reg. at 59,996.

³⁸ 84 Fed. Reg. at 59,999.

³⁹ 84 Fed. Reg. at 59,996.

⁴⁰ 84 Fed. Reg. at 59,996.

⁴¹ *See, e.g.*, 84 Fed. Reg. 59,990 (proposing to provide express authority for NCUA to “reject an application if the agency determines that the [federal credit union’s] selection reflects discrimination.”).

⁴² 84 Fed. Reg. at 59,998.

consider whether the proposed service area denies service to low-income and minority members of the community, without regard to whether denying such service would benefit the credit union from a business standpoint.

NCUA suggests that some community credit unions may lack the resources to serve the urban core in addition to low-income suburban areas.⁴³ In evaluating this argument, it is critical to recognize that a community credit union can choose among a wide a range of “local communities” defined by NCUA’s rules. For example, if a credit union lacks the resources to serve the urban core of the Washington, DC, CBSA, it could choose to serve a smaller local community such as Hyattsville or Silver Spring. Moreover, accepting a credit union’s assertion that it lacks the resources to serve areas of the community with high concentrations of low-income and minority residents would allow the credit union to shirk its special mission of serving such individuals. Credit unions seeking to exclude the urban core of the community from their service area should be required to show that in so doing, their chosen service area *maximizes* the achievable level of service to low-income and minority residents.

3. The “supplemental information” in the NPRM also fails to justify elimination of the requirement that community credit unions serving a CBSA must serve residents of the urban core of the community.⁴⁴

The NPRM provides examples of zip codes in urban areas that have higher median incomes than zip codes in suburban areas within the same CBSA. In particular, the agency cites zip codes in Washington D.C. and Atlanta in which household income is “sometimes higher” than in some zip codes associated with nearby suburbs.⁴⁵ The NPRM does not explain why it is appropriate to use zip codes as a metric. Zip code areas are not “local communities” under NCUA’s rules. Instead, the local community under consideration is a CBSA. A decision to eliminate the core service area requirement must be explained, if at all, by focusing on the impact of such a change on service to people of modest means within CBSAs.

The fact that there may be relatively affluent parts of the urban core of some CBSAs, in which median incomes exceed those in some outlying suburbs, does not come close to justifying a blanket rule that credit unions may exclude all, or any part of, the urban core from their service area. Such a rule would permit credit unions to choose to serve only high-income areas of the CBSA while excluding low-income areas.

Furthermore, the median income of the urban core of a CBSA may, and often does, fall significantly below the median income of neighboring suburbs, such that denying service to the urban core would have a negative effect on service to low- and moderate-income persons. The briefs filed with the court of appeals provide examples of such CBSAs, which the NPRM fails to

⁴³ 84 Fed. Reg. at 59,999.

⁴⁴ 84 Fed. Reg. at 59,996-98.

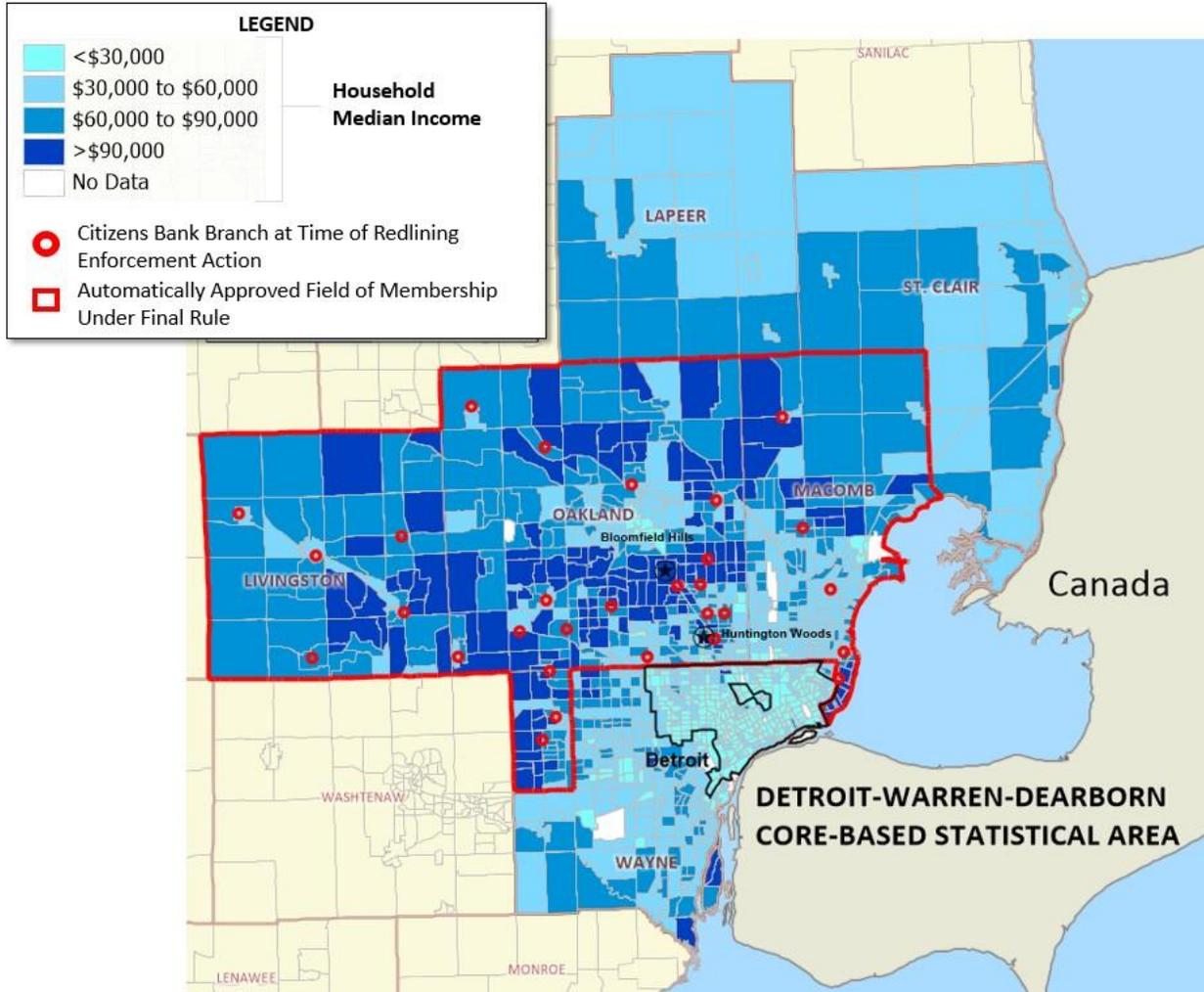
⁴⁵ 84 Fed. Reg. at 59,996-97.

acknowledge or address.⁴⁶ For example, the City of Detroit, which is part of the Detroit-Warren-Dearborn CBSA, has a median household income of \$30,344 and is 79% black, 7% Hispanic, and 11% white.⁴⁷ In contrast, Detroit's suburbs include Bloomfield Hills, with a median household income of \$186,586 — more than six times higher than Detroit's—and an 82% white, 2% black, and 1% Hispanic population, and Huntington Woods, with a median household income of \$125,873 and a 92% white, 1% black, and 1% Hispanic population.⁴⁸ By eliminating the core service area requirement, NCUA would permit a community credit union to serve exclusively affluent, predominantly white suburban areas like Bloomfield Hills and Huntington Woods, while excluding lower-income and minority residents of the City of Detroit from its service area. The following map shows the median household income in an area that NCUA would approve for a community charter after the elimination of the core service area requirement:

⁴⁶ Reply Brief for American Bankers Association, *ABA v. NCUA*, 934 F.3d 649 (D.C. Cir. 2019) (Nos. 18-5154, 18-5181), at 13-17.

⁴⁷ See Census Reporter, *Detroit, MI*, <https://censusreporter.org/profiles/06000US2616322000-detroit-city-wayne-county-mi/>.

⁴⁸ See Census Reporter, *Bloomfield Hills, MI*, <https://censusreporter.org/profiles/16000US2609180-bloomfield-hills-mi/>; Census Reporter, *Huntington Woods, MI*, <https://censusreporter.org/profiles/16000US2640000-huntington-woods-mi/>.



Detroit-Warren-Dearborn, Michigan Core-Based Statistical Area

The Cleveland-Elyria, Ohio, CBSA similarly includes a less-affluent urban core and more-affluent suburban areas. The eastern suburb of South Russell has a median household income of \$104,219 and a 100% white population,⁴⁹ and the western suburb of Avon has a median household income of \$92,883 and an 86% white population.⁵⁰ In contrast, Cleveland city center has a median household income of \$28,297, and the population is one-third white, 48% black, and 12% Hispanic.⁵¹

⁴⁹ See Census Reporter, *South Russell, OH*, <https://censusreporter.org/profiles/16000US3973684-south-russell-oh/>.

⁵⁰ See Census Reporter, *Avon, OH*, <https://censusreporter.org/profiles/16000US3903352-avon-oh/>.

⁵¹ See Census Reporter, *Cleveland, OH*, <https://censusreporter.org/profiles/16000US3916000-cleveland-oh/>.

In short, the fact that the median income in some areas of the urban core may exceed that of some areas of surrounding suburban areas of a CBSA is far from a sufficient justification for eliminating the requirement that community credit unions serving a CBSA must serve the urban core of their communities.

The NPRM states that elimination of the core service area requirement is reasonable, because NCUA has considered “data reflecting that community FCUs tend to serve most CBSA core areas across the country.”⁵² The NPRM provides no citation to data or studies substantiating this statement. Moreover, this statement on its face indicates that a significant number of CBSA core areas are *not* served by community credit unions. More generally, NCUA has not drawn a reasoned connection between the asserted fact that many urban cores are adequately served and the apparent conclusion that urban cores with a relatively high percentage of low- and moderate-income persons are equally, or even adequately, served. NCUA is obligated to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁵³

In addition, it is not sufficient that a “substantial majority” of CBSAs are served by community credit unions. Under the CRA, it is not a defense that *other* financial institutions provide service to a low-income or minority neighborhood.⁵⁴ If the argument that “other financial institutions are doing the work” is not a defense for banks, it cannot be a defense for credit unions with a special mission of serving the poor.

NCUA states that community credit unions designated as low-income “have the potential to serve over 10 million members across the country.”⁵⁵ The NPRM does not state how many persons of modest means these credit unions are actually serving. Moreover, the “potential” to serve just 3% of the population of the United States is wholly insufficient when approximately 11.8% of the U.S. population is made up of persons who are not only of modest means, but actually live below the poverty line.⁵⁶

In the NPRM, NCUA fails to address, or even acknowledge, a Government Accountability Office (GAO) study showing that “credit unions lag behind banks in serving low- and moderate-income households.”⁵⁷ The GAO study found that “about 31% of credit union customers are of

⁵² 84 Fed. Reg. at 59,997.

⁵³ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁴ See Community Reinvestment Act, 12 C.F.R. § 228.41(e).

⁵⁵ 84 Fed. Reg. at 59,997.

⁵⁶ Jessica Semega, Melissa Kollar, John Creamer, and Abinash Mohanty, U.S. Census Bureau, *Income and Poverty in the United States: 2018* (Sep. 2019) at 12, <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf>.

⁵⁷ Gov't Accountability Office, *Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements*, GAO-07-29, 1 (Nov. 2006). ABA discussed this study in briefing before the Court of Appeals and the District Court. See Principal and

‘modest means,’” as compared to 41% of bank customers.⁵⁸ Another Government Accountability Office study found that credit unions provide fewer “mortgages to low-and moderate-income households than do banks — 27% compared with 34% — of comparable asset size.”⁵⁹ NCUA must confront and respond to these studies, which indicate that credit unions are not adequately fulfilling their special mission of serving people of modest means.

NCUA states that its “experience in implementing this provision since 2016 indicates that FCUs generally have nondiscriminatory bases for pursuing this option.”⁶⁰ However, NCUA’s experience with this rule is quite limited. The agency cites only three applications, which is far too few to support a sweeping conclusion. Moreover, as noted above, the credit unions’ reasons for proposing to eliminate the urban core of the community from their service area do not tell the whole story. As explained above, given the special mission of credit unions, it is essential for NCUA to consider whether approving such an application will have a discriminatory *effect* on minority or low-income persons or neighborhoods.

4. NCUA proposes to clarify that it is authorized to engage in case-by-case review to ensure that credit unions are not “gerrymandering” or “redlining” low-income or minority members of the community. For the reasons set forth above, as well as the reasons in ABA’s briefs in the district court and the court of appeals, which are attached and incorporated into these comments by reference, NCUA should continue to require community credit unions that choose to serve a community defined as a CBSA to serve the urban core of the community.

Efforts by NCUA to adopt a “new factor” to address service to low-and moderate- income individuals, as found in its current proposal, should be strengthening in the following ways:

First, the statement that NCUA “may” require additional information on how the credit union’s business needs support its selection, and may conduct a further inquiry “that it deems appropriate,” is too limited. Instead, NCUA should require, at a minimum, that whenever a community credit union seeks to serve all or part of a CBSA, and seeks to exclude the urban core of a CBSA from its service area, it must submit data sufficient to demonstrate that doing so will

Response Brief, *American Bankers Association v. National Credit Union Administration*, No. 18-5154 (D.C. Cir. Jan. 23, 2019), at 73; Memorandum in Support of Plaintiff American Bankers Association’s Motion for Summary Judgment, *American Bankers Association v. National Credit Union Administration*, No. 16-cv-02394 (D.D.C. May 26, 2017), at 15.

⁵⁸ Gov’t Accountability Office, *Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements*, GAO-07-29, 27 (Nov. 2006).

⁵⁹ Gov’t Accountability Office, *Financial Condition Has Improved, but Opportunities Exist to Enhance Oversight and Share Insurance Management*, GAO-04-91, 5 (Oct. 2003). ABA also discussed this study in briefing before the Court of Appeals and the District Court. See Principal and Response Brief, *American Bankers Association v. National Credit Union Administration*, No. 18-5154 (D.C. Cir. Jan. 23, 2019), at 73; Memorandum in Support of Plaintiff American Bankers Association’s Motion for Summary Judgment, *American Bankers Association v. National Credit Union Administration*, No. 16-cv-02394 (D.D.C. May 26, 2017), at 15.

⁶⁰ 84 Fed. Reg. at 59,997.

advance, rather than undermine, the goal of providing financial services to people of modest means. The fact that the credit union's "business needs" may support its chosen service area is not sufficient in light of its mandate, since focusing on service to relatively affluent areas, and excluding lower-income areas, may generally be expected to benefit the credit union's bottom line. For this reason, credit unions should be required to show that their chosen service area will advance their special mission of serving low-and moderate-income persons. For example, the credit union might submit information sufficient to demonstrate that its chosen service area matches or exceeds the concentration of people of modest means, as compared to serving the entire urban core.

Second, as noted above, NCUA's review, in light of credit unions' special mission to serve persons of modest means, should not be limited to whether the credit union is engaged in intentional discrimination, but instead must extend to whether a proposed service area will have a disparate adverse *effect* on low-income and minority residents. NCUA appears to recognize and accept this critically important principle at least once in the NPRM.⁶¹ Any final rule should clearly adopt this principle.

Third, if a credit union asserts that it lacks sufficient resources to serve the entire urban core of the CBSA, that assertion alone cannot justify a proposal to exclude the urban core. Instead, NCUA should require the credit union to demonstrate that approval of its application will advance the credit union's mission of serving people of modest means. A credit union could make this showing by demonstrating, for example, that the area it proposes to serve has a lower median income, or a higher concentration of low-income residents, than the urban core it proposes to exclude. In reviewing the credit union's proposal, NCUA should take into account the possibility that the credit union could choose to serve a smaller local community that is consistent with its limited resources while also advancing its special mission of serving low-income individuals. Thus, for example, a credit union with limited resources could serve Prince George's County or Hyattsville rather than a self-selected part of a larger CBSA.

ABA appreciates the opportunity to share its views and would be happy to discuss any of these matters further at your convenience. If you have any questions, please contact the undersigned at (202) 663-5273 or junderwood@aba.com.

Sincerely,



Justin M. Underwood
Senior Director, Banking Policy
American Bankers Association

⁶¹ See 84 Fed. Reg. at 59,998.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 18-5154, 18-5181

AMERICAN BANKERS ASSOCIATION,

Plaintiff-Appellee-Cross-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the District of Columbia (Friedrich, J.)

**PETITION FOR REHEARING EN BANC
FOR APPELLEE-CROSS-APPELLANT**

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INTRODUCTION AND RULE 35 STATEMENT

Rehearing is warranted because the panel’s decision stretches *Chevron* deference beyond its limits. Relying on *Chevron*, the panel upheld the National Credit Union Administration’s interpretation of “local community” as any “Combined Statistical Area” inhabited by up to 2.5 million people. Under this expansive interpretation, large regions covering tens of thousands of square miles and narrow strips of land connecting cities hundreds of miles apart automatically qualify as “local communit[ies].” The panel likewise applied *Chevron* to uphold an interpretation of “rural district” under which entire states qualify as “rural district[s],” as does an area in which nearly 90 percent of the population resides in Salt Lake City or Denver—major cities separated by 370 miles.

Two doctrinal steps produced these counterintuitive results, and both present issues of exceptional importance to the relationship between courts and agencies.

First, the panel concluded that when a statute directs an agency to define a term by regulation, the express delegation “necessarily suggests that Congress did *not* intend the [terms] to be applied in [their] plain meaning sense.” Opinion (“Op.”) 16 (quoting *Women Involved in Farm Econ. v. U.S. Dep’t of Agric.*, 876 F.2d 994, 1000 (D.C. Cir. 1989)). The panel then upheld the agency’s interpretations of “local community” and “rural district” despite hundreds of examples—and not a single counter-example—showing that the agency’s definitions fall outside the reasonable

range of ambiguity of those terms. That mode of analysis conflicts with Supreme Court precedent, which holds that an agency's authority "go[es] no further than the ambiguity will fairly allow." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). An express delegation of interpretive authority resolves the threshold question *whether* the agency possesses interpretive authority, but does not enlarge the *scope* of that authority or authorize "interpretive gerrymanders." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). Rehearing en banc is warranted to realign this Court's *Chevron* jurisprudence with that of the Supreme Court.

Second, the panel determined that a party seeking pre-enforcement review of an agency rule must demonstrate not only that the rule allows what the statute prohibits, but *also* that no separate regulatory requirement will limit the number of unlawful applications. Op.25. The panel acknowledged that the agency's rule produces results that likely exceed the agency's authority, but nevertheless held, *sua sponte*, that the rule must be upheld because the challengers failed to negate the possibility that a different regulatory requirement might limit unlawful applications of the rule. That approach is incompatible with judicial review under the Administrative Procedure Act and warrants review by the full court.

STATEMENT OF THE CASE

1. The National Credit Union Act provides that membership in a community credit union “shall be limited to ... [p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3). This appeal arises from a challenge by the American Bankers Association (“Association”) to a National Credit Union Administration rule interpreting that provision.

In 1998, Congress amended the Act to add the word “local” before “community,” *id.*, and expressly found that “a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion and identity is essential to the fulfillment of the public mission of credit unions,” *id.* § 1751 note.

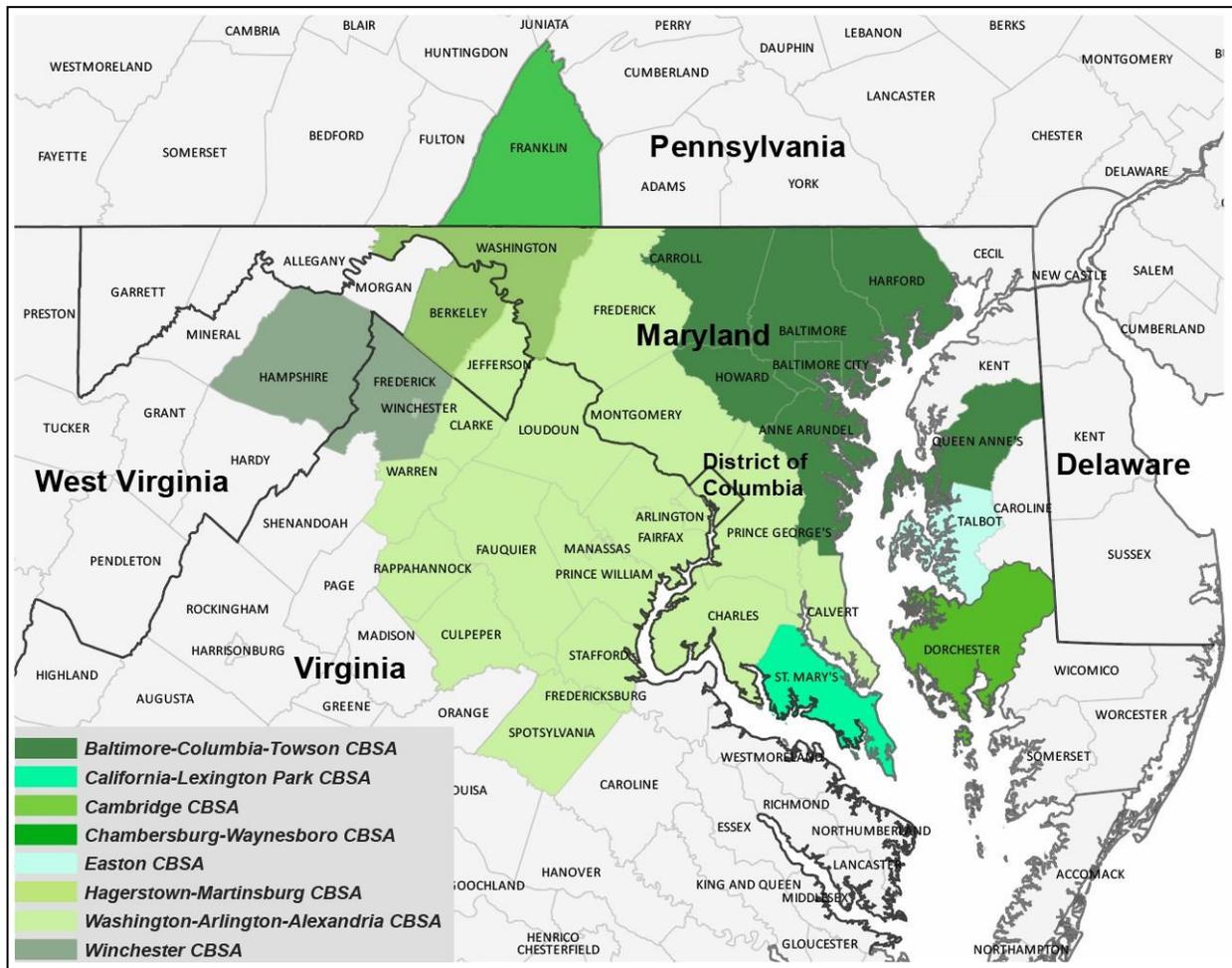
The Act directs the agency to define “local community, neighborhood, or rural district” by regulation. *Id.* § 1759(g)(1). Over time, the agency has promulgated a series of regulations seeking to stretch the statutory limitations on credit union membership. The Supreme Court reversed one such effort, which would have allowed credit unions to be composed of multiple unrelated employer groups. *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998).

The agency recognized that the “local” amendment requires a “more circumspect and restricted approach to chartering community credit unions.” 63

Fed. Reg. 71,988, 72,012 (Dec. 30, 1998). Nevertheless, the agency soon began expanding its definition of “local community.” Once again, courts overturned the agency’s actions.¹

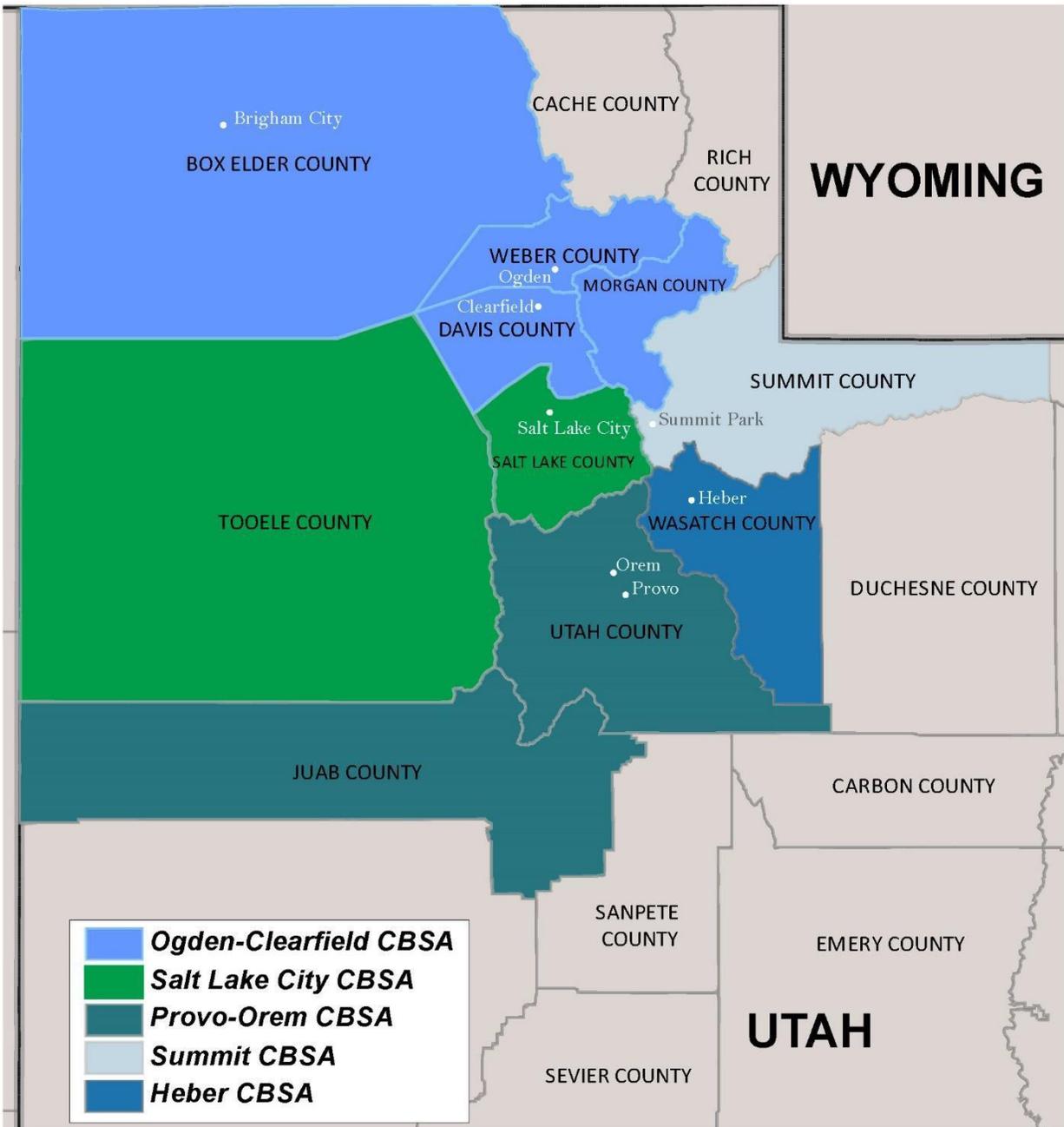
In the rule at issue here, the agency defined *any* “Combined Statistical Area,” or portion of such an area, as a “local community” so long as the area’s population does not exceed 2.5 million. JA164. “Combined Statistical Areas” are large regions that include multiple “Core-Based Statistical Areas” (i.e., multiple cities and surrounding suburbs), based on a modest commuting relationship with any adjacent Core-Based Statistical Area. For example, the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Combined Statistical Area (mapped below) includes eight Core-Based Statistical Areas, comprising forty counties and independent cities spread across four states and the District of Columbia:

¹ *ABA v. NCUA*, 347 F. Supp. 2d 1061 (D. Utah 2004) (rejecting six-county “local community” that spanned the entire state of Utah and included 1.4 million residents, almost two-thirds of the state’s population); *ABA v. NCUA*, 2008 WL 2857678 (M.D. Pa. 2008) (rejecting six-county “local community” covering more than 3,000 square miles and including Harrisburg, Hershey, Carlisle, York, and other Pennsylvania cities).



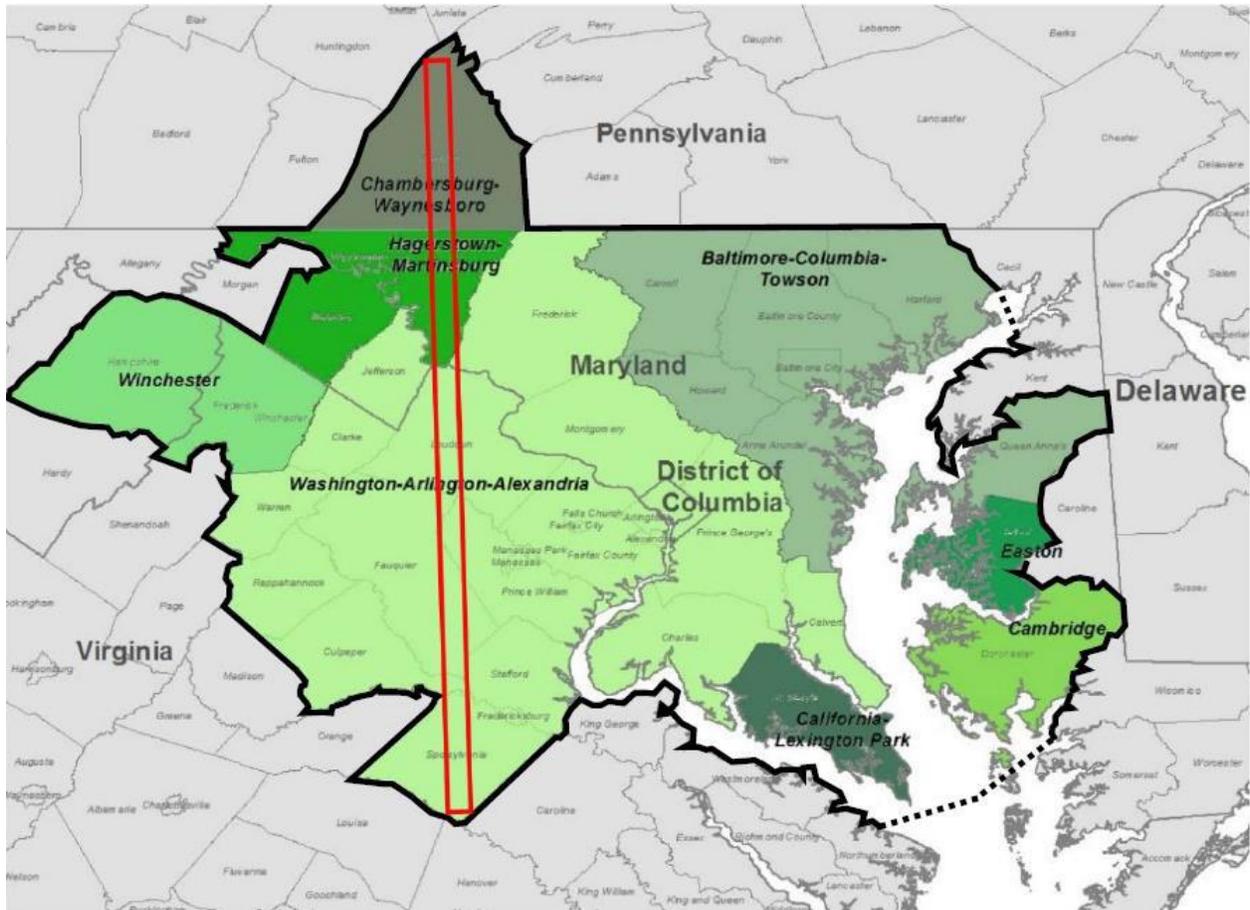
Washington–Baltimore–Arlington, DC–MD–VA–WV–PA Combined Statistical Area

The rule thus defines as “local communities” sprawling regions whose residents have little in common. One such “local community,” already approved under the rule, stretches from one side of Utah to the other, encompassing more than 80 percent of the state’s population and tens of thousands of squaremiles:

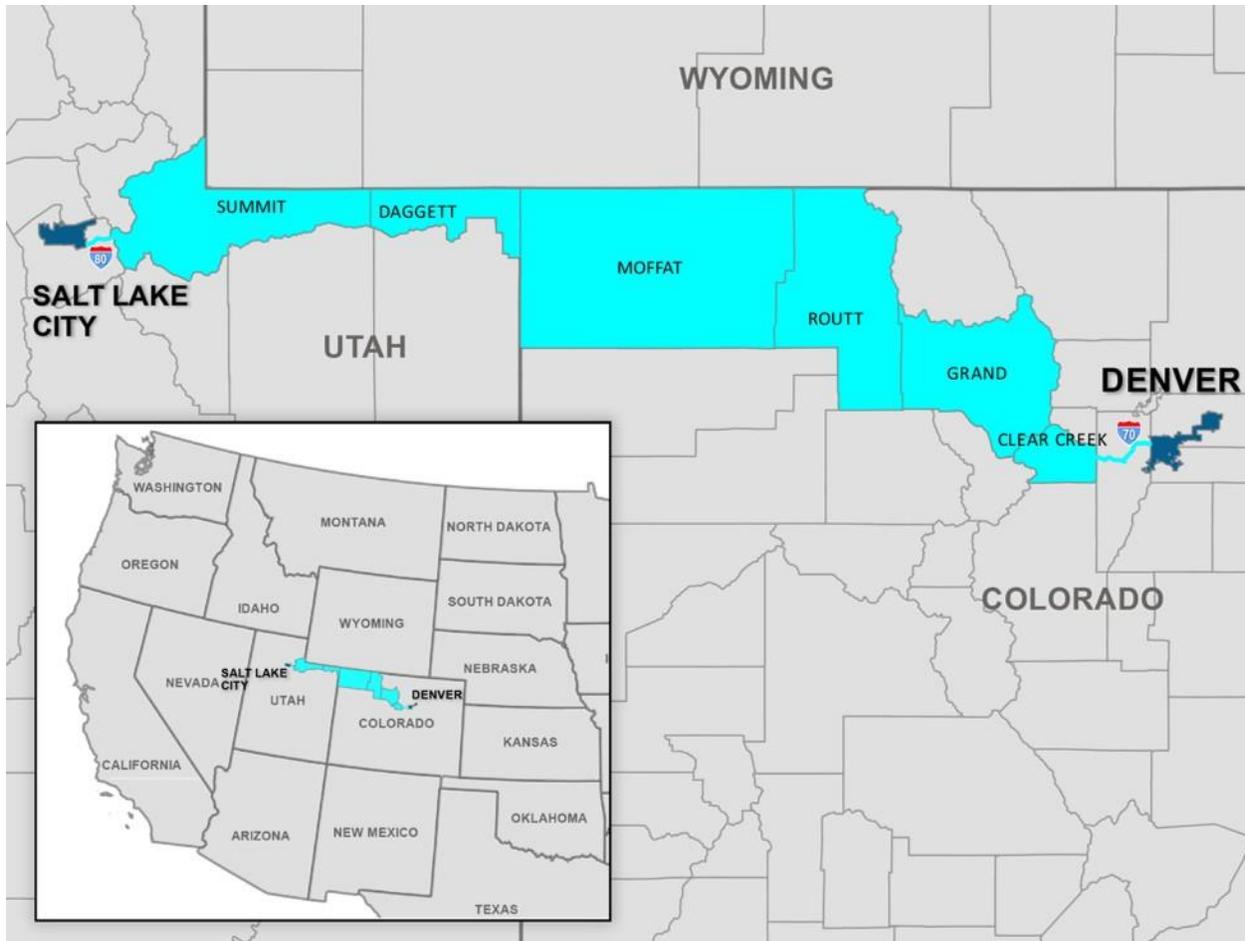


Salt Lake City–Provo–Orem, UT Combined Statistical Area

Moreover, the rule automatically treats as “local communities” narrow, gerrymandered strips that connect cities in different states separated by significant distances, including a region discussed by the district court which reaches from Doyleburg, Pennsylvania to Partlow, Virginia, 150 miles away:



The rule also expands the definition of a “rural district” by increasing the population limit from 250,000 (or 3 percent of total state population) to 1 million people. JA192. Under this definition, five entire states—Alaska, North Dakota, South Dakota, Vermont, and Wyoming—qualify as single “rural district[s].” Furthermore, the interaction of this provision with another regulation permits rural districts to include large cities such as Boston, Detroit, and Seattle, so long as additional, less-populated areas are also included. The rule thus treats as a rural district the following area, in which 90 percent of the population lives in Denver or Salt Lake City:



Under the rule, the agency retains no discretion to determine that any application of its “local community” or “rural district” rule is unreasonable. JA337.

2. The district court (Friedrich, J.) vacated both provisions of the rule. The court held that the Act’s grant of definitional authority resolves Step One of *Chevron* in the agency’s favor, but that the agency’s interpretations do not survive Step Two. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The court considered “the meaning of [each] statutory term at the time it became law,” looking to dictionaries and other examples of contemporary usage, and recognizing that “two words

together may assume a more particular meaning than those words in isolation.”

JA329 (quoting *FCC v. AT&T, Inc.*, 562 U.S. 397, 406 (2011)).

Applying these principles, the district court concluded that the agency did not reasonably define the term “local community.” The court explained that a Combined Statistical Area may be composed of “a series of daisy-chained Core-Based Statistical Areas that are linked to their neighbors but have nothing to do with those at the other end of the chain.” JA336. “Because any portion of a Combined Statistical Area automatically qualifies” as a local community, “the NCUA can do nothing to prevent a gerrymandering credit union from serving up to 2.5 million people from all ends of a Combined Statistical Area.” JA337. Accordingly, Combined Statistical Areas are “not anywhere near the standard meaning” of a local community: they may “stretch across vast regions that include multiple separate urban centers with suburban and rural communities, and residents of peripheral towns that may have no common bond at all beyond regional proximity.” *Id.*

The district court also concluded that the agency’s definition of “rural district” “is not even in the ballpark of the term’s standard meaning.” JA352. An extensive survey of judicial opinions and other sources from around 1934 (when the “rural district” provision was enacted) revealed hundreds of uses of the term “rural district,” but not a single usage that referred to an area even “approaching the size of a state.” JA350.

3. A panel of this Court reversed. The panel started from the proposition that “[a]n express delegation of definitional power ‘necessarily suggests that Congress did *not* intend the terms to be applied in their plain meaning sense.’” Op.16 (cleaned up) (quoting *Women Involved*, 876 F.2d at 1000)). “In *Chevron* terms,” the panel concluded, “Congress through explicit language has directly spoken to the precise question of whether the identified terms must carry certain meanings. The answer is no.” *Id.* (cleaned up).

Relying on the “vast discretion” flowing from the Act’s express delegation of interpretive authority, the panel upheld the agency’s expansive interpretation of “local community.” *Id.* at 18-19. The panel recognized that this interpretation authorizes “local communit[ies]” consisting of “a mere ‘daisy chain’ of urban centers” that “have nothing to do with those at the other end of the chain,” *id.* at 24. Although the panel acknowledged that treating such a “daisy chain” as a local community “might well ... contravene the Act,” it regarded approval of such credit unions as “conjectural” and therefore held that the challengers’ argument cannot be entertained as a facial challenge to the rule, but must instead be litigated through as-applied challenges to the approval of particular “local communit[ies].” Op.24-25.

The panel also held that “rural district” “do[es] not connote specific population or geographical constraints.” Op.32. And the panel concluded that it was reasonable to define major cities as parts of “rural districts,” so long as the cities

are “surrounded by rural land.” *Id.* at 32-33. The panel did not identify a single contemporaneous use of “rural district” that sweeps as broadly as the agency’s does here, or in which urban centers such as Boston, Denver, and Salt Lake City were part of a “rural district.”

ARGUMENT

The panel’s decision relies on two doctrinal steps, each of which contravenes Supreme Court precedent, and which together stretch *Chevron* deference past the breaking point. Rehearing is warranted to align this Court’s precedent with Supreme Court decisions that demarcate *Chevron*’s proper—and properly limited—domain.

I. An Express Delegation of Interpretive Authority Does Not Authorize an Agency to Go Further Than Statutory Ambiguity Allows.

The Supreme Court has held that when Congress uses an ambiguous term in a statute, “the agency can go no further than the ambiguity will fairly allow.” *Arlington*, 133 S. Ct. at 1863; *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (agency “possess[es] whatever degree of discretion the [statutory] ambiguity allows”); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (agency interpretation receives no *Chevron* deference if it “goes beyond the meaning that the statute can bear”). So, for example, if Congress uses an ambiguous term such as “yellow,” the agency may interpret that term to mean light yellow or dark yellow, but not purple. *See United States v. Home*

Concrete & Supply LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in judgment).

This bedrock principle does not change when Congress uses an ambiguous term and directs the agency to define that term by regulation. In this situation, it is reasonable to infer that Congress viewed the statutory term as ambiguous—i.e., as having a range of reasonable meanings rather than one plain meaning. But an express delegation of definitional authority does not give the agency license to go beyond the “bounds of reasonable interpretation.” *Michigan*, 135 S. Ct. at 2707 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014)). As the Supreme Court observed in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6 (1985), statutory language may not be read in a way that “conflicts with [its] normal meaning.” Otherwise, agencies would be effectively freed from *executing* the laws and granted Humpty Dumpty-like authority to *make* law.²

The panel reached a different result by relying on cases holding that an express grant of definitional authority “necessarily suggests that Congress did *not* intend the word to be applied in its plain meaning sense” and indicates that the statutory term does not “carry certain meanings.” Op.16 (quoting *Women Involved*, 876 F.2d at

² See Lewis Carroll, *Through the Looking-Glass*, 205 (1872) (“‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153-54 (10th Cir. 2016) (Gorsuch, J., concurring).

1000, and *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016)). These decisions conflict with the Supreme Court authority described above and misapprehend the role of an express delegation. Such delegations generally answer the question *whether* an agency has authority to interpret a particular phrase, and so resolve Step One of the *Chevron* analysis. But there is no basis—and the *Women Involved* line of cases provides none—for treating the delegation as expanding the *scope* of the agency’s interpretive authority. Whether a statute delegates interpretive authority implicitly or explicitly, “the agency can go no further than the ambiguity will fairly allow.” *Arlington*, 133 S. Ct. at 1863. Absent additional evidence that a statute grants an agency extraordinary interpretive authority, an express delegation alone is insufficient to confer such a license. “*Chevron* allows agencies to choose among competing reasonable interpretations of a statute,” but “does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.” *Michigan*, 135 S. Ct. at 2708; *see also UARG*, 573 U.S. at 328.

The district court’s well-reasoned opinion stands in contrast to the panel’s decision, and is consistent with the Supreme Court’s teachings on *Chevron*. The district court considered the terms “local community” and “rural district” as a whole, examined how those terms were understood at the time they were enacted, and concluded that the rule exceeds the agency’s statutory authority. In reaching this

conclusion, the district court carefully examined hundreds of uses of the terms in statutes, judicial opinions, and other sources, and found no uses even approaching the capacious definitions adopted by the agency. JA331-38, 347-52.

The panel dismissed the district court's analysis, but offered not a single counterexample suggesting that the rule's definitions fall within the range of reasonable meaning of "local community" or "rural district." Other aspects of the panel's analysis confirm that it unduly deferred to the agency's interpretation. For example, the panel considered the terms "local" and "community" separately, Op.18, thereby contravening the Supreme Court's instruction that "[t]wo words together may assume a more particular meaning than those words in isolation," *AT&T*, 562 U.S. at 406. The panel also gave short shrift to Congress's finding that a "meaningful affinity and bond" among credit union members is "*essential*" to the missions of credit unions, 12 U.S.C. § 1751 note, reasoning that the agency was entitled to "balance" this finding against other statutory purposes, Op.21-22. An "essential" requirement, by definition, cannot be traded off against other goals. *See Michigan*, 135 S. Ct. at 2708.

In dismissing the district court's analysis, the panel stated that "[m]uch more is required to cabin the agency's discretion." Op.35. That statement reflects a fundamental misapplication of the *Chevron* framework. Under that framework, courts do not begin by presuming that agencies enjoy maximal discretion, and then

asks whether those challenging agency action have borne the burden of paring it back. Instead, the agency is required to demonstrate that its interpretation is consistent with the statutory text. *See, e.g., La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”); *Ry. Labor Execs. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Further review is warranted to bring the panel’s decision, and the decisions of this Court on which it relied, into conformity with Supreme Court precedent.

II. The Panel’s Decision Improperly Limits Judicial Review of Agency Rules.

The agency never argued that the Association was making an impermissible facial challenge to the rule, and that issue was not briefed in this Court or the district

court. The panel nevertheless raised the issue *sua sponte* and held that the

Association’s challenge to the rule’s definition of “local community” is an impermissible facial challenge, and that the Association must proceed through as-

applied challenges to particular applications of the rule. Op.25. This aspect of the

panel’s decision is contrary to this Court’s longstanding practice and further

unsettles an area of the law that is already subject to considerable uncertainty.

Further review is warranted to clarify the limits of facial challenges to agency rules.

The Association argued that the rule’s definition of “local community” exceeds the

agency’s statutory authority. The panel acknowledged the strength of

this argument, observing that the panel “might well agree” that the rule authorizes local communities that “would contravene the Act.” Op.24. But the panel declined to entertain a facial challenge because the Association had “failed to demonstrate” that such “local communit[ies]” will actually be approved by the agency. *Id.* at 25. In particular, the panel relied on a separate regulation that requires credit unions to submit a business plan showing how the credit union would serve the proposed “local community.” *Id.* Given that requirement, the panel concluded, unlawful application of the rule is “too conjectural” to warrant vacatur. *Id.*

As the district court noted, the rule automatically defines *any* part of *any* Combined Statistical Area with up to 2.5 million people as a local community; the rule leaves the agency with no discretion to determine that a particular application of its rule is unreasonable. JA337. The requirement of a business plan is a *separate* regulatory mandate “imposed on top of the *local community* requirement; it does not factor into the NCUA’s definition of *local community*.” JA338 (emphasis in original). The panel cited no authority for the proposition that a regulation is not subject to facial challenge unless the challenger can demonstrate that no *other* regulatory requirement will limit unlawful applications of the rule. Because the panel’s approach significantly limits this Court’s ability to review agency regulations, it merits further review.

The panel opinion discusses one example involving widely separated cities within a Combined Statistical Area connected by a “thin strip” of land, but it does not dispute that there are an unlimited number of such examples, because the rule permits credit unions to define a “local community” as *any* part of a Combined Statistical Area. Nor does the panel opinion dispute that the “daisy chain” nature of Combined Statistical Areas means that there need not be—and often is not—any interaction between residents of the Core-Based Statistical Areas that make up a broader Combined Statistical Area. For these reasons, there was no basis for the panel to conclude that the rule exceeds the agency’s authority only in “uncommon particular applications.” Op.25 (quotations omitted).³

Rehearing is also warranted because there is considerable uncertainty concerning the permissible scope of facial challenges to agency rules. This Court has said that a facial challenge to a regulation may succeed “despite the existence of clearly valid applications of the regulation,” noting that “the normal *Chevron* standard is not transformed into an even more lenient ‘no valid applications’ test just because the attack is facial.” *National Mining v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1407 (D.C. Cir. 1998). In other cases, however, the Court has indicated that rulemaking challenges are governed by *United States v. Salerno*, which held that

³ Neither the rule nor the record addresses this issue, because the agency concluded that *every* part of *every* Combined Statistical Area of up to 2.5 million people constitutes a “local community.”

a facial *constitutional* challenge to a *statute* generally fails unless there is “no set of circumstances exists under which the [statute] would be valid.” 481 U.S. 739, 745 (1987); see *Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011); *Ass’n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012).⁴

This Court has recognized that applying a “no set of circumstances” standard “may pose potential problems for judicial review of agency regulations.” *Amfac Resort, L.L.C. v. U.S. Dep’t of the Interior*, 282 F.3d 818, 827 (D.C. Cir. 2002), *vacated in part sub nom. Nat’l Park Hosp. Ass’n v. U.S. Dep’t of the Interior*, 538 U.S. 803 (dismissing suit as unripe). The Court explained that upholding a rule because it is valid in some, or at least one, of its applications could require petitioners to bring subsequent as-applied challenges, which themselves might be barred due to statutory provisions that limit the time or venue for judicial review. *Id.* More generally, applying *Salerno* in the context of judicial review of agency regulations is inconsistent with the *Chevron* framework because it prevents courts from reviewing unreasonable interpretations of statutory terms. Just as a broken clock is right twice a day, many *ultra vires* regulations will nevertheless produce some

⁴ These decisions are questionable in the light of the Supreme Court’s recognition that, even in the constitutional context, “the distinction between facial and as-applied challenges is not so well defined ... that it must always control,” and “[t]he distinction ... goes to breadth of the remedy employed by the Court.” *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

permissible outcomes. Further review is warranted to harmonize this Court's conflicting decisions on this issue.

III. These Issues Are Exceptionally Important.

Both issues presented by this petition are exceptionally important. Many statutes expressly authorize agencies to interpret particular statutory terms. Yet under the panel's reasoning, regulated parties cannot organize their affairs based on the statute's range of ordinary meanings, because the agency retains "vast discretion" to adopt exotic definitions that ordinary speakers of the English language would not anticipate. *Op.18*. Reflecting the importance of these issues, the Supreme Court has repeatedly reversed lower courts for excessively permissive application of *Chevron* deference, and several Justices have identified the need to reconsider and re-focus the doctrine's role. *See, e.g., Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("reflexive [*Chevron*] deference" warrants "reconsider[ation]" of the manner in which "courts have implemented that decision"); *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting).

Similarly, the line between permissible and impermissible facial challenges to agency rules lies at the heart of judicial review under the Administrative Procedure Act. If the panel opinion's requirements for pre-enforcement review were applied universally, nearly every rulemaking case heard by this Court would be affected, and

many past decisions would have come out differently. The panel's approach is incompatible with the directive that courts "shall ... hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(C). Rehearing is warranted to clarify this important and recurring issue, and to bring this Court's jurisprudence into alignment with the Administrative Procedure Act.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 4, 2019

CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) and 40(b)(1) because it contains 3,874 words, exclusive of the parts of the Petition exempted by Rule 32(f). This Petition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font.

October 4, 2019

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 4, 2019. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

October 4, 2019

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

ADDENDUM

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

The parties in consolidated cases No. 18-5154 and 18-5181 are Plaintiff-Appellee-Cross-Appellant American Bankers Association and Defendant-Appellant-Cross-Appellee National Credit Union Administration.

The following amici have appeared in this Court and the district court: Credit Union National Association; CUNA Mutual Holding Company; National Association of Federally-Insured Credit Unions; Independent Community Bankers of America; Alabama Bankers Association; Alaska Bankers Association; Arizona Bankers Association; Arkansas Bankers Association; California Bankers Association; Colorado Bankers Association; Connecticut Bankers Association; Delaware Bankers Association; Florida Bankers Association; Georgia Bankers Association; Hawaii Bankers Association; Idaho Bankers Association; Illinois Bankers Association; Indiana Bankers Association; Iowa Bankers Association; Kansas Bankers Association; Kentucky Bankers Association; Louisiana Bankers Association; Maine Bankers Association; Maryland Bankers Association; Massachusetts Bankers Association; Michigan Bankers Association; Minnesota Bankers Association; Mississippi Bankers Association; Missouri Bankers Association; Montana Bankers Association; Nebraska Bankers Association; Nevada

Bankers Association; New Hampshire Bankers Association; New Jersey Bankers Association; New Mexico Bankers Association; New York Bankers Association; North Carolina Bankers Association; North Dakota Bankers Association; Ohio Bankers League; Oklahoma Bankers Association; Oregon Bankers Association; Pennsylvania Bankers Association; Rhode Island Bankers Association; South Carolina Bankers Association; South Dakota Bankers Association; Tennessee Bankers Association; Texas Bankers Association; Utah Bankers Association; Vermont Bankers Association; Virginia Bankers Association; Washington Bankers Association; West Virginia Bankers Association; Wisconsin Bankers Association; Wyoming Bankers Association; Arkansas Community Bankers; Independent Bankers of Colorado; Community Bankers Association of Georgia; Community Bankers Association of Illinois; Community Bankers of Iowa; Community Bankers Association of Kansas; Community Bankers of Michigan; Independent Community Bankers of Minnesota; Missouri Independent Bankers Association; Montana Independent Bankers; Nebraska Independent Community Bankers; Independent Community Bankers Association of New Mexico; Independent Bankers Association of New York State; Independent Community Banks of North Dakota; Community Bankers Association of Ohio; Community Bankers Association of Oklahoma; Pennsylvania Association of Community Bankers; Independent Banks of South Carolina; Independent Community Bankers of South Dakota; Independent Bankers

Association of Texas; Virginia Association of Community Bankers; Community Bankers of Washington; and Community Bankers of West Virginia.

In addition, the following amici have appeared before this Court, but not the district court: Puerto Rico Bankers Association; Bluegrass Community Bankers Association; and California Community Banking Network.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.
*Counsel for American Bankers
Association*

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the American Bankers Association states that it is a trade association with no parent company. No publicly-held company has a 10% or greater ownership interest in ABA.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.
*Counsel for American Bankers
Association*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 16, 2019

Decided August 20, 2019

No. 18-5154

AMERICAN BANKERS ASSOCIATION,
APPELLEE

v.

NATIONAL CREDIT UNION ADMINISTRATION,
APPELLANT

Consolidated with 18-5181

Appeals from the United States District Court
for the District of Columbia
(No. 1:16-cv-02394)

Daniel Aguilar, Attorney, U.S. Department of Justice,
argued the cause for Appellant-Cross-Appellee. With him on
the briefs was *Mark B. Stern*, Attorney.

Allison Jones Rushing was on the brief for *amici curiae*
Credit Union National Association, et al. in support of
Appellant-Cross-Appellee. *Nicholas G. Gamse* entered an
appearance.

Steven D. Gordon was on the brief for *amici curiae* State Bankers Associations in support Appellee-Cross-Appellant American Bankers Association.

Robert A. Long Jr. argued the cause for Appellee-Cross-Appellant. With him on the briefs were *Andrew J. Soukup*, *Philip Levitz*, and *Lauren Moxley*.

Before: HENDERSON, PILLARD, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: Longstanding principles of administrative law teach us to give federal agencies breathing room when they make policy and “resolv[e] the struggle between competing views of the public interest.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). And because many policy decisions merge with legal ones, *Chevron* requires us frequently to sustain agency interpretations of certain federal statutes. Congress often expects agencies, with their political accountability, “bod[ies] of experience[,] and informed judgment,” to make sound interpretive choices “with the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001) (citation omitted).

Congress expressly tasked the National Credit Union Administration (NCUA) with making such choices in defining the reach of federal credit unions. Since the Great Depression, Congress has maintained a “system of federal credit unions that . . . provide credit at reasonable rates” and banking services to “people of ‘small means.’” *First Nat’l Bank & Tr. Co. v. NCUA (First Nat’l Bank I)*, 988 F.2d 1272, 1274 (D.C.

Cir. 1993) (citation omitted), *aff’d*, 522 U.S. 479 (1998). Although a private bank may solicit and welcome customers

from anywhere, Congress has limited whom these federal financial institutions may serve. For instance, certain institutions called “community credit unions” may cover individuals and entities only within a preapproved geographical area. The credit union will not receive a federal charter (and thus cannot start operations) unless it first proffers a geographical coverage area and the NCUA accepts the proposal. Congress explicitly assigns the agency the task of creating vetting standards.

Exercising its expressly delegated power, the NCUA has promulgated a final rule that makes it easier for community credit unions to expand their geographical coverage and thus to reach more potential members. Representing competitors to the credit unions, the American Bankers Association (Association) has challenged the NCUA’s new rule as neither “in accordance with law” nor within “statutory jurisdiction.” 5

U.S.C. § 706(2)(A), (C). The District Court vacated significant portions of the rule, deeming them to be based on unreasonable agency interpretations of the Federal Credit Union Act (Act), Pub. L. No. 73-467, 48 Stat. 1216 (1934) (codified as amended at 12 U.S.C. §§ 1751 to 1795k). *See Am. Bankers Ass’n v. NCUA*, 306 F. Supp. 3d 44, 61, 69-70 (D.D.C. 2018).

We appreciate the District Court’s conclusions, made after a thoughtful analysis of the Act. But we ultimately disagree with many of them. In this facial challenge, we review the rule not as armchair bankers or geographers, but rather as lay judges cognizant that Congress expressly delegated certain policy choices to the NCUA. After considering the Act’s text, purpose, and legislative history, we hold the agency’s policy choices “entirely appropriate” for the most part. *Chevron*, 467 U.S. at 865. We therefore sustain the bulk of the rule. Still, we do not rubber-stamp this regulation. We remand, without vacating, one portion for further consideration of the

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discriminatory impact it might have on poor and minority urban residents.

I.

A.

The nation's credit unions started in the early twentieth century "as a populist mechanism designed to empower farmers against bad loans." Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 500 (2013). Walloped by crop failures and the Great Depression, farmers seeking credit became not only increasingly suspicious of traditional bankers, who "disregard[ed]" poor individuals and stayed in the big cities, but also fearful of loan sharks, "who would extract 'up to a thousand percent' in interest rates." *Id.* at 500-01 (quoting 80 CONG. REC. 6752 (1936) (statement of Rep. Lundeen)). The farmers thus began to build their own credit networks.

In a national grassroots campaign, farmers created localized, non-profit "credit groups" collecting funds from and loaning small sums to one another at low interest rates. *See id.* at 501-02. The success of any such self-help institution "hinge[s] on the interpersonal dynamics of its members: Lenders must be able to evaluate the ability and willingness of potential borrowers to pay back their loans and borrowers must feel obligated to pay back those loans." Wendy Cassity, Note, *The Case for a Credit Union Community Reinvestment Act*, 100 COLUM. L. REV. 331, 337 (2000); *see also First Nat'l Bank & Tr. Co. v. NCUA (First Nat'l Bank II)*, 90 F.3d 525, 526 (D.C. Cir. 1996), *aff'd*, 522 U.S. 479 (1998).

By 1934, individuals had organized about 3,000 local credit unions, with about 750,000 members. *See* 80 CONG.

REC. at 6753. Recognizing the success of credit unions at the state level, Congress created a federal system that year by passing the Act. Legislators worried that “usurious money lending . . . obviously destroy[ed] vast totals of buying power [once held by] . . . the average worker.” H.R. REP. NO. 73-2021, at 1-2 (1934); *see also* S. REP. NO. 73-555, at 1 (1934). Congress touted the Act’s ability to “make more available to people of small means credit for provident purposes.” H.R. REP. NO. 73-2021, at 1; *see also* S. REP. NO. 73-555, at 1.

Credit unions multiplied over the ensuing decades. By 1970, Congress created an independent agency to supervise federal credit unions: the NCUA. *See* Pub. L. No. 91-468, 84 Stat. 994 (1970) (codified as amended in scattered sections of 12 U.S.C.); *see also* *Swan v. Clinton*, 100 F.3d 973, 974 (D.C. Cir. 1996) (noting that Congress “entrusted” the agency with “the responsibility of overseeing” federal credit unions). Legislators thought that the agency would be “more responsive to the needs of credit unions” and would “provide more flexible and innovative regulation” than prior government agencies, which did not have federal credit unions as their sole focus. S. REP. NO. 91-518, at 3 (1969).

The NCUA faced its first major crisis at the end of the 1970s. After years of economic decline in several industrial sectors, federal credit unions tied to those business sectors began to suffer. The resulting liquidation of numerous credit unions “threaten[ed] ‘the safety and soundness of the federal credit union system.’” Cassity, *supra*, at 338-39 (footnote omitted). Reacting to the emergency, the NCUA in 1981 promulgated a groundbreaking rule that loosened a major size limitation on certain federal credit unions. Almost immediately, those financial institutions grew in membership.

Meanwhile, credit unions became “caught up in the broader changes in banking and faced internal as well as external pressure to compete with [private] banks and seek higher profits.” Baradaran, *supra*, at 505. Unlike credit unions, private, for-profit banks were “owned by equity holders who may not necessarily be customers (depositors or borrowers),” and they did “not have similar membership and commercial lending restrictions” as credit unions. DARRYL E. GETTER, CONG. RESEARCH SERV., IF11048, INTRODUCTION TO BANK REGULATION: CREDIT UNIONS AND COMMUNITY BANKS: A COMPARISON 1 (2018). To remain viable, credit unions “started to focus on attracting more customers and expanding the industry.” Baradaran, *supra*, at 505. As part of that strategy, many consolidated through mergers. And private banks soon treated credit unions as serious competitors, seeking to curb their growth. *See NCUA v. First Nat’l Bank & Tr. Co. (First Nat’l Bank III)*, 522 U.S. 479, 485 (1998); *First Nat’l Bank I*, 988 F.2d at 1276.

In 1998, the banking industry successfully challenged as contrary to the Act the 1981 rule that had eased size limitations for certain federal credit unions. *See First Nat’l Bank III*, 522 U.S. at 503. Congress swiftly responded. In less than six months, legislators amended the Act, superseding the holding in *First National Bank III*, loosening size limitations on certain federal credit unions, and adding other reforms. *See Credit Union Membership Access Act*, Pub. L. No. 105-219, 112 Stat. 913 (1998) (codified as amended in scattered sections of 12 U.S.C.). Partly because of the 1998 amendments and related NCUA regulations, credit unions continued to merge and grow in membership. Now, more than 61 million customers perform their banking services at about 3,400 federal credit unions. *See 2018 NAT’L CREDIT UNION ADMIN. ANN. REP.* 192.

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B.

Federal credit unions pool funds from – and give loans to – their members and other credit-union entities. 12 U.S.C. § 1757(5), (6). A credit union’s members, whether individual or corporate, must come from the credit union’s membership “field,” *id.* § 1753(5), which is based on a shared occupation, association, or geographical area. Members receive regular dividends. *Id.* § 1763. Congress has shielded federal credit unions from federal corporate income taxes and most state and local taxes, but members must pay taxes on their dividends. *See* JAMES M. BICKLEY, CONG. RESEARCH SERV., 97-548 E, SHOULD CREDIT UNIONS BE TAXED? 3-5 (2005).

To create a federal credit union, at least seven individuals must present a proposed charter and pay a fee to the NCUA. *See* MICHAEL P. MALLOY, BANKING LAW & REGULATION § 2.04 (2d ed. 2019). In the application, the organizers must pledge to deposit funds for shares in the institution and must describe the credit union’s proposed membership field. 12 U.S.C. § 1753(3), (5). The NCUA must approve the charter before the institution may start. *See id.* § 1754. The agency will complete an “appropriate investigation” and determine the “general character and fitness” of the organizers, the “economic advisability of establishing” the credit union, and the “conform[ity]” of proposal details with the Act. *Id.*

The Act governs two types of federal credit unions: “common-bond” credit unions and “community” credit unions. *See id.* § 1759(b). This case deals with the latter category. The 1934 version of the Act required a community credit union’s membership field to reflect a particular geographical area – to wit, “a well-defined neighborhood, community, or rural district.” § 9, 48 Stat. at 1219. As amended in 1998, the Act provides that membership for a community credit union “shall

be limited to . . . [p]ersons or organizations within a well-defined *local* community, neighborhood, or rural district.” 12 U.S.C. § 1759(b) (emphasis added). The 1998 version calls on the NCUA to “prescribe, by regulation, a definition for the term ‘well-defined local community, neighborhood, or rural district.’” *Id.* § 1759(g)(1). Thus, under the new regime, individuals seeking to organize a new community credit union (or alter an existing one) must commit to serving members within the NCUA’s contemporaneous definition of “local community, neighborhood, or rural district.” *See* S. REP. NO. 105-193, at 4, 8 (1998); H.R. REP. NO. 105-472, at 21 (1998). As part of their application to the NCUA, they must provide a proposed description of the precise geographical area that the credit union would serve.

Since 1998, there has been “dramatic growth” in the number of community credit unions. U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-29, CREDIT UNIONS: GREATER TRANSPARENCY NEEDED ON WHO CREDIT UNIONS SERVE AND ON SENIOR EXECUTIVE COMPENSATION ARRANGEMENTS 4 (2006). Despite a 11-percent drop in the number of federal credit unions from 2000 to 2005, community credit unions doubled to 1,115. *Id.* at 4, 12. Meanwhile, the amount of assets in community credit unions quadrupled to \$104 billion. *Id.* at 4.

C.

On December 7, 2016, the NCUA amended its membership-field rules for community credit unions. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412 (Dec. 7, 2016). Several changes rely on two terms devised by the Office of Management and Budget (OMB) and based on data collected by the Census Bureau (Census): “Core Based Statistical Areas” and “Combined Statistical Areas.”

The OMB has designated numerous regions around the country as Core Based Statistical Areas, which comprise at least one urban cluster, or core, of 10,000 or more people and adjacent counties with substantial commuting ties to that core. See U.S. CENSUS BUREAU, GEOGRAPHICAL PROGRAM, GLOSSARY, <https://www.census.gov/programs-surveys/geography/about/glossary.html>. In layman's terms, a Core Based Statistical Area is a city or town and its suburbs.

Meanwhile, a Combined Statistical Area is a conglomerate of two or more adjoining Core Based Statistical Areas, each of which has substantial commuting ties with at least one other Core Based Statistical Area in the group. *Id.* Essentially, a Combined Statistical Area is a regional hub with urban centers connected by commuting patterns. Combined Statistical Areas may “reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreation activities.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 15-01, REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF THE DELINEATIONS OF THESE AREAS app. 2-3 (2015).

Relevant here, the 2016 rule made two changes to the NCUA's definition of the term “local community” under § 1759(b)(3) and one to that of “rural district.” The changes affect what proposed membership areas satisfy the geographical limitation imposed by the Act.

The first change to the “local community” definition involves Combined Statistical Areas. A proposed area qualifies as a local community if it encompasses the whole or a portion of a Combined Statistical Area and does not exceed a

designated population limit. *See* 81 Fed. Reg. at 88,440. The NCUA has set that cap at 2.5 million people.

The second change involves Core Based Statistical Areas. The parties agree that all or part of a Core Based Statistical Area may qualify as a local community so long as it does not exceed the population limit. But since 2010, the NCUA required such a membership area to include the urban core. The new rule no longer requires that the core be included in the local community that a credit union proposes to serve. *See id.* at 88,413, 88,440.

As for the “rural district” definition, the new rule increases the population cap for valid rural districts from 250,000 people (or 3 percent of the population of the state where most eligible residents are located) to 1 million people. *See id.* at 88,416, 88,440. The new population limit works with two other constraints set by the rule: (1) an outer geographical limit on how far a rural district may extend past the borders of the credit union’s headquarters state; and (2) a requirement either that most eligible residents reside in Census-designated rural areas, or that the population density of the proposed district equals 100 or fewer people per square mile. *See id.* at 88,440.

D.

On the day the NCUA published the rule, the Association filed this injunctive and declaratory action in the District Court. The Association claimed that the three changes described above were not only arbitrary and capricious under the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as 5 U.S.C. §§ 701-06), but also unreasonable and entitled to no deference under *Chevron*. The agency and Association filed cross-motions for summary

judgment. On March 29, 2018, the District Court granted both motions in part and denied them in part.

The court made three relevant holdings. First, it rejected as unreasonable the qualification of certain Combined Statistical Areas as local communities. *See Am. Bankers Ass'n*, 306 F. Supp. 3d at 61. Second, it sustained as well-reasoned the elimination of the core requirement from the Core Based Statistical Area a credit union proposes to serve as its local community. *Id.* at 64-65. Third, it rejected as unreasonable the increased population cap for rural districts. *Id.* at 69-70. (It also sustained a separate portion of the rule, which the Association does not challenge here.)

The NCUA and Association timely appealed. We have appellate jurisdiction under 28 U.S.C. § 1291.

II.

At the outset, we must assure ourselves of our subject matter jurisdiction over the appellate proceeding. *See, e.g., United States v. Gooch*, 842 F.3d 1274, 1277 (D.C. Cir. 2016).

In their original briefing, the parties failed to apprise us of a rule that was promulgated while this appeal was pending and that changed membership-field requirements for community credit unions. *See* Chartering and Field of Membership, 83 Fed. Reg. 30,289 (June 28, 2018). The 2018 rule eliminated the portion of the 2016 rule allowing Combined Statistical Areas to qualify as local communities. *Compare* 12 C.F.R. pt. 701, app. B, ch. 2 § V.A.2 (2018), *with id.* (2019). The 2018 rule preamble did not specifically discuss the removal but concluded that “[a]ny modification in th[e] final rule is consistent with the District Court decision” in this action. 83 Fed. Reg. at 30,291.

“Under the mootness doctrine, we cannot decide a case if ‘events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.’” *Reid v. Hurwitz*, 920 F.3d 828, 832 (D.C. Cir. 2019) (citation omitted). The same principle applies to individual claims. *See Tucson Med. Ctr. v. Sullivan*, 947 F.2d 971, 977 (D.C. Cir. 1991). Accordingly, if a rule under review (or a portion of it) is superseded or amended during an appeal, the proceeding (or relevant part) might be moot. *See, e.g., Am. Bankers Ass’n v. NCUA*, 271 F.3d 262, 274 (D.C. Cir. 2001). We therefore requested supplemental briefing on the issue of appellate jurisdiction.

Based on the government’s submission and representations at oral argument, we hold that the portion of the appeal related to Combined Statistical Areas is not moot. “[T]he mere power to [reinstitute] a challenged law is not a sufficient basis on which a court can conclude that” a challenge remains live. *Nat’l Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997). The government has stated that, if we reverse the relevant part of the District Court’s decision, all three members of the NCUA’s board intend to reinstitute the Combined Statistical Area portion of the 2016 rule. *See* Decl. of Michael McKenna ¶ 3, ECF No. 1781123; Oral Arg. Recording 11:33-48. Accordingly, *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982), governs this case. In *Aladdin’s Castle*, the Supreme Court deemed the controversy live in part because the government had announced “an intention” to restore the rule under challenge if the lower-court decision were vacated. *Id.* at 289 & n.11; *see also Am. Bankers Ass’n*, 271 F.3d at 274. The NCUA’s submission and representations evince such an intention here, and the Association – which bears the “heavy burden” of proving

mootness, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted) – offers no evidence to the contrary.

The Association attempts to distinguish *Aladdin's Castle* on two grounds, but neither sways us. First, the Association notes that the city government in *Aladdin's Castle* said it would reenact “precisely the same” law, *see* 455 U.S. at 289, but that in this case any future notice-and-comment proceedings might produce a different “local community” definition, perhaps not even relying on Combined Statistical Areas. After all, the agency must keep a “flexible and open-minded attitude” during the process. *See Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). We grant that commenters might convince the NCUA to change its mind; *mann tracht, und Gott lacht*. But that strikes us as speculative as public input convincing Mesquite legislators to enact a different law. We do not see *Aladdin's Castle* turning on such conjecture. Instead, we see a live dispute because there is “no certainty” that the NCUA will forego reinstating the same Combined Statistical Area definition. *Aladdin's Castle*, 455 U.S. at 289; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (holding that the court must find “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur” (emphasis added) (quoting *Friends of the Earth*, 528 U.S. at 189)). After all, the NCUA continues to defend the definition here. *See Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012).

Second, the Association observes that both sides in *Aladdin's Castle* urged the Supreme Court to treat their dispute as live. In contrast, only the NCUA seeks to proceed here; the Association would prefer to wait until the agency reinstates the rule. But the existence or absence of jurisdiction does not turn on which parties challenge or defend it. *Cf. Bender v.*

Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). Because the NCUA remains bound by the lower-court judgment, the present injury renders irrelevant the Association's preference. "Jurisdiction existing," our duty to decide the appeal "is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation omitted).

In short, we may review the challenge to the rule change involving Combined Statistical Areas. We see no jurisdictional issues with the rest of the appeal. We thus turn to the merits.

III.

We review *de novo* the District Court's rulings on summary judgment. *See Loan Syndications & Trading Ass'n v. SEC*, 882 F.3d 220, 222 (D.C. Cir. 2018). We review the administrative record and give "no particular deference" to the District Court's views. *Oceana, Inc. v. Ross*, 920 F.3d 855, 860 (D.C. Cir. 2019) (citation omitted).

The APA governs this suit. In relevant part, the statute provides that we "decide all relevant questions of law" and "interpret . . . statutory provisions." 5 U.S.C. § 706. We ordinarily set aside agency actions that are either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C).

We review the agency rule in accordance with the familiar *Chevron* doctrine, a two-prong test for determining whether an agency "has stayed within the bounds of its statutory authority" when issuing its action. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted). At the first step, we

determine “whether Congress has directly spoken to the precise question at issue,” and we “give effect” to any “unambiguously expressed intent.” *Chevron*, 467 U.S. at 842-43 & n.9.

If we glean no such unambiguous intent, we turn to the second step and determine “whether the agency’s answer” to the question “is based on a permissible construction of the statute.” *Id.* at 843. By arriving at the second step, we have concluded that Congress either explicitly or implicitly delegated to the agency the lawmaking authority to clarify the statute. We presume that Congress would not authorize the promulgation of an “[im]permissible construction.” *Chevron*, 467 U.S. at 843. Accordingly, we will set aside agency actions based on such a construction, because they are either “not in accordance with law” or “in excess of statutory jurisdiction.” 5 U.S.C. § 706(2)(A), (C); *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056, 1063 (D.C. Cir. 2014); *Ass’n of Privacy Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012).

IV.

For all three challenges, the first step of the *Chevron* analysis proceeds in the same way. “We begin our analysis, as always, with the statutory text.” *Tesoro Alaska Co. v. FERC*, 778 F.3d 1034, 1038 (D.C. Cir. 2015). Congress having expressly assigned the NCUA the power to define the challenged terms, *see* 12 U.S.C. § 1759(g)(1), we may proceed to *Chevron*’s second prong without further analysis, *see U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 717 (D.C. Cir. 2016); *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 760 (7th Cir. 2014); *Comm’r v. Pepsi-Cola Niagara Bottling Corp.*, 399 F.2d 390, 393 (2d Cir. 1968) (Friendly, J.) (“When Congress has used a general term and has empowered an administrator

to define it, the courts must respect his construction if this is within the range of reason.”).

An express delegation of definitional power “necessarily suggests that Congress did *not* intend the [terms] to be applied in [their] plain meaning sense,” *Women Involved in Farm Econ. v. U.S. Dep’t of Agric.*, 876 F.2d 994, 1000 (D.C. Cir. 1989), that they are not “self-defining,” *id.*, and that the agency “enjoy[s] broad discretion” in how to define them, *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016). In *Chevron* terms, Congress through explicit language “has directly spoken to the precise question” of whether the identified terms must carry certain meanings. 467 U.S. at 842-43. The answer is no. *See Buongiorno v. Sullivan*, 912 F.2d 504, 509 (D.C. Cir. 1990) (Thomas, J.) (“When Congress expressly delegates the authority to fill a gap in a statute, Congress speaks, in effect, directly, and says, succinctly, that it wants the agency to annotate its words.”). To hold otherwise at the first *Chevron* step would “undermine” the ability of Congress to delegate definitional power. *Rush Univ. Med. Ctr.*, 763 F.3d at 760.

Consequently, we turn to whether the NCUA’s definitions are “based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843.

V.

Agency interpretations promulgated to fill an explicit legislative gap “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 844; *see also Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015).

Under arbitrary and capricious review, “we may not substitute our own judgment for that” of the agency. *FERC v.*

Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016); accord *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019). Still, we are “not a ‘rubber stamp,’” *Oceana*, 920 F.3d at 863; “the agency must examine the relevant data and articulate a satisfactory explanation for its action,” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983). A rule is arbitrary and capricious if (1) the agency “has relied on factors which Congress has not intended it to consider”; (2) the agency “entirely failed to consider an important aspect of the problem”; (3) the agency’s explanation “runs counter to the evidence before the agency”; or (4) the explanation “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

In turn, we assess three definitional changes in the 2016 rule: (1) qualifying Combined Statistical Areas as local communities; (2) eliminating the core requirement for local communities based on Core Based Statistical Areas; and (3) raising the population cap for rural districts. We sustain the first and third amendments in full. As for the second, we hold that it is rationally related to the Act’s text and purposes, but that it is insufficiently explained.

A.

The District Court rejected the first change because it approved certain Combined Statistical Areas “no matter how geographically dispersed and unconnected” the “members may be.” *Am. Bankers Ass'n*, 306 F. Supp. 3d at 61. To the court, the approval did not fit with the term “local community,” which, in its view, “encompass[es] an area no larger than a county.” *Id.* at 58, 61. We respectfully disagree.

The NCUA possesses vast discretion to define terms because Congress expressly has given it such power. But the authority is not boundless. The agency must craft a reasonable definition consistent with the Act's text and purposes; that is central to the review we apply at *Chevron's* second step. Here, the NCUA's definition meets the standard.

We first focus on the text. Congress introduced the phrase "local community" in the 1998 amendments. The word "community" had a broad scope at the time. It meant not only "society at large" but also a "body of individuals organized into a unit or manifesting usu[ally] with awareness of some unifying trait." *See* Community, WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 460 (1993). The group could be "united by historical consciousness or . . . common social, economic, and political interests." *Id.* But the unifying trait could also be simply "living in a particular place or region." *Id.*

The NCUA has recognized that the modifier "local" "reflects congressional intent that it takes 'a more circumspect and restricted approach to chartering community credit unions.'" *Am. Bankers Ass'n*, 271 F.3d at 273 (citation omitted); *see also* Oral Arg. Recording 3:16-18. Indeed, Congress made clear its intention to "modif[y]" the "current law regarding community credit unions" by adding the word "local" to community. S. REP. NO. 105-193, at 6-7.

Insertion of the modifier "local" before "community" implies that the community "relate[s] to" a "particular limited district" or is "confined to a particular place." *Local*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1327 (1993). But that place need not be the size of a county, as the District Court held. The Supreme Court has recognized that the geographical areas

“need not be small.” *First Nat’l Bank III*, 522 U.S. at 492. And if Congress wanted a local community to correspond to a particular geographical unit, such as a county, “it easily could have written that limitation explicitly.” NCUA Br. 25-26 (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008)); *see also* Credit Union Nat’l Ass’n Amicus Br. 15. The NCUA sensibly reads the term “local” to mean simply that the community, regardless of shape or size, should be neither “broad” nor “general.” *Local*, SUPRA, at 1327.

To be clear, we do not hold today that the NCUA must consider only bonds and social connections as understood in 1998. The parties agree, and thus we assume, that the NCUA, despite its expressly delegated authority, must adopt a definition consistent with what the term “local community” meant in 1998, the time of its adoption.

After consulting state statutes and invoking the canon of *noscitur a sociis*, the District Court developed a rather size-restrictive meaning for the phrase. *See Am. Bankers Ass’n*, 306 F. Supp. 3d at 57-59. But we do not think that defining a “local community” to refer to an area larger than a county is an unreasonable interpretation of the Act’s text.

We receive little guidance from the state statutes in effect in 1998. Indeed, some of the statutes considered “local communities” to be quite large. *See, e.g., ALASKA STAT. § 18.66.990(7)* (1998) (defining “local community entity” as “a city or borough or other political subdivision of the state, a nonprofit organization, or a combination of these” (emphasis added)); *see also* NCUA Br. 25 n.4.

We also reject the District Court’s invocation of the *noscitur a sociis* canon. When several terms “are associated in a context suggesting that [they] have something in common,

they should be assigned a permissible meaning that makes them similar.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (2012). But the “substantive connection, or fit, between” the terms here – local community, neighborhood, and rural district – is “not so tight or so self-evident.” *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010). Only the word “neighborhood” has a dictionary definition clearly suggesting a region of small size; the phrase “local community” does not, as we have explained above, and neither does “rural district,” as we explain below. A size restriction would impermissibly “submerge[]” the independent “character” of the latter two terms. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or. (Sweet Home)*, 515 U.S. 687, 702 (1995) (citation omitted).

The Association also points to other textual indicators. But contrary to what it suggests, *see* Am. Bankers Ass’n Br. 27-28, we see nothing in the record suggesting that “local community” is a term of art. The Association also says the usage of word “local” in two other federal statutes indicates that rules permitting coverage areas of larger than a county would be manifestly contrary to the Act. *See id.* at 32; *see also* 15 U.S.C. § 2203 (1998) (defining “local” as “city, town, county, . . . or other political subdivision of a State”); 18 U.S.C. § 666 (1998) (same). (The Association pointed to other laws, but they did not exist in 1998. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4703(b), 123 Stat. 2190, 2837 (2009); PRIME Act Grants, 66 Fed. Reg. 29,010 (May 29, 2001).) True enough. But the two statutes address materially distinct issues – fire prevention and embezzlement – and thus do not indicate that the term “local” must imply a size limitation here. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (“[M]ost words have

different shades of meaning and consequently may be variously construed . . . in different statutes ” (citation omitted)).

In addition to being consistent with the Act’s text, the Combined Statistical Area definition rationally advances the Act’s underlying purposes. In the 1998 amendments, Congress made two relevant findings about purpose. First, legislators found “essential” to the credit-union system a “meaningful affinity and bond among members, manifested by a commonality of routine interaction[;] shared and related work experiences, interests, or activities[;] or the maintenance of an otherwise well-understood sense of cohesion or identity.” § 2, 112 Stat. at 914. Second, Congress highlighted the importance of “credit union safety and soundness,” because a credit union on firm financial footing “will enhance the public benefit that citizens receive.” *Id.* The legislative history also confirms the importance of common bonds, *see* S. REP. NO. 73-555, at 2; *see also* H.R. REP. NO. 105-472, at 12; H.R. REP. NO. 73-2021, at 2; 144 CONG. REC. S9094 (daily ed. July 28, 1998) (statement of Sen. Mikulski); *id.* at S8971-72 (daily ed. July 24, 1998) (statement of Sen. Moseley-Braun), and economic “integrity,” S. REP. NO. 105-193, at 3; *see also* 144 CONG. REC. S9094 (statement of Sen. Mikulski); *id.* at S8972 (statement of Sen. Moseley-Braun), to federal credit unions.

We recognize that there may be some tension between the Act’s principal purposes: A credit union with exceedingly close ties among its members is unlikely to have a large enough customer base to thrive economically. To the extent that such tension exists, the Act leaves to the NCUA to strike a reasonable balance. Congress was well aware that a viable credit union might serve a relatively large geographical area. *See, e.g.*, H.R. REP. NO. 73-2021, at 2 (“[T]here are cases in which communities and organizations cross State lines.”).

The NCUA did just that in promulgating the Combined Statistical Area definition. That definition allows for larger community credit unions; the decision is consistent with decades of history promoting the economic viability of credit unions in the face of banks and other competing financial institutions. Nonetheless, the NCUA struck a balance by ensuring that members within the local community maintain somewhat of a commuter relationship with each other. As the Association even acknowledges, commuting patterns “may sometimes serve as a proxy for community interaction.” *Am. Bankers Ass’n Br. 38 n.25*. We see nothing irrational about adopting the factor as a proxy for the common bond contemplated by Congress. Perhaps we would have made a different call had we been the policymakers. Perhaps we would have sought a tighter bond. Or perhaps we would not have prioritized credit-union growth. *See Iowa Bankers Ass’n Amicus Br. 24-25*. But we must “refrain from substituting [our] own interstitial lawmaking for that” of the agency. *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 244 (2004) (citation omitted).

The NCUA also reasonably explained its amendment to the “local community” definition. To begin with, the agency reasonably circumscribed the size of a local community under the Combined Statistical Area rule by imposing a 2.5 million-person population limit. Used by the OMB in analogous circumstances, the cap is a “logical breaking point in terms of community cohesiveness with respect to a multijurisdictional area.” *Chartering and Field of Membership for Federal Credit Unions*, 75 Fed. Reg. 36,257, 36,259 (June 25, 2010). Moreover, the NCUA reasonably relied on its prior experience with Core Based Statistical Areas, which no party disputes can serve as local communities under the Act. The agency noted that the average geographic size of Combined Statistical Areas with populations of up to 2.5 million people is 4,553 square

miles, and that the average size of the Core Based Statistical Areas approved by the NCUA as local communities is 4,572 square miles. *See* 81 Fed. Reg. at 88,414-15. Given that similarity in size, the NCUA reasonably considered adopted its population-limited Combined Statistical Areas standard.

Finally, the NCUA's definition does not readily create general, widely dispersed regions. *Cf. First Nat'l Bank III*, 522 U.S. at 502 (indicating that community credit unions may not be "composed of members from an unlimited number of unrelated geographical units"). Combined Statistical Areas are geographical units well-accepted within the government. *See* 81 Fed. Reg. at 88,414. Because they essentially are regional hubs, the Combined Statistical Areas concentrate around central locations. The OMB carved out the areas so that their constituent parts share commuting ties and they reflect "broader social and economic interactions." OFFICE OF MGMT. & BUDGET, SUPRA, at app. 2-3. The NCUA rationally believed that such "real-world interconnections" would qualify as the type of mutual bonds suggested by the term "local community." Credit Union Nat'l Ass'n Amicus Br. 9. Thus, the agency reasonably determined that Combined Statistical Areas "simply unif[y], as a single community," already connected neighboring regions. *See* 81 Fed. Reg. at 88,415.

The Association raises a potpourri of objections to the NCUA's decision-making. *See* Am. Bankers Ass'n Br. 33-48. Virtually all of its gripes are forfeited because it failed first to raise them to the agency, *see, e.g., Koretoff v. Vilsack*, 707 F.3d 394, 397-98 (D.C. Cir. 2013) (*per curiam*), or lack merit because they involve outdated "local community" definitions, which either did not allow for the qualification of certain geographical areas as local communities or lacked a population cap of 2.5 million people.

But one of the complaints is “deserving of sustained consideration.” *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018). The Association contends that some large Combined Statistical Areas are so sprawling that the NCUA’s definition, which treats a 2.5-million-person portion of them as a local community, must be unreasonable. Recall that a Combined Statistical Area is a regional hub with more than one urban center. Under the OMB’s technical specifications, each center need not be connected to every other by commuting ties; rather, each need only have ties to one other center within the hub. As the Association colorfully puts it, the OMB may designate as a Combined Statistical Area a mere “daisy chain” of urban centers “that are linked to their neighbors but have nothing to with those at the other end of the chain.” *See Am. Bankers Ass’n Br. 36* (citation omitted). Theoretically, the Association continues, certain 2.5-million-person communities might bring together parts of different urban centers with no connection with one another. The Association also suggests that the rule might permit local communities comprising non-contiguous portions of a Combined Statistical Area. *See id.* at 39.

We understand the Association’s argument to be attacking the Combined Statistical Area definition as unreasonable. To the Association, the NCUA failed sufficiently to consider the potential for the rule to create unreasonable results. One hypothetical application disturbed the District Court here: the prospect that, within the Combined Statistical Area including the District of Columbia and counties from three states (Maryland, Pennsylvania, and Virginia), one could create a local community bringing together Doylesburg, Pennsylvania, and Partlow, Virginia, towns located 200 miles apart. *See Am. Bankers Ass’n*, 306 F. Supp. 3d at 59-60.

We might well agree with the District Court that the approval of such a geographical area would contravene the Act.

But even so, the Association would need much more to mount its facial pre-enforcement challenge in this case. As the Supreme Court repeatedly has held, “the fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule” facially invalid. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 619 (1991); *see also EPA v. EME Homer City Generation, L.P. (EME Homer)*, 572 U.S. 489, 524 (2014) (“The possibility that the rule, in uncommon particular applications, might exceed [the agency]’s statutory authority does not warrant judicial condemnation of the rule in its entirety.”); *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 188 (1991) (“That the regulation may be invalid as applied in s[ome] cases . . . does not mean that the regulation is facially invalid because it is without statutory authority.”); *cf. Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (“Virtually every legal (or other) rule has imperfect applications in particular circumstances.”).

Here, the Association’s complaint and the District Court’s accompanying worry strike us as too conjectural. The NCUA must assess the “economic advisability of establishing” the proposed credit union before approving it, 12 U.S.C. § 1754, and as part of the assessment, the organizers must propose a “realistic” business plan showing how the institution and its branches would serve all members in the local community, *see* 12 C.F.R. pt. 701, app. B, ch. 1 § IV.D. The Association has failed to demonstrate the plausibility of a local community that is defined like the hypothetical narrow, multi-state strip and accompanies a realistic business plan. And if the agency were to receive and approve such an application, a petitioner can make an as-applied challenge. *See, e.g., EME Homer*, 572 U.S. at 523-24; *Buongiorno*, 912 F.2d at 510. The Association has succeeded in such challenges in the past. *See, e.g., Am. Bankers Ass’n v. NCUA*, No. 1:05-CV-2247, 2008 WL 2857678, at *1 (M.D. Pa. July 21, 2008); *Am. Bankers Ass’n v.*

NCUA, 347 F. Supp. 2d 1061, 1074 (D. Utah 2004). Thus, we reject the facial attack on the amended “local community” definition involving Combined Statistical Areas.

B.

We turn to the next rule change. The District Court upheld the eliminated core requirement for a local community based on a Core Based Statistical Area. The court acknowledged that defining a local community without its urban core “does not alter the . . . common bond” shared by the members in the remainder. *Am. Bankers Ass’n*, 306 F. Supp. 3d at 62-63. Meanwhile, the court accepted the agency’s response to the claim that the new definition encouraged redlining – a broad category of lending practices with negative impact on “areas where low-income and minority populations are concentrated.” *Id.* at 65 (quoting 81 Fed. Reg. at 88,413).

Like the District Court, we hold that the eliminated core requirement is consistent with the Act’s text and purposes. Still, we see merit in the Association’s redlining argument and thus hold the definitional change to be arbitrary and capricious.

1.

We will sustain the eliminated core requirement if it reflects a reasonable interpretation of “local community” that is rationally related to the dual purposes of promoting credit-union growth and ensuring some cohesion among members. It does. Omission of the urban core from proposed geographical area will permit community credit unions to reach new members in the suburban parts of the Core Based Statistical Area and thus to maintain a healthy membership. Because the suburbs under the OMB’s definition have substantial commuting ties to the urban cluster, they all will be “within a

feasible commuting radius” and thus “share[] at least some geographic ties.” *Am. Bankers Ass’n*, 306 F. Supp. 3d at 64. Those bonds do not disappear if the local community lacks the core. The Association seeks greater “assurance[s]” of a meaningful bond among members, *Am. Bankers Ass’n Br.* 66-67; *see also* *Am. Bankers Ass’n Reply* 11, but we do not replace the agency’s policy judgment with ours.

We also do not believe that the eliminated core requirement would create sprawling, boundless geographical regions. No one disputes that, as a general matter, a membership area comprising an intact Core Based Statistical Area will satisfy any definition of “local community.” If the local community with the core poses no problem, we fail to see how a local community without one would. And even as to Core Based Statistical Areas that do not qualify as local communities (because they have populations of more than 2.5 million), the geographical ties ensure that the proposed membership area will still be contained within the boundaries of a single, well-recognized metropolitan region. A single region is not what concerned the Supreme Court in *First National Bank III*. *See* 522 U.S. at 502.

The Association objects to the expansive hypothetical membership fields, highlighting two Core Based Statistical Areas whose populations exceed the NCUA’s cap of 2.5 million. The Association asserts that the rule change “makes it much easier to unite far-distant edges” of those sprawling areas in a single membership area. *Am. Bankers Ass’n Reply* 9. Fair point. But economic realities do not make it plausible that organizers would propose such a local community or that the NCUA would approve it. Like the Combined Statistical Area definition, the eliminated core requirement does not become facially infirm because of farfetched hypotheticals. To the extent they occur in the future, troublesome rule applications

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might be subject to as-applied challenges. *See Am. Bankers Ass'n*, 271 F.3d at 267.

2

Despite the eliminated core requirement's consistency with the Act, we cannot sustain the definitional change because the NCUA has not adequately explained it.

The Association contends that the rule change “effectively allows credit unions to engage in ‘redlining’ by denying service to urban areas with large numbers of minority and lower-income residents.” *Am. Bankers Ass'n Br.* 65. The NCUA attempted to address this concern in the preamble. At first blush, the agency's statements appear persuasive. Still, the Association persuasively argues that the response fails to “consider an important aspect” of the redlining issue or is otherwise “so implausible” as to be unreasonable. *State Farm*, 463 U.S. at 43. Thus, the eliminated core requirement is arbitrary and capricious.

During the notice-and-comment proceedings, the Association warned against redlining and objected that community credit unions could now “serv[e] wealthier suburban counties and exclud[e] markets containing low-income and minority communities that reside in the core area.” Letter from James Chessen, Exec. Vice President & Chief Economist, *Am. Bankers Ass'n*, to Gerard S. Poliquin, Sec'y of the Board, Nat'l Credit Union Admin. (Feb 5, 2016), *Am. Bankers Ass'n v. NCUA*, No. 1:16-cv-02394-DLF (D.D.C. filed Aug. 23, 2017), ECF No. 26-1 at 228. Fairly read, the Association's objection is not to traditional redlining, which encompasses the refusal to make loans in low-income or minority neighborhoods within a service area, *see Baradaran, supra*, at 494; *see also Cassity, supra*, at 348, 355. Federal

credit unions “cannot ‘redline’” in the traditional sense because “everyone in a credit union’s ‘community’ is a member who is eligible to take advantage of credit union services” and credit unions “by definition cannot reach beyond their member communities to offer credit to the general public.” Cassity, *supra*, at 355. But a community credit union can engage in more unconventional redlining practices: “gerrymander[ing] to create its own community of exclusively higher-income members.” *Id.* at 359. We think it evident that the Association was focusing on such gerrymandering.

In response, the NCUA acknowledged that it originally kept the core requirement as a benefit to “low-income and underserved populations.” 81 Fed. Reg. at 88,413. Some commenters criticized the core requirement as failing to achieve that goal; it caused community credit unions “to sacrifice service to other areas” within the Core Based Statistical Area, *id.*, and such service arguably could benefit poor and minority customers residing outside the core, *see id.* at 88,414 (remarking on the importance of credit unions “providing financial services to low income and underserved populations without regard to where they are located within a community, *i.e.*, beyond its ‘core area’”).

Still, the agency dismissed the redlining concern on other grounds, pointing to its “supervisory process to assess [credit-union] management’s efforts to offer service to the entire community [the credit union] seeks to serve.” *Id.* The NCUA focused on two aspects of its process. First, the agency touted its “annual evaluation,” which “encompasses [the credit union]’s implementation of its business and marketing plans.” *Id.* Citing its “[e]xperience” as support, the agency identified the evaluation as a “more effective means” than a core requirement to “ensur[e] that the low-income and underserved populations are fairly served.” *Id.* Indeed, prior evaluations

confirm that the agency has had “success in providing financial services to low-income and underserved populations without regard to where they are located within” the membership area. *Id.* at 88,414. Second, the NCUA noted its “mandate to consider member complaints alleging discriminatory practices affecting low-income and underserved populations, such as redlining, and to respond as necessary when such practices are shown to exist.” *Id.*

Both aspects of the NCUA’s supervisory process fail to address the redlining issue raised by the Association. The annual evaluation process might be an adequate response to traditional redlining, because it might ensure that community credit unions adequately serve poor and minority residents living in their local communities. But we do not see how it fixes gerrymandering or the potential discriminatory economic impact on urban residents. *See State Farm*, 463 U.S. at 43 (requiring the agency to consider relevant factors). The annual evaluation process necessarily does not come into effect until the NCUA already has approved the charter, business plan, and proposed local community. *See Iowa Bankers Ass’n Amicus Br. 12*. And nothing in the record suggests that business plans may focus on residents residing outside the finalized membership area; in fact, the law forbids federal credit unions from serving those residents.

The complaint process also does not work in the gerrymandering context. As the preamble points out, complaints are raised by the membership, which would not include the affected urban residents because of the rule change. It seems quite implausible, absent some contrary evidence the agency failed to detail, that members will file grievances based on gerrymandering harms suffered by residents outside the coverage area. *See State Farm*, 463 U.S. at 43 (rejecting implausible explanations).

The NCUA attempts to defend the rule change by offering a buffet of other potential rationales in its briefing and at oral argument. They all fail because the agency did not adopt them when promulgating the rule change. *See State Farm*, 463 U.S. at 43 (noting that courts may not “supply a reasoned basis for the agency’s action that the agency itself has not given” (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))). We pause, though, to caution the NCUA about two proffered reasons. At oral argument, the government counsel suggested that the agency may reject proposed local communities if it suspects they discriminate against residents in the urban core. *See Oral Arg. Recording* 5:28-49, 13:43-14:09. But current reviewing guidelines do not indicate that the agency looks for such discrimination. *See* 12 C.F.R. pt. 701, app. B, ch. 1 § VII.A. And the NCUA made the opposite representations to the District Court. *See Transcript of Motion Hearing* at 48:23-49:7 (“[District Court]: . . . If a credit union comes to the agency and says I want to serve X area, either in a rural district or a combined statistical area, and they meet the definition, the agency has no authority to reject that application, as long as the credit union can demonstrate that they can serve the area? [NCUA]: . . . I think that’s probably right, your Honor.”), *Am. Bankers Ass’n v. NCUA*, No. 1:16-cv-02394- DLF (D.D.C. filed Mar. 27, 2018), ECF No. 33. The government counsel also suggested that community credit unions already cover the vast majority of urban cores. *See Oral Arg. Recording* 8:10-22, 12:30-41; *see also id.* at 7:39-8:01; *cf.* NCUA Reply 27-28. Perhaps, but the current record does not support the assertion.

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C.

Finally, the District Court rejected the increased population cap for rural districts. The court worried that a rural district satisfying the new, higher limit could be too large or could contain “numerous urban centers.” *Am. Bankers Ass’n*, 306 F. Supp. 3d at 69. Because the rule qualified certain districts “no matter [their] geographic size or the number or size of metropolitan areas falling within [their] proposed boundaries,” the court held that the NCUA’s new definition is unreasonable. *Id.* at 69-70. But in our view, the new “rural district” definition is reasonable.

As suggested above, we assume that the NCUA must adopt definitions consistent with the statutory terms as understood in 1934, not today. The terms “rural” and “district” do not connote specific population or geographical constraints. *See First Nat’l Bank III*, 522 U.S. at 492 (noting that markets “need not be small”). A “district” means a “portion of a state, county, country, town, or city . . . made for administrative, electoral, or other purposes.” *District*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 649 (2d ed. 1934) (emphasis added). The district may be “of undefined extent.” *Id.* Meanwhile, “rural” indicates a “country” or “agricultur[al]” lifestyle, as opposed to that of a “city or town.” *Rural*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1861 (2d ed. 1934). “Rural” lands generally “resembl[e]” the “country[side].” *Id.*

Nothing about the 1-million-person cap prevents the rural district from resembling the countryside. And one of the unchallenged restrictions helps provide a rural character to such districts. Either most residents in the proposed district live on rural land, or the population density is 100 or fewer people per square mile. *See* 81 Fed. Reg. at 88,440.

Accordingly, even if most residents live on urban areas in the rural district, those areas will be surrounded by rural land. That's because 100 people per square mile – or one person for every six or so acres – is a rural population density.

As for size, the contemporaneous definition of “district” reassures us that rural districts may cross state lines. And a second unchallenged restriction assures that the 1-million-person cap will not support gigantic or straggly rural districts. As the rule explains, the boundaries of a community credit union's district may not “exceed the outer boundaries of the states” immediately surrounding the state where the proposed credit union would have its headquarters. 81 Fed. Reg. at 88,440. Thus, even though the population density of the entire United States is less than 100 people per square mile, *see* NCUA Br. 56 n.44; Oral Arg. Recording 39:34-38, the geographical limitation forces a rural district to be much smaller. We are confident that such districts will not be so enormous as to amount to federations of “unrelated geographic units.” *See First Nat'l Bank III*, 522 U.S. at 502.

In arguing that the amended “rural district” definition is unreasonable, the Association relies heavily on the interpretive analysis performed by the District Court. *See Am. Bankers Ass'n*, 306 F. Supp. 3d at 67-69. The court's core contention is that we must construe “rural” and “district” together as a specialized phrase that meant, in 1934, an “area[] much smaller than a state.” *Id.* at 68. For support, the District Court not only consulted two 1934-era dictionaries, results of a Westlaw search of contemporaneous opinions, and a database containing historical uses of the phrase, but also invoked the *noscitur a sociis* canon. *See id.* at 67-69.

The proffered definitional evidence is pretty thin. The 1934-era dictionaries described what the specialized phrase

“rural district” meant in *Great Britain*, not in the much larger and more expansive United States, which by the 1930s encompassed forty-eight continental states. *See, e.g., Rural District*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1861 (1934) (“in England, a subdivision of an administrative county embracing . . . county parishes”).

The proffered Westlaw search results included scores of federal and state judicial and administrative opinions. *See* Plaintiff’s Supplemental Memorandum app. 6, *Am. Bankers Ass’n v. NCUA*, No. 1:16-cv-02394-DLF (D.D.C. filed Mar. 16, 2018), ECF No. 32-6. But we find little of use in those documents. Many of those opinions do not discuss size or population. *See, e.g., Nicolai v. Wis. Power & Light Co.*, 269 N.W. 281, 282-83 (Wis. 1936). Those that do involve specific rural districts whose sizes were between a town and a state. *See, e.g., Sarther Grocery Co. v Comm’r*, 22 B.T.A. 1273, 1274 (1931). But none declares that rural districts by definition are restricted to any particular size or population.

The District Court next turned to the Corpus of Historical American Usage, a free and public online database. *See Am. Bankers Ass’n*, 306 F. Supp. 3d at 68 & n.5. The database notes 197 mentions of the phrase in the first half of the twentieth century and only 37 in the second. *See* Search Results for RURAL DISTRICTS and RURAL DISTRICT, CORPUS OF HISTORICAL AMERICAN ENGLISH, <https://www.english-corpora.org/coha/> (follow “List” hyperlink; then search matching strings field for “RURAL DISTRICT”). The perceived drop-off led the District Court to determine that, “even if *rural district* does not carry meaning distinct from its individual words today, it did in 1934.” *Am. Bankers Ass’n*, 306 F. Supp. 3d at 68.

Although federal courts may use “crude[]” searches on databases to learn of ambiguities in a statutory term, *Muscarello v. United States*, 524 U.S. 125, 129-30 (1998), the search here did not suffice to show that the agency’s definition was unreasonable. Much more is required to cabin the agency’s discretion. A search of a commercial database, ProQuest, reveals that the phrase appeared at least 500 times in the second half of the century. We are not confident that the proffered evidence establishes a particular historical trend.

The District Court lastly invoked *noscitur a sociis*. See *Am. Bankers Ass’n*, 306 F. Supp. 3d at 68-69. The canon is inapposite. Recall that the term “rural district” was listed with “community,” not “local community,” in 1934. At the time, “community” could refer to “[s]ociety at large” or a “commonwealth or state.” *Community*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 452 (1934). Indeed, we said that the word is “too indefinite to be used for purposes of exact measurement in terms of acres or square miles.” *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 631 (D.C. Cir. 1939), *rev’d sub nom.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Thus, we do not see size or population as a connection between the terms.

The increased population cap is consistent with not only the Act’s text but also its purposes. For instance, as the preamble noted, the expanded definition allows community credit unions in rural districts to reach more “persons of modest means who may reside” in those areas. 81 Fed. Reg. at 88,416; *see also* § 2(1), (2), 112 Stat. at 913.

And the change is neither arbitrary nor capricious. The new rule explains that it provides a “level of operating efficiencies and scale” making rural districts attractive options for prospective credit unions. 81 Fed. Reg. at 88,416. “[A]

sufficiently large population base is essential to enable” them “to offer financial services economically.” *Id.* at 88,417. The NCUA also chose the 1-million figure based on prior experience. The agency noted that it had approved of eight districts with populations of more than 250,000, and that one of them already had exceeded 1 million. *See id.* “Having set a 1 million precedent in one state,” the agency felt justified in having a “*fixed* 1 million population cap for the other 49 states.” *Id.* (emphasis added). We cannot say this policy choice lacks rational explanation.

The Association says the NCUA failed to consider prior agency decisions. *See Am. Bankers Ass’n Br.* 61. But we see no discrepancy and thus summarily reject the objection. The Association also turns to troubling hypothetical examples of rural districts with unruly shapes and those with dense urban areas such as Denver, Colorado. *See NCUA Br.* 55-61; Oral Arg. Recording 37:55-38:05. Again, such implausible outliers do not impugn the rule’s general reasonableness.

VI.

We now consider the remedy. To sum up, we hold that defining certain Combined Statistical Areas or portions of them as local communities and raising the population cap for rural districts are consistent with the Act and reasonably explained. Thus, we sustain both aspects of the challenged rule. We also leave undisturbed the portion of the District Court’s opinion that the parties do not contest on appeal.

But we deem the eliminated core requirement to be arbitrary and capricious. When a rule is contrary to law, the “ordinary practice is to vacate” it. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019); *see also* 5 U.S.C. § 706(2) (noting that the “reviewing court

shall . . . set aside” unlawful agency action). But in “rare cases,” we will opt instead to remand without vacating the rule, so that the agency can “correct its errors.” *United Steel*, 925 F.3d at 1287; *see also* 5 U.S.C. § 702 (“Nothing herein . . . affects . . . the power or duty of the court to . . . deny relief on any . . . appropriate . . . equitable ground ”); *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm’n*, 896 F.3d 520, 536 (D.C. Cir. 2018). In considering whether to adopt the latter equitable remedy, we balance “(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur.” *United Steel*, 925 F.3d at 1287 (citation omitted). A strong showing of one factor may obviate the need to find a similar showing of the other. *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (holding that, because the agency likely could justify its action on remand, the potential for disruption was “only barely relevant”); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (determining that, because vacatur would give regulated parties a “peculiar windfall,” the meager chance of justifying the action was given “little weight” in the remedial analysis).

The NCUA has not requested remand without vacatur in this case. But because we have a “duty” to ensure the propriety of the APA remedy, 5 U.S.C. § 702, we hold that we have the discretion to raise the issue *sua sponte*, *cf. Igonia v. Califano*, 568 F.2d 1383, 1387 (D.C. Cir. 1977); *Gaddis v. Dixie Realty Co.*, 420 F.2d 245, 247 (D.C. Cir. 1969) (*per curiam*). Remand without vacatur is appropriate here.

We conclude that the NCUA might be able to offer a satisfactory reason on remand. And as for disruptive effect, we perceive a substantial likelihood that vacating the rule could make it more difficult for some poor and minority suburban

residents to receive adequate financial services. Even temporarily depriving these members of the opportunity is inequitable, because it would “set back” the Act’s objective of offering financial services to people of small means. *See Nat’l Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007); *see also Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1152 (D.C. Cir. 2005) (declining to vacate rule because, in the interim, it “may do some good, if it does anything at all”).

Given the potential for sufficient justification and the substantial likelihood of disruptive effect, we have a rare case in which vacatur is inappropriate. *See United Steel*, 925 F.3d at 1287. Thus, we remand without vacating the relevant part of the 2016 rule. We trust that the agency will act expeditiously. *See EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015).

* * *

In short, we reverse the challenged portions of the District Court’s summary judgment order. With respect to the qualification of certain Combined Statistical Areas as local communities and the increased population cap for rural districts, we direct the District Court to issue summary judgment in favor of the NCUA. As to the elimination of the urban-core requirement for local communities based on Core Based Statistical Areas, we direct the District Court to issue summary judgment in favor of the Association and to remand, without vacating, the relevant portion of the 2016 rule for further explanation.

So ordered.

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 18-5154, 18-5181

AMERICAN BANKERS ASSOCIATION,

Plaintiff-Appellee-Cross-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the District of Columbia

**CORRECTED PRINCIPAL AND RESPONSE BRIEF
FOR APPELLEE-CROSS-APPELLANT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties in consolidated cases No. 18–5154 and 18–5181 are Plaintiff-Appellee-Cross-Appellant American Bankers Association and Defendant-Appellant-Cross-Appellee National Credit Union Administration.

The following amici have appeared in this Court: Credit Union National Association, CUNA Mutual Holding Company, and National Association of Federally-Insured Credit Unions. These amici also appeared before the district court. In addition, the following amici appeared before the district court: Independent Community Bankers of America; Arkansas Community Bankers; Independent Bankers of Colorado; Community Bankers Association of Georgia; Community Bankers Association of Illinois; Community Bankers of Iowa; Community Bankers Association of Kansas; Community Bankers of Michigan; Independent Community Bankers of Minnesota; Missouri Independent Bankers Association; Montana Independent Bankers Association; Nebraska Independent Community Bankers; Independent Community Banks of North Dakota; Independent Community Bankers Association of New Mexico; Independent Bankers Association of New York State; Community Bankers Association of Ohio; Community Bankers

Association of Oklahoma; Pennsylvania Association of Community Bankers; Independent Banks of South Carolina; Independent Community Bankers of South Dakota; Independent Bankers Association of Texas; Virginia Association of Community Bankers; Community Bankers of Washington; Community Bankers of West Virginia; Alabama Bankers Association; Alaska Bankers Association; Arizona Bankers Association; Arkansas Bankers Association; California Bankers Association; Colorado Bankers Association; Connecticut Bankers Association; Delaware Bankers Association; Florida Bankers Association; Georgia Bankers Association; Hawaii Bankers Association; Idaho Bankers Association; Illinois Bankers Association; Illinois League of Financial Institutions; Indiana Bankers Association; Iowa Bankers Association; Kansas Bankers Association; Kentucky Bankers Association; Louisiana Bankers Association; Maine Bankers Association; Maryland Bankers Association; Massachusetts Bankers Association; Michigan Bankers Association; Minnesota Bankers Association; Mississippi Bankers Association; Missouri Bankers Association; Montana Bankers Association; Nebraska Bankers Association; Nevada Bankers Association; New Hampshire Bankers Association; New Jersey Bankers Association; New Mexico Bankers Association; New York Bankers Association; North Carolina Bankers Association; North Dakota Bankers Association; Ohio Bankers League; Oklahoma Bankers Association; Oregon Bankers Association; Pennsylvania Bankers Association;

Rhode Island Bankers Association; South Carolina Bankers Association; South Dakota Bankers Association; Tennessee Bankers Association; Texas Bankers Association; Utah Bankers Association; Vermont Bankers Association; Virginia Bankers Association; Washington Bankers Association; West Virginia Bankers Association; Wisconsin Bankers Association; and Wyoming Bankers Association.

B. Rulings Under Review

The ruling under review is the March 29, 2018 Memorandum Opinion and Order issued by District Court Judge Dabney L. Friedrich. *See Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 306 F. Supp. 3d 44 (D.D.C. 2018). The district court granted in part and denied in part the American Bankers Association's motion for summary judgment, and granted in part and denied in part National Credit Union Administration's cross-motion for summary judgment.

C. Related Cases

The case on review has not previously been before this, or any other, Court. Counsel is not aware of any related cases currently pending in this, or any other, Court.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the American Bankers Association states that it is a trade association with no parent company. No publicly-held company has a 10% or greater ownership interest in ABA.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

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GLOSSARY

ABA	American Bankers Association
GAO	Government Accountability Office
NCUA	National Credit Union Administration
OMB	Office of Management and Budget

INTRODUCTION

By statute, community credit unions “shall be limited” to serving a single “well-defined local community, neighborhood, or rural district.” 12 U.S.C.

§ 1759(b)(3). Congress imposed this limitation based on its finding that “a meaningful affinity and bond among [credit union] members, manifested by a commonality of routine interaction, shared and related work experiences, interests or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity is essential to the fulfillment of the public mission of credit unions.” Pub. L. 105–219, § 2, 112 Stat. 913 (1998) (codified at 12 U.S.C. § 1751 note). In 1998, Congress emphasized its intent to limit the area served by a community-based credit union by adding the word “local” before “community.” *Id.* § 101(2) (codified at 12 U.S.C. § 1759(b)(3)).

The National Credit Union Administration (“NCUA”), the agency that regulates federal credit unions, recognized that this statutory language requires it to take a “more circumspect and restricted approach to chartering community credit unions.” 63 Fed. Reg. 71,998, 72,012 (Dec. 30, 1998). Over time, however, NCUA has repeatedly expanded its definition of “local community, neighborhood, or rural district.”

In the Final Rule at issue here, NCUA determined that any “Combined Statistical Area,” or portion of such an area, is a single “local community,” so long

as the population served by the credit union does not exceed 2.5 million. As the district court explained in vacating this aspect of the Rule, “Combined Statistical Areas” are multi-city regions that are not reasonably defined as single local communities. In addition, NCUA defined a single “rural district” to include entire states and multi-state regions. Such vast regions, which may encompass multiple large cities and predominantly urban populations, cannot reasonably be viewed as “rural districts.” Finally, NCUA determined that a credit union that serves a community defined as an urban “core” and its surrounding suburbs may serve only the affluent suburbs and refuse to serve lower-income residents in the urban core. This determination, which effectively authorizes credit unions to engage in “redlining,” is both inconsistent with the statute and arbitrary and capricious.

NCUA argues that it has essentially limitless discretion to define the statutory terms, and that because it has already broadened its definition of the statutory terms several times, it may take further steps in that direction. But NCUA’s discretion does not extend to adopting unreasonable definitions of statutory terms. It has done so here, and therefore these aspects of the Final Rule must be vacated.

JURISDICTIONAL STATEMENT

NCUA’s Final Rule was published in the *Federal Register* on December 7, 2016. JA129. That same day, ABA filed a complaint in the district court. JA18. The district court had jurisdiction under 28 U.S.C. § 1331. The district court issued

a final order disposing of all parties' claims on March 29, 2018. JA313–14. NCUA filed a timely appeal on May 23, 2018. JA354. ABA filed a timely cross-appeal on June 5, 2018 JA356. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Pertinent statutes and regulations omitted from NCUA's brief are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether NCUA unreasonably defined a single "local community" to include any "Combined Statistical Area," and any part of such an area, with a population of up to 2.5 million people.

2. Whether NCUA unreasonably defined a single "rural district" to include entire states and multi-state regions encompassing large cities and a predominantly urban population.

3. Whether NCUA unreasonably defined any part of a "Core-Based Statistical Area" that excludes the area's urban core as a single "local community," and whether it was arbitrary and capricious for NCUA to permit credit unions to deny service to urban areas of the community with a high concentration of lower-income and minority residents.

STATEMENT OF THE CASE

A. Origin and Purpose of Credit Unions

Federal credit unions are mutually-owned financial institutions chartered and regulated by the NCUA pursuant to the Federal Credit Union Act, Pub. L. 73–467, 48 Stat. 1216, 12 U.S.C. § 1751 *et seq.* Credit unions enjoy a sweeping exemption from virtually all federal, state, and local taxes (except property taxes). *See* 12 U.S.C. § 1768.¹ In return for this tax exemption and other advantages, credit unions are charged with a special mission to “make more available to people of small means credit for provident purposes.” Pub. L. 73–467, 48 Stat. 1216 pmb.; *see also* Pub. L. No. 105–219, § 2, 112 Stat. 913 (1998) (credit unions are tax-exempt “because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means”).

A federal credit union may not serve “just anyone from the general public.” U.S. Dep’t of the Treasury, *Comparing Credit Unions with Other Depository Institutions* (Jan. 2001) at 20. Instead, a credit union’s members must share a “common bond” that distinguishes them from the general public. *Id.* The requirement that credit unions have “a meaningful affinity and bond among

¹ This tax exemption costs the federal government approximately \$2.9 billion a year, an amount that is projected to reach \$3.2 billion in 2020. *See* Joint Comm. on Taxation, Joint Comm. of Fed. Tax Expenditures for Fiscal Years 2016–2020, (Jan. 30, 2017), https://www.jct.gov/publications.html?func=download&id=4971&chk=4971&no_html=1.

members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity is essential to the fulfillment of the public mission of credit unions.” 12 U.S.C. § 1751 note.

A meaningful affinity among members is “the cement that unite[s] credit union members in a cooperative venture.” *First Nat’l Bank & Trust Co. v. NCUA*, 988 F.2d 1272, 1276 (D.C. Cir. 1993). When Congress enacted the Federal Credit Union Act, it “assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.” *First Nat’l Bank & Trust Co. v. NCUA*, 90 F.3d 525 (D.C. Cir. 1996) (quoting 988 F.2d at 1276). By discouraging default and reducing the costs of originating small consumer loans, the Act’s common bond requirement made it economically feasible for credit unions to provide loan services to individuals who would not otherwise have had access to financial markets. *See* 78 Cong. Rec. 7259, 12,223–25 (1934). “That is surely why it was thought that credit unions, unlike banks, could loan ‘on character.’” 988 F.2d at 1276 (quoting 78 Cong. Rec. at 12,223).²

² *See also* GAO, *Community Reinvestment Act, Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework*, GAO-18-224, at 101 (“[I]f a short-term, small amount loan borrower has no prior relationship with the credit union, there is a greater risk that the borrower may walk off with unsecured cash and never return.”).

To ensure that credit union members are united in a common venture, Congress created three types of federal credit unions: single common-bond credit unions, multiple common-bond credit unions, and community credit unions. 12 U.S.C. § 1759(b). A single common-bond credit union is limited to members that share a single “common bond of occupation or association.” *Id.* § 1759(b)(1). A multiple common-bond credit union is composed of “[m]ore than one group” that “has (within the group) a common bond of occupation or association,” but each additional group is limited to 3,000 members, subject to narrow exceptions. *Id.* §§ 1759(b)(2), 1759(d). This case concerns the third type of credit union, a “community credit union.” By statute, membership in a community credit union “shall be limited to . . . [p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” *Id.* § 1759(b)(3).

B. The Courts Reject NCUA’s Efforts to Expand Credit Unions, and Congress Responds

For decades, the Federal Credit Union Act limited membership in federal credit unions “to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.” *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 484 (1998) (emphasis omitted). In 1982, however, “NCUA reversed its longstanding policy in order to permit credit unions to be composed of multiple unrelated employer groups.” *Id.* This Court held that NCUA’s interpretation was contrary to the statutory limitations on credit unions,

and the Supreme Court affirmed. *First Nat'l Bank & Tr. Co. v. NCUA*, 90 F.3d 525 (D.C. Cir. 1996), *aff'd*, 522 U.S. at 500–03. Both this Court and the Supreme Court held that the statute required all members of an occupational credit union to share a single common bond. 522 U.S. at 503; 90 F.3d at 531.

Following the Supreme Court's decision, Congress enacted the Credit Union Membership Access Act. Congress accorded limited recognition to multiple common-bond credit unions, but strictly limited additional groups to no more than 3,000 members, subject to narrow exceptions. Pub. L. No. 105–219, 112 Stat. 913 (1998) (codified at 12 U.S.C. § 1759(b)(2)). Congress also added the word “local” before “community,” specifying that membership in a community credit union is limited to “[p]ersons or organizations within a well-defined *local* community, neighborhood, or rural district.” *Id.* (emphasis added) (codified at 12 U.S.C. § 1759(b)(3)).

C. NCUA's Persistent Loosening of Statutory Limits on Community Credit Unions

NCUA initially recognized that the 1998 legislation imposes significant limitations on credit unions, but it soon began to loosen those limitations. NCUA's progressive relaxation of the statutory limitations has fostered rapid consolidation in the credit union industry. From 2012 to 2017, the number of credit unions with \$500

million or more in assets increased by more than 30%, and the total number of federal credit unions decreased by 18%, from 4,272 to 3,499.³

1. 1998 Regulations

NCUA initially acknowledged that Congress's decision to replace the term "community" with "local community" "was intended as a limiting factor" and imposed a "more circumspect and restricted approach to chartering community credit unions." 63 Fed. Reg. at 72,012. NCUA stated that, pursuant to the statute, its "policy is to limit the community to a single, geographically well-defined area where individuals have common interests or interact." *Id.* at 72,037. NCUA identified several factors that are relevant to determining whether an area is a well-defined local community: the presence of a single major trade area, shared governmental or civic facilities, an area newspaper, the population and geographic size of the proposed community, and the specific geographic boundaries used to define the community. *Id.* NCUA gave examples of acceptable and unacceptable fields of membership. *Id.* at 72,038. Acceptable fields of membership included persons who "live, work, worship, or attend school in, and businesses located in the area of Johnson City, Tennessee, bounded by Fern Street on the north, Long Street on the east, Fourth Street on the south, and Elm Avenue on the west," "live, worship,

³ Compare NCUA, *Overall Trends Report* (Dec. 31, 2017), <https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2017-q4.pdf>; with NCUA, *Overall Trends Report* (Dec. 31, 2012), <https://www.ncua.gov/Legal/Documents/Reports/FT20121231.pdf>

or work in and businesses and other legal entities located in Independent School District No. 1, DuPage County, Illinois,” and “live or work in Green County, Maine.” *Id.* at 72,038–39. Unacceptable fields included persons “who live or work in the Greater Boston Metropolitan Area” or “the State of California.” *Id.* at 72,039.

2. 2003 Regulations

NCUA began to expand its definition of “local community” in 2003. Under its 2003 rules, the local community requirement was met if “[t]he area to be served is in a recognized single political jurisdiction, i.e., a city, county, or their political equivalent, or any contiguous portion thereof.” 68 Fed. Reg. 18,334, 18,357 (Apr. 15, 2003). In addition, the requirement might be met (1) if “the area to be served is in multiple contiguous political jurisdictions” as long as the area’s population does not exceed 500,000, or (2) by a Metropolitan Statistical Area or equivalent area with a population of up to one million people.⁴ *Id.* For the latter two categories, credit unions were required to make a written submission “describing how the area meets the standards for community interaction and/or common interests.” *Id.*

⁴ A Metropolitan Statistical Area is a geographic area defined by the Office of Management and Budget (“OMB”) that contains an urban area of at least 50,000 people, plus adjacent counties with “a high degree of social and economic integration with the core as measured through commuting ties.” U.S. Census, *Metropolitan and Micropolitan Glossary*, <https://www.census.gov/programs-surveys/metro-micro/about/glossary.html>.

3. Federal Courts Reject NCUA's Expansive Definition of Local Community

In March 2003, NCUA granted a request from a community credit union in Utah to expand its charter from one county to six counties. *See ABA v. NCUA*, 347 F. Supp. 2d 1061, 1069 (D. Utah 2004). The expansion would have included 1.4 million residents—almost two-thirds of the state's population—and encompassed an area extending to Utah's borders with Nevada and Wyoming. *Id.* In defense of its decision, NCUA contended that “there is no requirement that there be commonality and shared interest among all six counties.” *Id.* at 1072.

The federal district court disagreed. *Id.* at 1073. Noting that “[a]nyone familiar with the six-county area has an intuitive notion that the expanded community charter covers a large geographic area and population base,” the court held that the “type of reasoning” NCUA adopted “directly contradicts the insertion of the term ‘local’ in the regulations.” *Id.* at 1070, 1072. The court criticized NCUA for failing “to recognize and critically assess the size of the community it was analyzing as ‘local.’” *Id.* at 1069–70. The court emphasized that NCUA “must have some gatekeeping responsibility to ensure that the ‘local’ requirement is satisfied,” and “cannot act as a rubber stamp or cheerleader” for the credit union industry. *Id.* at 1070.

A second federal court reached a similar conclusion after NCUA determined that a six-county area in Pennsylvania is a single “well-defined local community.”

ABA v. NCUA, No. 1:05-CV-2247, 2008 WL 2857678, at *10 (M.D. Pa. July 21, 2008). The court noted that, “[t]o a casual observer familiar with central Pennsylvania, it would likely be a remarkable finding that . . . a geographical area of more than 3,000 square miles with a population of over 1.1 million people and encompassing Harrisburg, Hershey, Carlisle, York, Lebanon, Gettysburg, and Shippensburg—constituted a ‘well-defined local community.’” *Id.* The court commented that NCUA’s “lopsided decision reflects a certain deafness to the unfavorable evidence in the record.” *Id.* at *14.

4. 2010 and 2013 Regulations

Despite these judicial decisions, NCUA further expanded its definitions of “local community” and “rural district” in 2010 and 2013. NCUA abandoned the requirement of a narrative description and instead defined a local community as (1) any Single Political Jurisdiction or any contiguous portion thereof, or (2) any Core-Based Statistical Area or Metropolitan Division with a population not exceeding 2.5 million people, or any portion thereof. 75 Fed. Reg. 36,257, 36,264 (June 25, 2010).

A Core-Based Statistical Area is an OMB-defined geographic area that includes an urban core of at least 10,000 people, plus adjacent counties with “a high degree of social and economic integration with the core as measured through

commuting ties.”⁵ An outlying county is included in a Core-Based Statistical Area if at least 25% of workers in the county commute to or from the core. 75 Fed. Reg. at 37,250. NCUA justified its decision to define Core-Based Statistical Areas as local communities on the ground that the area’s “central core often acts as a nucleus drawing a sufficiently large critical mass of area residents into the core area for employment and other social activities such as entertainment, shopping, and educational pursuits.” *Id.* at 36,258.

The 2010 rule also defined “rural district” as an area with (1) well-defined, contiguous geographic boundaries, (2) either a population that mostly lives in areas designated as rural or a population density of no more than 100 persons per square mile, and (3) a population of no more than 200,000. *Id.* at 36,264. In 2013, NCUA increased the population limit for rural districts to the greater of 250,000 people or 3% of the state in which most of the district is located. 78 Fed. Reg. 13,460, 13,463 (Feb. 28, 2013).

D. NCUA’s Rule

In the Final Rule at issue in this case, NCUA further loosened the statutory restrictions on community credit unions. JA164–170, 192–93.

⁵ See U.S. Census, *Metropolitan and Micropolitan Glossary*, *supra* note 4. Core-Based Statistical Areas include both Metropolitan Statistical Areas and Micropolitan Statistical Areas. *Id.* A Metropolitan Statistical Area must have a core urban area population of over 50,000, while a Micropolitan Statistical Area must have a core urban area population of 10,000 to 50,000 individuals. *Id.*

First, the Rule provides that any “Combined Statistical Area,” or portion of such an area, automatically qualifies as a single local community, so long as the area served by the credit union does not include more than 2.5 million people. JA192. A Combined Statistical Area is an OMB-defined “larger region” that combines two or more adjacent Core-Based Statistical Areas.⁶ Because of the way Combined Statistical Areas are defined, there is no requirement that residents interact with each other across the entire area or share ties with a common “core” area.

Second, the Rule expands the definition of “rural district” by quadrupling the population limit, from 250,000 to 1,000,000, and eliminating the alternative population limit of 3% of the state in which the rural district is located. JA192. Under the new rule, any area with a population of up to 1 million people qualifies as a single rural district if (1) at least half of the population resides in rural areas, or (2) the area’s population density does not exceed 100 persons per square mile. JA168. Under this definition, five entire states (Alaska, North Dakota, South Dakota, Vermont, and Wyoming) are defined as single rural districts. The Rule also permits rural districts to cross multiple state lines and serve predominantly urban populations living in large cities.

Third, NCUA eliminated the requirement that community credit unions serving a community defined by a Core-Based Statistical Area need not serve

⁶U.S. Census, *Metropolitan and Micropolitan Glossary*, *supra* note 4; JA129–30.

residents of the urban “core” of the community, which serves as the “focal point for common interests and interaction among residents.” JA130. NCUA determined that any portion of a Core-Based Statistical Area with up to 2.5 million people constitutes “a well-defined local community.” JA130.

At the same time that it issued the Final Rule, NCUA proposed to increase the population limit for “local communities” to 10 million people. 81 Fed. Reg. 78,748, 78,751 (Nov. 9, 2016). NCUA also stated that it “finds considerable merit in commenters’ suggestions to eliminate the population cap” altogether. JA 165, 168.

E. This Litigation

ABA challenged the Final Rule in district court. The parties filed cross-motions for summary judgment; the district court granted each side’s motion in part.

First, the court held that a single “local community” is not reasonably defined to include any Combined Statistical Area, or portion thereof, with a population of up to 2.5 million people. JA338. The court reviewed dictionaries and other sources from around 1998, when Congress added the term “local” before “community.” *See* JA330–32. The court determined that the defining characteristic of a “community” is a common bond, and that a “local community” is geographically limited, “generally encompassing an area no larger than a county.” JA331–32. The court concluded that the surrounding statutory terms “neighborhood” and “rural district,”

as well as Congress's decision to add "local" to the statute, confirm the meaning of "local community." JA332–34.

The court determined that NCUA exceeded its statutory authority by deeming any 2.5 million-person portion of a Combined Statistical Area to be a part of a single local community. The court explained that, while each Core-Based Statistical Area within a Combined Statistical Area must have a specified level of employment interchange with one adjacent Core-Based Statistical Area, it need not have any interchange at all with any other parts of the Combined Statistical Area. JA335–36. Consequently, a Combined Statistical Area "might be composed of a series of daisy-chained Core-Based Statistical Areas that are linked to their neighbors but have nothing to do with those at the other end of the chain." JA335–36. As an example, the court observed that a narrow rectangle of land extending from Doylestown, Pennsylvania to Partlow, Virginia automatically qualifies as a "well-defined local community" under the Final Rule even though residents "live about 200 miles from each other" and "might not share any commonality whatsoever." JA336–37.

Second, the court concluded that NCUA's definition of "rural district" is unreasonable. JA352. The court noted that the parties do not dispute that "in 1934 the word *rural* meant what it means now—the pastoral countryside, as opposed to an urban area." JA347. Analyzing sources from the 1930s, the court determined that Congress intended "rural district" to refer to geographically small rural areas.

JA348–52. The court identified dozens of uses of “rural district” from judicial opinions and other sources, and determined that not one “appears to envision a rural district approaching the size of a state.” JA350. Contrary to the term’s meaning, the court observed, the Rule defines “areas significantly larger than most states as belonging to a single *rural district*.” JA351. The court also disagreed with NCUA that “a district can be considered rural if most of the district’s residents live in urban areas.” JA348. The court noted that the Rule leaves NCUA “no escape hatch for fielding *rural district* applications,” as it “automatically characterizes the area” meeting the Rule’s requirement “as a rural district—no matter its geographic size or the number or size of metropolitan areas falling within its proposed boundaries.” JA352.

Third, the court held upheld NCUA’s rules concerning Core-Based Statistical Areas, although it described them as “troubling,” “jarring,” and a “barely reasonable interpretation” of the statute. JA340–43. The court noted that “because of the population-limit increase, the Rule automatically qualifies portions of ten of the largest Core-Based Statistical Areas as belonging to a single *local community*.” JA340. As an example, the court observed that “the Rule describes residents of [Reliance, Virginia] and residents of [Lusby, Maryland] as part of a single local community even though they live about 140 miles from each other—a drive of more than two hours.” JA341. Despite the court’s concerns, it determined that outlying

areas of a Core-Based Statistical Area can “contain at least some traces of the social, economic, and geographic commonalities of a local community.” JA342.⁷

NCUA appealed; ABA filed a cross-appeal.

SUMMARY OF ARGUMENT

1. Community credit unions “shall be limited to” serving “[p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3). This limitation is intended to ensure “a meaningful affinity and bond among [credit union] members,” which Congress found “is essential to the fulfillment of the public mission of credit unions.” 12

U.S.C. § 1751 note. Congress emphasized its intent to limit the areas served by community credit unions by adding the word “local” before “community” in 1998. Even before that amendment, this Court recognized that the common bond requirement is designed to “ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.”

First Nat’l Bank & Trust Co., 988 F.2d at 1276. NCUA’s definitions of “local

⁷ The district court also upheld NCUA’s decision to allow credit unions serving a community defined by a single political jurisdiction, Combined Statistical Area, or Core-Based Statistical Area to serve an “adjacent area” based on evidence of common interests or interaction among residents on both sides. JA345–47. That holding is not at issue on appeal.

community” and “rural district” are unreasonable in light of the statutory language, context, and purpose.

2. NCUA’s regulations deem any “Combined Statistical Area,” or portion of such an area, to be a single local community, so long as the area served by the credit union has a population of no more than 2.5 million. By definition, Combined Statistical Areas are large regions that include multiple “Core-Based Statistical Areas.” A Core-Based Statistical Area is included in a Combined Statistical Area if it has a relatively low level of commuting interaction with an adjacent Core-Based Statistical Area. The “daisy chain” nature of Combined Statistical Areas (A is connected to B, B is connected to C, and so on) requires no interaction among residents across the entire area. For example, the Combined Statistical Area that includes Washington, DC and Baltimore encompasses 40 counties and independent cities spread across Maryland, Virginia, West Virginia, and Pennsylvania. Some of the Core-Based Statistical Areas included in this Combined Statistical Area have absolutely no commuting interaction with each other.

The Final Rule nevertheless defines *any* area within *any* Combined Statistical Area, with up to 2.5 million inhabitants, as a single local community—even areas that include widely separated cities connected by a thin strip of territory. NCUA did not explain how this rule is consistent with prior judicial decisions rejecting the agency’s determinations that the same—or smaller—areas are single local

communities, or with NCUA's own statements concerning the nature of a local community.

3. The agency's definition of "rural district" unreasonably defines entire states and multi-state regions that include large cities as "rural districts." The phrase "rural district" appears hundreds of times in statutes, judicial decisions, and other sources, and consistently refers to a non-urban area that does not approach the size of an entire state. By allowing rural districts to include up to a million people so long as the average population does not exceed 100 persons per square mile, NCUA has defined "rural districts" in a way that incorporates major urban areas. As with its definition of "local community," NCUA's definition of "rural district" is inconsistent with its prior statements concerning the limited meaning of that statutory term.

4. The Final Rule unreasonably permits a credit union serving a local community defined as an urban "core" and its suburbs to refuse to serve residents living in the community's urban core. A Core-Based Statistical Area is defined by commuting ties between an urban core and its outlying suburbs. Once the urban core is eliminated, there is no assurance that those served by a community credit union interact with each other. Indeed, outlying parts of a Core-Based Statistical Areas may include isolated communities separated by large distances and difficult terrain that do not even have commuting ties to the (excluded) urban core. NCUA's

rule is also arbitrary and capricious because it authorizes credit unions, which have a special mission of providing credit to people of modest means, to effectively engage in “redlining” by refusing to serve urban areas of the community with the highest concentrations of lower-income and minority individuals.

STANDING

The ABA filed comments on NCUA’s proposed rule. JA61–64. ABA’s members have standing because the Final Rule permits credit unions to expand their tax-exempt operations at the expense of other financial institutions. *See* JA96–124 (ABA member standing declarations). As a result, ABA’s members will suffer a competitive injury that flows directly from the Final Rule, and would be redressed by a favorable court ruling. ABA’s members have prudential standing because their “interest in limiting the markets that federal credit unions can serve is arguably within the zone of interests” protected by the Federal Credit Union Act. *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. at 488. ABA has associational standing because its members would have standing to sue in their own right, the interests the agency seeks to protect are germane to the ABA’s purposes, and the claims asserted and relief requested do not require the participation of ABA’s members as parties. *See Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333 (1977); JA96–124 (ABA standing declaration).

ARGUMENT

I. NCUA's Definition Of "A Well-Defined Local Community, Neighborhood, or Rural District" Must Be Reasonable.

Congress has determined that community credit unions "shall be limited to" serving "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3).⁸ Congress authorized NCUA to define these statutory terms by regulation, *see id.* § 1759(g)(1), but the agency is "hardly free to write its own law." *Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 968 (D.C. Cir. 1985). The Court "must reject administrative agency actions which exceed the agency's statutory mandate or frustrate congressional intent." *Id.*

NCUA argues that terms such as "local community" lack a single "plainly unambiguous meaning," NCUA Br. 28, and on that basis asserts virtually unlimited authority to interpret these statutory terms. But when Congress leaves a gap for the agency to fill, the agency may not exceed the "bounds of reasonable interpretation." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Terms such as "local community" and "rural district" are ambiguous in the sense that they have a *range* of reasonable meanings, but that does not allow the agency to assign a meaning that falls outside

⁸ NCUA repeatedly states that Congress has "authorized" credit unions to serve anyone within a well-defined local community, neighborhood, or rural district. NCUA Br. 2, 14, 16. The statutory language ("shall be limited") makes clear that this is a *limitation* on federal credit unions.

the reasonable range. “[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); *United States Postal Serv. v. Postal Regulatory Comm’n*, 886 F.3d 1253, 1255 (D.C. Cir. 2018) (same). To determine whether the agency’s interpretation is reasonable, the statutory language “should be read in context, the statute’s place in the overall statutory scheme should be considered, and the problem Congress sought to solve should be taken into account.” *Goldstein v. Sec. & Exch. Comm’n*, 451 F.3d 873, 878 (D.C. Cir. 2006) (internal quotations omitted).

For example, the term “yellow” is ambiguous in the sense that it can apply to various shades of yellow, but that does not mean an agency is free to interpret “yellow” to mean “purple.” See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment); *Global Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring) (When Congress uses an undefined term that could refer to (a) or (b) but not (c), agency may not “pursue a (c), (d), or (f) interpretation”); *Ass’n of Private Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 189–90 (D.D.C. 2015) (distinguishing between “transforming yellow into purple” and adding “clarity to an ambiguous statutory command” by determining “how yellow is yellow enough”). When an interpretation “goes beyond the meaning that the statute can

bear,” it receives no deference. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).⁹

These interpretive principles govern this case. NCUA has discretion to define Takoma Park, Maryland as a “local community.” It arguably has authority to define the entire District of Columbia as one local community. But the fact that “local community” has a range of reasonable meanings does not permit NCUA to adopt an *unreasonable* definition. Doing so amounts to defining “yellow” to mean “purple.” Whether the agency’s adopts an interpretation all at once or in gradual steps, it may not exceed the “degree of discretion an ambiguity allows.” *Postal Regulatory Comm’n*, 886 F.3d at 1255.

The cases NCUA cites do not support a different result. *See* NCUA Br. 27–28. Those cases recognize that, when Congress expressly delegates authority to an agency to define a statutory term, the legislature has not spoken directly to the “precise question at issue” (the meaning of the undefined term) for purposes of step one of an analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See Lindeen v. Sec. & Exch. Comm’n*, 825 F.3d 646, 653–54 (D.C. Cir. 2016); *Women Involved in Farm Econ. v. U.S. Dep’t of*

⁹ The *Chevron* doctrine can be understood as calling for a single inquiry into the reasonableness of the agency’s statutory interpretation. *See* Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 601 (2009) (under *Chevron*, a court will uphold an agency interpretation if it is within the statute’s “zone of ambiguity”).

Agric., 876 F.2d 994, 998–99 (D.C. Cir. 1989); *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 208 (2015). But that does not end the court’s inquiry, or allow the agency to adopt any definition it chooses. Instead, under step two of the *Chevron* analysis, the court considers whether the agency’s interpretation is a “permissible construction of the statute” in light of congressional intent and statutory context. *See Lindeen*, 825 F.3d 656–57; *Women Involved*, 876 F.2d at 1001; *Pharm. Research*, 790 F.3d at 208. In *Women Involved*, for example, the Court concluded (and all parties agreed) that “the word ‘person’ as used in the statute was never intended to have its ordinary meaning.” 876 F.2d at 995–1000. Even then, the Court assessed congressional intent and the statutory context and determined that the agency’s interpretation was reasonable. *See id.* In the other cases NCUA cites, the Court similarly tested the agency’s definitions in light of congressional intent and statutory context and found the definitions “obviously consistent with the purpose of the Act,” “perfectly reasonable.” *Pharm. Research*, 790 F.3d at 200; *accord Lindeen*, 825 F.3d at 656–57.

Here, statutory context and congressional intent limit the range of reasonable interpretations of “local community” and “rural district.” Congress limited a credit union’s field of membership in order to create a “meaningful affinity and bond among [credit union] members, manifested by a commonality of routine interaction . . . or the maintenance of an otherwise well-understood sense of cohesion or

identity,” because it found the such a “meaningful affinity and bond” is “essential to the fulfillment of the public mission of credit unions.” 12 U.S.C. § 1751 note. Even before Congress added the word “local” to the statute—an amendment NCUA acknowledges “was intended as a limiting factor” that requires the agency to take “a more circumspect and restricted approach to chartering community credit unions,” 63 Fed. Reg. at 72,012—this Court twice noted that “Congress assumed implicitly that a common bond would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.” *First Nat’l Bank & Trust Co.*, 988 F.2d at 1276; *First Nat’l Bank & Trust Co.*, 90 F.3d at 515 (same). And in 1998, Congress not only added “local” before “community,” but also placed a presumptive cap of 3,000 members on separate groups joining “multiple common-bond” credit unions, and explained that this limitation implements Congress’s “local preference” which it adopted because it “strongly believes that credit union members who live, work and interact in the same geographic area are likely to have more of a meaningful affinity and common bond than those who do not.” H.R. Rep. No. 105–472, at 20 (1998). Remarkably, NCUA’s brief all but ignores statutory context and congressional intent, which strongly confirm that NCUA is not authorized to adopt bloated “non-intuitive” definitions of “local community” and “rural district.”

II. A Combined Statistical Area Is Not A Single Well-Defined Local Community.

The district court correctly concluded that a Combined Statistical Area is not one “well-defined local community.” JA334–38.

A. NCUA’s Definition Of “Local Community” Must Be Reasonable.

NCUA asserts that “a well-defined local community” has no “plainly defined, ordinary meaning,” and on that basis claims virtually unlimited discretion to define the term as it chooses. NCUA Br. 16–17. But “local community” is an everyday term with an ordinary meaning, even if that meaning blurs somewhat at the edges. NCUA has discretion to choose among the reasonable interpretations of “local community,” but it may not adopt an unreasonable meaning.

As an initial matter, NCUA agrees that the statute requires community-based credit unions to serve only one local community. *See* 63 Fed. Reg. at 72,037 (“Community charters must be based on *a single*, geographically well-defined area.”). As the Supreme Court has explained, “[t]he reason that the NCUA has never interpreted, and does not contend that it *could* interpret, the geographical limitation to allow a credit union to be composed of members from an unlimited number of unrelated geographic units, is that to do so would render the geographical limitation meaningless.” *First Nat’l Bank & Trust Co.*, 522 U.S. at 502.

Next, NCUA has recognized that Congress’s addition of the word “local” before “community” in 1998 “was intended as a limiting factor” that imposes a

“more circumspect and restricted approach to chartering community credit unions.” 63 Fed. Reg. at 72,012; *see also* JA303; *ABA v. NCUA*, 271 F.3d 262, 273 (D.C. Cir. 2001). As the district court noted, a “local community” is more limited in size and scope than a “community.” JA330–331 (citing Merriam Webster’s Collegiate Dictionary (10th ed. 1997) (defining “local” as “of, relating to, or characteristic of a particular place: not general or widespread”); Webster’s Third New International Dictionary (3d ed. 1993) (“primarily serving the needs of a particular limited district, often a community or minor political subdivision” and “limited in operation to only part of the territory subject to the legislative power (as a town, district, county)”); *see also* JA331–32 (citing statutory definitions of “local community” as a similarly small area, typically no larger than a county).

Consistent with these definitions, usages of “local community” around the time the word “local” was added to the statute in 1998 consistently referred to small, unified areas. For example, Westlaw includes 126 references to “local community” in federal and state judicial opinions from 1998, none of which appears to refer to a large area. *See, e.g., Hells Canyon Pres. Council v. Jacoby*, 9 F. Supp. 2d 1216, 1224–25 (D. Or. 1998) (noting that a two-lane paved road was “essential to the economies of the local communities, such as Joseph, Halfway, Pine Creek, and Richland,” Oregon); *Pendleton Citizens for Cmty. Sch. v. Marockie*, 203 W. Va. 310, 317 (1998) (contrasting “local community high schools” like one in Circleville, West

Virginia from “larger consolidated high schools”).¹⁰ Likewise, the Corpus of Historical American English, a broad database of American word usage, includes 135 uses of “local community” in the 1990s and 2000s and none appears to refer to a large area. See Corpus of Historical American English, <https://corpus.byu.edu/coha/> (results from search of “local communit*”).

Even before Congress added the term “local” to “community,” “the defining characteristic” of a “community” “was a common bond.” JA330 (citing Chambers Dictionary (1993) (defining a “community” as “a group of people who have common interest, characteristics or culture”). Beyond the requisite common bond, “community” could have a range of meanings, though it typically referred to “a body of people who live ‘in the same locality’ or in ‘one place,’” JA330 (citing Chambers Dictionary (1993); Oxford Dictionary of Current English (3d ed. 2001)), for instance, “a ‘neighborhood, vicinity, or locality,’” JA330 (citing Black’s Law Dictionary (7th ed. 1999)). Because the Federal Credit Union Act separately permits credit unions to serve members that share a common bond without requiring them to be located in one place, *see* 12 U.S.C. § 1759(b), and because the terms “neighborhood” and “rural district” refer to particular places, the statutory term

¹⁰ Between 1990 and 2010, 3,302 federal and state cases referred to a “local community.” We reviewed cases from 1998, the year Congress added “local” to the statute.

“community” denoted a body of people in one place even before Congress amended the statute to refer specifically to a “local community.”

NCUA nevertheless argues that the statutory language, even as amended authorizes (or at least does not “flatly prohibit”) a field of membership of any size, so long as it is has a “definite spatial form or location” related to “a particular place.” NCUA Br. 24. NCUA did not rely on this interpretation in adopting the Final Rule, and so it cannot do so here. *See Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Such an interpretation is unreasonable in any event. Statutory interpretation must take account of context. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014). In the context of this statute, interpreting “local community” to mean “everyone in the United States” or “everyone in the State of California” is clearly unreasonable. Similarly, even if “local law” can in some contexts refer to the law of an entire country, and “local rules” to the rules of a state-wide judicial district, *see Credit Union Amicus Br. 10*, in the context of this statute it is unreasonable to interpret “local *community*” to mean the entire United States or a whole state.

Moreover, “local community” is part of a larger statutory phrase: “a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3). NCUA does not dispute that a “neighborhood” is a relatively small area: a “‘section or district’ lived in by people ‘forming a loosely cohesive community within a larger

unit (as a city, town).” JA333 (citing Webster’s Third New International Dictionary (3d ed. 1993); The Century Dictionary and Cyclopedia (1911)). The district court concluded that the terms “neighborhood” and “rural district” “inform the interpretation of *local community* because, as the *noscitur a sociis* canon dictates, ‘a word is given more precise content by the neighboring words with which it is associated.’” JA332 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)); *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

NCUA argues that the *noscitur a sociis* canon has no application here, because “three words in a list ‘is too short to be particularly illuminating.’” NCUA Br. 26 (quoting *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 288 (2010)). But that is true only of “a list of three items, each quite distinct from the other no matter how construed.” *Graham*, 559 U.S. at 288. The *noscitur a sociis* canon is regularly applied to lists of three items that share some identifiable characteristic. *See, e.g., Yates*, 135 S. Ct. at 1085 (applying *noscitur a sociis* to limit meaning of “[t]angible object” to “objects used to record or preserve information,” based on statutory placement with “record” and “document”); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying *noscitur a sociis* to limit meaning of “discovery” to mineral resources, based on statutory placement with “exploration” and “prospecting”). Because “local community,” “neighborhood,”

and “rural district” each denote limited geographical areas, it is appropriate to apply the “commonsense canon of *noscitur a sociis*” here. *Williams*, 553 U.S. at 294–95.¹¹

NCUA also argues that the district court erroneously held that a local community can be “no larger than a county.” NCUA Br. 23. But that is not what the court held. Instead, the court canvassed a broad range of usages of the term “local community” from the time that phrase was added to the statute in 1998, and concluded that, because nearly all involved a town, city, or county, the usages suggested that local community was generally understood to encompass an area no larger than that. JA330–32.

NCUA objects to the district court’s reliance on state statutes, arguing that a court should not assume Congress was familiar with them. NCUA Br. 24–25. The district court did not assume that Congress was familiar with these statutes, but only that they provided additional evidence of the meaning ascribed to a phrase that is not specifically defined in dictionaries. JA331–32. This use of contemporaneous statutes in statutory interpretation is routine. *See, e.g., Perrin v. United States*, 444

U.S. 37, 44 (1979) (considering contemporaneous state and federal statutes to interpret statutory meaning of “bribery”); *Sec. Indus. Ass’n v. Bd. of Governors of*

¹¹ As explained in Part III(A), *infra*, a “rural district” consistently referred to a relatively small area when the Federal Credit Union Act was enacted.

Fed. Reserve Sys., 468 U.S. 137, 150 (1984) (considering contemporaneous statutes to determine the meaning of “security” and “note”).

Moreover, state statutes defining “local community” are consistent with federal statutes and regulations. *See, e.g.*, 15 U.S.C. § 2203(7) (“‘local’ means of or pertaining to any city, town, county, special purpose district, unincorporated territory, or other political subdivision of a State”); 34 U.S.C. § 30502(3) (“‘local’ means a county, city, town, township, parish, village, or other general purpose political subdivision of a State”); 18 U.S.C. § 666(d)(3) (“‘local’ means of or pertaining to a political subdivision within a State”); 13 C.F.R. § 119.2 (defining “[l]ocal community” as “an identifiable area and population constituting a political subdivision of a state”).

NCUA argues that a federal statute governing “locality pay areas” for federal employees supports its definition of “local community.” NCUA Br. 20. But “locality” is not synonymous with “local community.” “Locality” means only “the fact or quality of having a place, that is of having position in space” and “a place or district, of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities.”¹² Moreover, “locality-based pay” for federal government employees is a very different concept from a single “local community.” “Locality pay areas” are established and modified under 5 U.S.C.

¹² Oxford English Dictionary (Compact ed. 1971).

§ 5304 in order to identify areas in which cost-of-living differences create pay disparities among federal workers.¹³ Such pay disparities need not be limited to a single local community, and therefore the existence of locality pay areas does not support NCUA’s definition of “local community.”

In short, NCUA’s definition of “local community” must be within the reasonable range of meaning of that term.

B. A Combined Statistical Area Is A “Daisy-Chain” Concept That Requires No Interaction Among Residents From Different Parts Of The Area, Not A Single Local Community.

OMB defines Combined Statistical Areas as “larger regions” rather than single local communities. JA130.¹⁴ By definition, they include multiple Core-Based Statistical Areas. 75 Fed. Reg. at 37,251. OMB, which created the concept of the “Combined Statistical Area,” has emphasized that they “represent groupings” of Core-Based Statistical Areas, and “should not be ranked or compared with individual Core-Based Statistical Areas.”¹⁵ On average, Combined Statistical Areas are more

¹³ See 5 C.F.R. § 531.602-03; U.S. Office of Personnel Mgmt., Report on Locality-Based Comparability Payments for the General Schedule: Annual Report of the President’s Pay Agent, at 14 (2014), <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/pay-agent-reports/2014report.pdf>.

¹⁴ See OMB, Exec. Office of the President, OMB Bull. No. 15-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas*, Appendix at 1–2 (2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/bulletins/2015/15-01.pdf> [hereinafter OMB Bull. No. 15-01].

¹⁵ *Id.* at 4.

than four times larger than Core-Based Statistical Areas;¹⁶ the largest Combined Statistical Area today has 24 million residents.¹⁷

For example, the Washington–Baltimore–Arlington, DC–MD–VA–WV–PA Combined Statistical Area includes not only the entire Washington and Baltimore metropolitan areas, but also six additional Core-Based Statistical Areas (pictured in varying shades of green on the map on page 35).¹⁸ It encompasses 40 counties and independent cities and a population exceeding nine million,¹⁹ spread across the District of Columbia, most of Maryland, a large portion of Northern Virginia, three counties in West Virginia, and one county in Pennsylvania.²⁰ No reasonable definition of “a well-defined local community” can include so many local communities spread over such a large region.

¹⁶ See U.S. Census, *American FactFinder*, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (average population of Combined Statistical Areas is approximately 1.4 million) [hereinafter *American FactFinder*]; U.S. Census, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017 - United States—Metropolitan and Micropolitan Statistical Area; and for Puerto Rico*, <https://www.census.gov/data/tables/2017/demo/popest/total-metro-and-micro-statistical-areas.html> (average population of a Core-Based Statistical Area, i.e., a Metropolitan or Micropolitan Statistical Area, but not a Metropolitan Division, is approximately 300,000).

¹⁷ See *American FactFinder*, *supra* note 16.

¹⁸ OMB Bull. No. 15-01, *supra* note 14, at 113.

¹⁹ See *id.* at 25, 27, 28, 34, 52, 53, 64, 68, 113; U.S. Census, *American FactFinder*, *supra* note 16.

²⁰ See OMB Bull. No. 15-01, *supra* note 14, at 25, 27, 28, 34, 52, 53, 64, 68, 113.

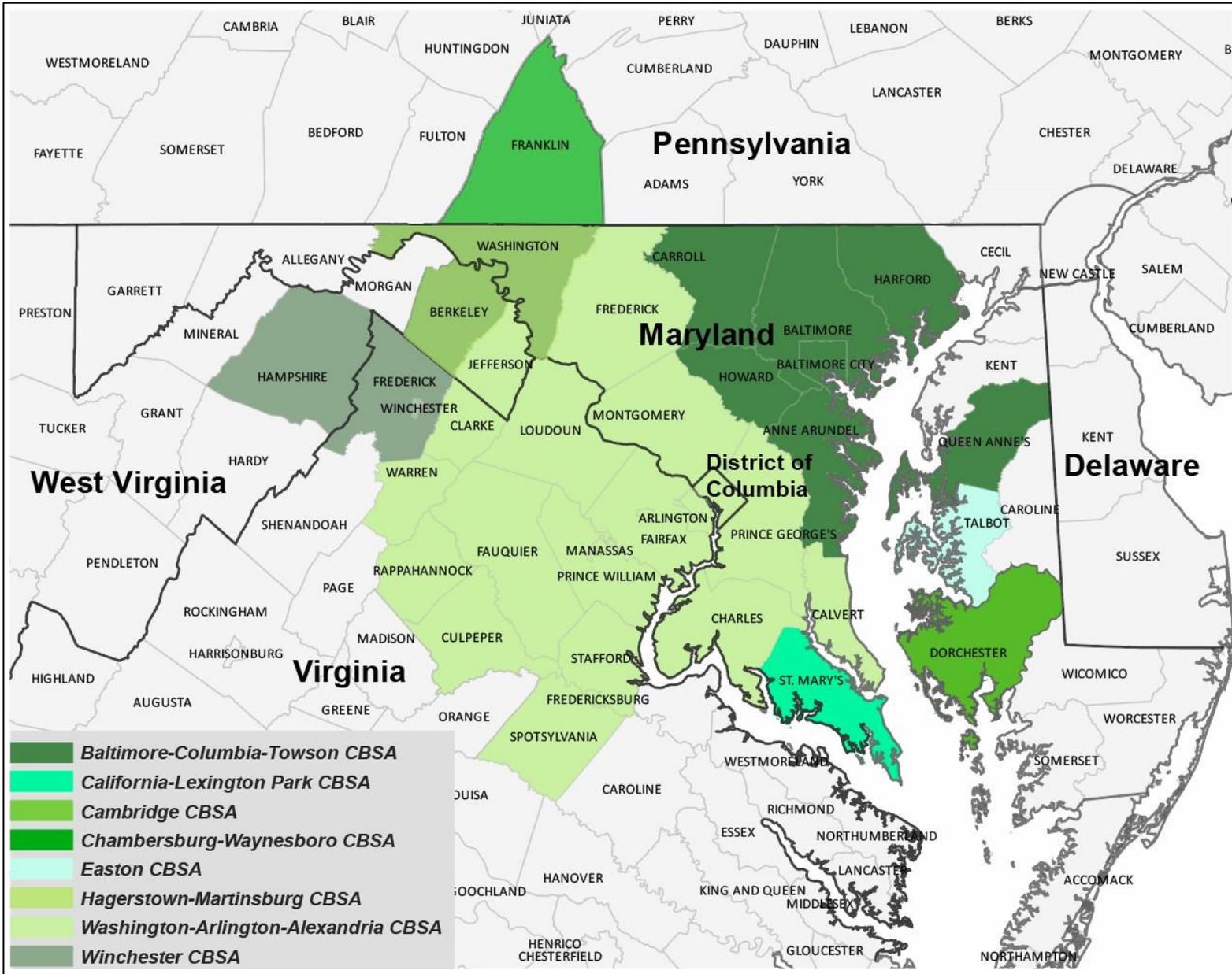


Figure 1: Washington–Baltimore–Arlington, DC–MD–VA–WV–PA Combined Statistical Area

Apart from their sheer size, Combined Statistical Areas are constructed in a way that requires no interaction among residents living in different parts of the area. NCUA has recognized that such interaction is the “most prominent” requirement of a local community. 63 Fed. Reg. at 72,037; *accord* NCUA Br. 17 (“The agency has consistently defined ‘local community’ to mean geographic areas that share common social and economic interactions.”).

By definition, a Combined Statistical Area includes two or more adjacent Core-Based Statistical Areas with an “employment interchange” rate of at least 15%.²¹ To be included in a Combined Statistical Area, a Core-Based Statistical Area must have a relatively modest 15% employment interchange with a single adjacent Core-Based Statistical Area. It may have *no* employment interchange—indeed, *no ties at all*—to any other Core-Based Statistical Area within the Combined Statistical Area. As the district court noted, a Combined Statistical Area may be a “daisy chain” of metropolitan areas “that are linked to their neighbors but have nothing to do with those at the other end of the chain.” JA336.

²¹ The employment interchange rate is “the sum of the percentage of commuting from the smaller area to the larger area and the percentage of employment in the smaller area accounted for by workers residing in the larger area.” 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 Fed. Reg. 37,246, 37,248 (June 28, 2010). Thus, two Core-Based Statistical Areas will be included in a Combined Statistical Area if roughly 7.5% percent of the population of each Core-Based Statistical Area commutes to the adjacent Core-Based Statistical Area.

Census data on the Washington–Baltimore–Arlington, DC–MD–VA–WV–PA Combined Statistical Area illustrates the “daisy chain” nature of Combined Statistical Areas. While 14% of workers in the Chambersburg–Waynesboro, PA Core-Based Statistical Area commute to the adjacent Hagerstown–Martinsburg, MD–WV Core-Based Statistical Area, *not a single worker* in the Chambersburg–Waynesboro, PA Core-Based Statistical Area commutes to the Cambridge, MD, the Easton, MD, *or* the California–Lexington Park, MD Core-Based Statistical Areas on other sides of the Combined Statistical Area.²² Similarly, while 16% of workers in the Cambridge, MD Core-Based Statistical Area commute to the adjacent Easton, MD Core-Based Statistical Area, *not one worker* in the Cambridge, MD Core-Based Statistical Area commutes to the Chambersburg–Waynesboro, PA, the Winchester VA–WV Core-Based Statistical Area, *or* the California–Lexington Park, MD Core-Based Statistical Areas, which are all part of the Combined Statistical Area.²³ Indeed, only a tiny percentage of commuters from these Core-Based Statistical Areas commute *anywhere* in the Washington–Baltimore–Arlington, DC–MD–VA–WV–

²² See U.S. Census, *Residence County to Workplace County Commuting Flows for the United States and Puerto Rico Sorted by Residence Geography: 5-Year ACS, 2009-2013*, <https://www.census.gov/data/tables/time-series/demo/commuting/commuting-flows.html> (follow “Table 1” hyperlink for “County to County Commuting Flows for the U.S. and Puerto Rico: 2009-2013”) [hereinafter U.S. Census, *Commuting Flows*].

²³ See *id.*

PA Combined Statistical Area other than an adjacent Core-Based Statistical Area.²⁴

With such weak or non-existent ties, there is no reasonable basis to deem the larger region defined by a Combined Statistical Area as a single local community.²⁵

NCUA emphasizes that its rules currently limit a community credit union to serving an area with a population of no more than 2.5 million people.²⁶ But Combined Statistical Areas with fewer than 2.5 million inhabitants are still, by definition, “larger regions” that combine multiple counties, cities, and towns that need have no interaction with each other. *See supra* at 13. Moreover, the 2.5- million-person limit does not preclude fields of membership based on the largest Combined Statistical Areas. Instead, the Final Rule deems *any* portion of *any* Combined Statistical Area be a single local community so long as the area served does not exceed 2.5 million people. JA192. As the district court explained, a field

²⁴ *See id.* In the Chambersburg–Waynesboro, PA Core-Based Statistical Area, for example, only 5% of workers commute anywhere in the Combined Statistical Area other than the adjacent Hagerstown–Martinsburg, MD–WV Core-Based Statistical Area. *See* U.S. Census, *Commuting Flows*, *supra* note 22. In the Cambridge, MD Core-Based Statistical Area, only 6% commute anywhere else in the Combined Statistical Area other than the adjacent Easton, MD Core-Based Statistical Area. *See id.*

²⁵ NCUA relies on a single factor—commuting patterns—to define a local community. Although commuting activity may sometimes serve as a proxy for community interaction, it is possible “to leave one’s local community to commute to work.” JA342. That possibility increases where, as with Combined Statistical Areas, the required level of commuting is set at a low level.

²⁶ NCUA’s reliance on the 2.5 million-person cap is somewhat surprising, because the agency has proposed to increase this limit to 10 million people, *see* 81 Fed. Reg. at 78,751, and it “finds considerable merit in commenters’ suggestions to eliminate the population cap” altogether, JA165.

of membership carved out of a Combined Statistical Area may not be “a well-defined local community.” JA337–38. It may, for instance, be a “thin strip” stretching for hundreds of miles across multiple states and multiple Core-Based Statistical Areas, as the district court illustrated in its opinion. JA336. There is no reason to think such “thin strips ” are single local communities. JA336–37.

Indeed, it is not even clear that the Final Rule requires credit unions to serve one contiguous portion of a Combined Statistical Area. JA192. The Rule provides that a rural district must have “contiguous geographic boundaries,” but omits this requirement for Combined Statistical Areas. JA192. Moreover, the Final Rule *amended* a provision of the regulations that had limited credit unions to serving a “contiguous portion” of a single political jurisdiction, deleting the term “contiguous” and substituting “individual.” *Compare* JA192 *with* 75 Fed. Reg. at 36,264 (2010 Rule). And the Final Rule authorizes credit unions to serve “a portion” of a Combined Statistical Area, without using the terms “contiguous” or “individual.” JA192. When language is included in one section of a statute or rule, but omitted in another, “it is generally presumed that [the drafter] act[ed] intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983). NCUA’s counsel nevertheless informed the district court that the agency interprets its Rule as authorizing service only in a single contiguous portion of a Combined Statistical Area. Although the district court accepted this

interpretation, the agency remains free to change it at any time without notice or an opportunity for comment.

The absence of ties across Combined Statistical Areas distinguishes them from any of the geographic areas NCUA has previously defined as a single local community. Residents of a city or county share ties to one political jurisdiction. Likewise, Core-Based Statistical Areas share ties to a single urban core, which serves as a single economic and cultural hub and population center for the whole Core-Based Statistical Area. *See* 75 Fed. Reg. at 37,246.

NCUA argues that many Combined Statistical Areas include only two Core-Based Statistical Areas. But almost half include three or more Core-Based Statistical Areas, and more than a quarter include from four to nine such areas.²⁷ Moreover, a region that includes even two different urban cores is not a single “local community.” NCUA itself has recognized that it is “inappropriate to automatically conclude” that any area that “do[es] not have one dominant economic hub, but rather may contain two or more dominant hubs” qualifies as one local community. 75 Fed. Reg. at 36,258. The agency has not explained why that is no longer true.

NCUA suggests that metropolitan divisions require only the same 15% employment interchange rate as Combined Statistical Areas, but that is a red herring. Metropolitan divisions are *subdivisions* of Core-Based Statistical Areas, and all

²⁷ *See* OMB Bull. No. 15-01, *supra* note 14, at 98–114.

counties in a metropolitan division outside the urban core must have a minimum 25% commuting rate with the core. *See id.* at 37,250. For example, the Silver Spring–Frederick–Rockville Metropolitan Division is a subdivision of the Washington–Arlington–Alexandria Core-Based Statistical Area consisting of Montgomery and Frederick counties.²⁸ At least 25% of the workers in both Montgomery and Frederick counties commute to or from Washington, DC. By definition, the two counties share ties with the urban core: Washington.

NCUA asserts that Combined Statistical Areas may “reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreation activities,” NCUA Br. 19 (quoting JA317), but nothing in the definition of a Combined Statistical Area requires any such ties and the record “does not provide support for th[e] conclusion” that they exist. JA335. Moreover, even if such ties existed they would not be sufficient to demonstrate the existence of “a well-defined local community” with the common bond Congress expected credit union members to share. For example, Chicago is a center of wholesaling and commodity distribution for much of the Midwest, but this “broader economic interaction” does not make the entire Midwest one “local community.” Similarly, the fact that some Washington, D.C. residents travel to West Virginia or the Chesapeake Bay (and, for

²⁸ *See id.* at 52.

that matter, to New York City and Boston) for weekend activities does not transform the entire region into one “local community.” *Contra* Credit Union Amicus Br. 9.

Even NCUA’s own examples do not share common ties across the Combined Statistical Area. The Midland–Odessa Combined Statistical Area includes Midland and Martin counties in the Midland Core-Based Statistical Area and Ector County in the Odessa Core-Based Statistical Area.²⁹ Only 38 people commute between Martin and Ector counties.³⁰ Likewise, only 11 people commute from Doña Ana to Hudspeth County on opposite sides of the El Paso–Las Cruces, TX–NM Combined Statistical Area, and *not a single person* commutes from Hudspeth to Doña Ana.³¹

Finally, NCUA argues that even if residents in different parts of a Combined Statistical Area “might not have much in common with each other,” the agency’s definition “can occasionally be overbroad” without being unreasonable. NCUA Br. 30. The problem with NCUA’s definition is that residents living in different parts of a Combined Statistical Area may have *no* interactions at all with each other. Nor is this a problem that arises only “occasionally.” Instead, it is a pervasive problem arising from the “daisy chain” nature of Combined Statistical Areas.

²⁹ See OMB Bull. No. 15-01, *supra* note 14, at 41, 43, 107.

³⁰ U.S. Census, *Commuting Flows*, *supra* note 22.

³¹ See OMB Bull. No. 15-01, *supra* note 14, at 32, 38, 102; U.S. Census, *Commuting Flows*, *supra* note 22.

In sum, NCUA's rules concerning single political jurisdictions and Core-Based Statistical Areas push against—and may exceed—the reasonable limits of a single “well-defined local community.” Its categorical approval of Combined Statistical Areas as single “local communities” is a bridge too far.

C. The Combined Statistical Area Rule Is Arbitrary And Capricious.

In addition to being an unreasonable interpretation of the statutory text, NCUA's determination that a Combined Statistical Area is a single well-defined local community disregards, without adequate explanation, decisions of federal courts and NCUA's own prior decisions.

In *ABA v. NCUA*, 347 F. Supp. 2d 1061, 1067 (D. Utah 2004), the court invalidated NCUA's approval of a six-county community charter in Utah because the agency had not established that the area is “a well-defined local community.” The court observed that “[a]nyone familiar with the six-county area has an intuitive notion that the expanded community charter covers a large geographic area and population base.” *Id.* at 1069. The area includes almost two-thirds of Utah's population, stretching “from the Nevada border to the Wyoming border,” and “cross[ing] two major mountain ranges.” *Id.* The Utah court emphasized that, “NCUA must have some gatekeeping responsibility to ensure that the ‘local’ requirement is satisfied,” and “cannot act as a rubber stamp or cheerleader for any application brought before it.” *Id.* at 1070. Yet, the six-county area the district court

rejected is just *part* of the Salt Lake City–Provo–Orem Combined Statistical Area (mapped on the following page). That Combined Statistical Area also includes *four additional large counties*. Pursuant to the Final Rule, NCUA approved this entire Combined Statistical Area—containing more than 80% of Utah’s population³²—as a field of membership for the Utah Community Credit Union.³³ In doing so, NCUA adopted a position that is even more extreme than the one rejected by a federal court, without acknowledging or answering the court’s objections.

³² See U.S. Census, *American FactFinder*, *supra* note 16; U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST040216/49,00>.

³³ NCUA, *Monthly Activity Report - Insurance Related Activity* (Aug. 2017) 6 of 42, <https://www.ncua.gov/analysis/Documents/Insurance-Report-Activity/insurance-report-activity-august-2017.pdf>.

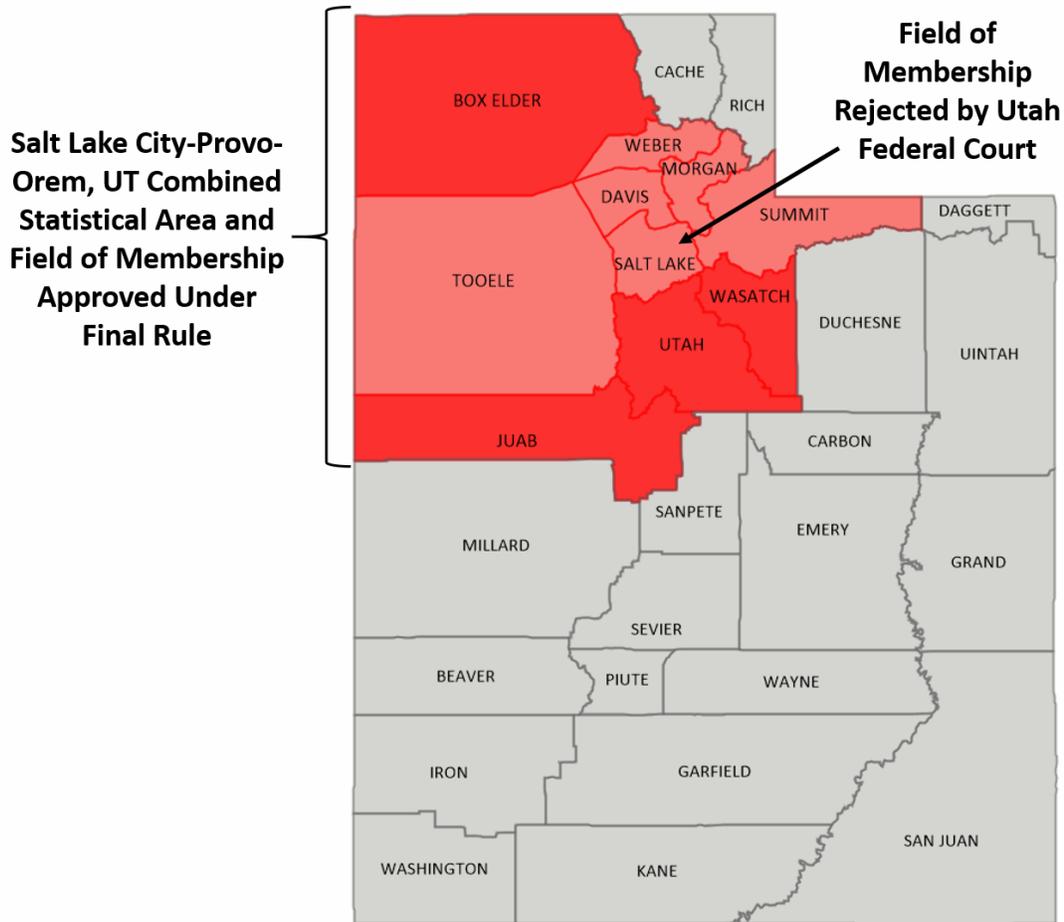


Figure 2: Approved Combined Statistical Area Field of Membership Larger Than Field of Membership Previously Rejected By a Federal Court

Similarly, in *ABA v. NCUA*, 2008 WL 2857678 (M.D. Pa. July 21, 2008), the court rejected a field of membership comprising six counties in Pennsylvania that together constitute the Harrisburg–York–Lebanon Combined Statistical Area. *Id.*³⁴ The court explained that “[t]o a casual observer familiar with central Pennsylvania, it would likely be a remarkable finding that the [field of membership]—a geographic area of more than 3,000 square miles with a population over 1.1 million people and encompassing Harrisburg, Hershey, Carlisle, York, Lebanon, Gettysburg, and Shippensburg—constituted a ‘well-defined local community.’” *Id.* at 10. Yet the Final Rule deems the same area to be “a well-defined local community,” and NCUA has approved this very area as the field of membership for two credit unions, again without acknowledging the court’s objections or explaining how they have been overcome.³⁵

In addition, NCUA has not adequately explained its departure from its own statements concerning the nature of a “well-defined local community.” For

³⁴ See 2008 WL 2857678, at *7 n.7; OMB Bull. No. 15-01, *supra* note 14, at 33, 35, 38, 53, 103. The counties are Adams, Cumberland, Dauphin, Lebanon, Perry, and York. 2008 WL 2857678, at *7 n.7. Those counties cover four Core-Based Statistical Areas: Gettysburg, Harrisburg–Carlisle, Lebanon, and York–Hanover. *Id.* at 33, 35, 38, 53.

³⁵ See NCUA, *Monthly Activity Report - Insurance Related Activity* (Oct. 2017) 2 of 16, <https://www.ncua.gov/analysis/Documents/Insurance-Report-Activity/insurance-report-activity-oct-2017.pdf> (approving New Cumberland Federal Credit Union expansion); NCUA, *Monthly Activity Report - Insurance Related Activity* (Dec. 2017) 4 of 18, <https://www.ncua.gov/analysis/Documents/Insurance-Report-Activity/insurance-report-activity-dec-2017.pdf> (approving Americhoice Federal Credit Union expansion).

example, NCUA has not explained how Combined Statistical Areas can automatically qualify as single local communities even though they may not meet a single one of the criteria the agency has identified as indicia of a local community: a single economic hub and population center; absence of isolated areas; and quasi-governmental agencies, governmental designations, shared public services and facilities, and colleges and universities serving the entire area. *See* JA192–93.

Similarly, NCUA has taken the position that it is “difficult for a major metropolitan city . . . or an area covering multiple counties with significant population to have sufficient interaction and/or common interests, and to therefore demonstrate that these areas meet the requirement of being ‘local.’” 63 Fed. Reg. at 72,037. The Final Rule nevertheless deems Combined Statistical Areas containing *multiple* metropolitan areas and *dozens* of counties, to be single local communities. *See* JA192. NCUA has not explained why the “Greater Boston Metropolitan Area” was a prototypically “unacceptable” field of membership that “d[id] not meet the definition of local community” in 1998, but the even larger Boston–Worcester–Providence, MA–RI–NH–CT Combined Statistical Area *does* meet the definition today, subject only to a 2.5-million-person limit. 63 Fed. Reg. at 72,039. Nor has NCUA explained why previously rejected fields of membership did not meet the definition of “local community” before, but do now. *See, e.g., In re Hudson Valley Fed. Credit Union*, 1999 WL 35787082, at *2 (July 22, 1999) (rejecting

approximately-850,000-person portion of New York–Newark, NY–NJ–CT–PA Combined Statistical Area); *In re Cinfed Fed. Credit Union*, 2007 WL 1958692, at *2 (Mar. 15, 2007) (rejecting less-than-2-million-person portion of Cincinnati–Wilmington–Maysville, OH–KY–IN Combined Statistical Area); *In re Bellco First Fed. Credit Union*, 1999 WL 34801880, at *2 (May 19, 1999) (rejecting 2.2-million-person portion of Denver–Aurora, CO Combined Statistical Area); *In re Vantage Credit Union Field of Membership Appeal*, 2010 WL 11400686, at *1 (rejecting approximately 2.5-million-person portion of St. Louis–St. Charles–Farmington MO–IL Combined Statistical Area).³⁶

For all of these reasons, a Combined Statistical Area is not “a well-defined local community,” and NCUA’s reversal of its prior position is arbitrary and capricious.

III. NCUA’s Definition of “Rural District” Is Unreasonable.

A. Multiple Contemporary Sources Of Meaning Indicate That A “Rural District” Is Relatively Small And Does Not Include Large Cities.

Community credit unions “shall be limited” to serving a single “well-defined local community, neighborhood, or *rural district*.” 12 U.S.C. § 1759(b)(3) (emphasis added). Congress used the term “rural district” in the original Federal

³⁶ See also OMB Bull. No. 15-01, *supra* note 14, at 26, 29, 31, 37, 43, 47, 100–101, 109, 111 (confirming that counties included in rejected fields of membership are in respective Combined Statistical Areas).

Credit Union Act of 1934. JA347. “The parties do not dispute that in 1934 the word *rural* meant what it means now—the pastoral countryside, as opposed to an urban area.” JA347 (citing Webster’s New International Dictionary (2d ed. 1934); Concise Oxford Dictionary of Current English, New Edition (1929)).

As NCUA notes, contemporaneous dictionaries included definitions of “district” both small³⁷ and potentially larger.³⁸ NCUA Br. 34. But “broad[er] definitions of *district* do not necessarily mean that a *rural district* could be broad.” JA349. Just as “[i]t would be a mistake” to conclude from the broader definitions of “district” that a “school district” or “fire district” can be very large, so too would it be a mistake to conclude that a “rural district” can be very large—particularly when all sources of contemporary meaning suggest otherwise. *Id.*

Every available source of contemporary meaning confirms that, in 1934, a “rural district” referred to an area much smaller than a state. At least two American dictionaries in use in 1934 defined “rural district” as “a subdivision of an administrative county embracing usually several country parishes.” JA349 (quoting Webster’s New International Dictionary (2d ed. 1934) and citing Funk & Wagnell’s

³⁷ *E.g.*, 2 Dictionary of American English, 777 (1940) (“[a] subdivision of a city serving as a unit for policing, fire prevention, political representation, etc.”).

³⁸ *E.g.*, Webster’s New International Dictionary, 757 (2d ed. 1934) (“[a] division of territory; a defined portion of a state, county, country, town, or city, etc., made for administrative, electoral, or other purposes”).

New Standard Dictionary of the English Language (1913)). NCUA dismisses this definition as irrelevant because it referred to a British governmental unit. But as the district court noted, the fact that it appeared in American dictionaries indicates “some degree of American familiarity.”³⁹ JA349.

Moreover, other sources of contemporary meaning strongly indicate that in 1934 a “rural district” was a relatively small, non-urban area. The district court reviewed all 293 usages of the term “rural district” in U.S. judicial opinions on Westlaw from 1920 through 1940. JA350 (citing Dist. Ct. Dkt. 32–6). It found 144 usages that gave some indication of geographic scope and referred to school districts or other similarly small rural areas within counties or towns. *Id.* (citing examples such as “a rural district adjoining the village,” a “rural district of Labette county,” and a rural district “about five miles square”). “Against th[ose] dozens of similar examples, *not one opinion* appear[ed] to envision a rural district approaching the size of a state.” JA350 (emphasis added).

³⁹ Modern dictionaries similarly define “rural district” as “a subdivision of an administrative county that usually embraces several country parishes and is governed by a council.” Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/rural%20district>; *see also* Collins Dictionary Online, <https://www.collinsdictionary.com/dictionary/english/rural-district> (“in England and Wales from 1888 to 1974 and Northern Ireland from 1898 to 1973) a rural division of a county”); Oxford English Dictionary Online, <http://www.oed.com/view/Entry/168989?redirectedFrom=rural+district#eid194638056> (“a district comprising a rural area; spec. a subdivision of a county in a rural area of England and Wales as constituted by the Local Government Act of 1894 and abolished by the Local Government Act of 1972”).

Similarly, not one of the 71 references to “rural district” between the 1920s and 1930s found in the Corpus of Historical American English appears to refer to an area approaching the size of a state. *See* Corpus of Historical American English, corpus.byu.edu/coha (results from search of “rural district*” include, for example, a “teacher in the rural districts in Huron County” and “the residents of rural districts in Blue Gum County”).

Despite this overwhelming evidence, NCUA argues that the district court erred by holding that a “rural district” could be no larger than a county. NCUA Br. 34. But that is not what the district court held. The court concluded that “[u]sage of rural district in [the] 1934-era” “referred to areas much smaller than a state,” JA350, and therefore “a definition of rural district that includes [] expansive areas [the size of a state or larger] is not even in the ballpark of the term’s standard meaning,” and so is unreasonable, JA352. The district court’s conclusion was informed by its observation that “rural district” in 1934 “commonly referred to areas smaller than a county,” but the court did not hold that a rural district could never be larger than a county. *Id.*

NCUA contends that the district court erred in presuming that Congress adopted the meaning of “rural district” reflected in state judicial opinions. *See* NCUA Br. 34–35. As an initial matter, this argument does not reflect the full scope of the district court’s analysis. That court did not limit its analysis to state court

cases. *See* JA350. Instead, it considered contemporary state *and federal* cases, as well as dictionaries. *See* JA347–50; ABA Suppl. Mem. App. 6, Dist. Ct. Dkt. 32–6 (cited at JA350). Moreover, where Congress borrows a term that has “accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.” *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).⁴⁰

NCUA cites *Competitive Enterprise Institute v. U.S. Department of Transportation*, 863 F.3d 911 (D.C. Cir. 2017) for the proposition that the Court should defer to NCUA’s definition of “rural district,” because it “cannot say that Congress spoke to the precise question” of the limits of the meaning of the statutory term. *Id.* at 917. But in *Competitive Enterprise Institute*, this Court concluded that “some dictionary definitions” and “some state laws” “support[ed] the [agency],” while “other dictionary definitions and other state laws support[ed] petitioners.” *Id.* That is not the case here. NCUA has not identified *any* dictionary definition or statute that supports its interpretation of “rural district”; *every* available source of meaning supports a narrower reading. NCUA is owed no deference for an

⁴⁰ Similarly, because “rural district” referred to a relatively small rural area when the term was included in the Federal Credit Union Act, there was no reason for Congress to enact additional statutory language limiting a rural district’s size. *Contra* Credit Union Amicus Br. 15.

interpretation of “rural district” for which it has presented no supporting evidence. *See, e.g., McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (no deference to agency’s “unsupported suppositions”).

As the district court explained, that “rural district” has a circumscribed meaning in the Federal Credit Union Act is especially clear when the term is read in the context of the neighboring words with which it is associated—“local community” (originally “community”) and “neighborhood”—which also describe small, circumscribed areas. *See* JA351. NCUA’s objections to the application of the *noscitur a sociis* canon are misplaced.

First, the canon is not, as NCUA suggests, being applied “to define two otherwise undefined terms based on the meaning of a single word.” NCUA Br. 36. Rather, the district court looked to the three terms together in context—“[local] community, neighborhood, or rural district”—and confirmed that they all share the common characteristic of being small. That is exactly the way the canon is intended to be used. *See, e.g., Williams*, 553 U.S. at 294; *Jarecki*, 367 U.S. at 307.

Second, as explained above, contrary to NCUA’s suggestion, the canon is regularly applied to lists of three terms when, as here, all appear to share a common characteristic (here, a limited geographic area). *See supra* at 30–31.

Third, even if “the term ‘community’ *by itself*,” set alongside “rural district,” would not have been as probative of the meaning of “rural district,” NCUA Br. 36

(emphasis added), those two terms were included alongside the third term, “neighborhood,” which is indisputably a small area. “Community, neighborhood, or rural district” together strongly suggest an intent to identify small areas.

Fourth, NCUA’s contention that *noscitur a sociis* “cannot be used to give a word ‘essentially the same function’ as other words in a list,” NCUA Br. 36, is inapposite: “rural district” is not synonymous with “local community.” While they are both small areas, rural districts must be rural, and the residents may be too widely separated to fit easily within a single “local community.”

B. The Rule Unreasonably Defines Entire States And Multi-State Regions Including Large Cities As Single “Rural Districts.”

Until recently, NCUA recognized that a rural district is “relatively small.” JA132. NCUA’s prior regulations provided that the total population of a “rural district” could not exceed 250,000, or 3% of the state’s population, whichever was larger. 78 Fed. Reg. at 13,461. The Final Rule dramatically expands NCUA’s definition of “rural district” by quadrupling the numerical limit to one million residents. JA192. NCUA now defines a single “rural district” as *any* one-million-person area in which (1) at least half the population resides in federally-designated rural areas, *or* (2) the area’s population density does not exceed 100 per square mile. *See id.*

Under NCUA’s new interpretation, five entire states (Alaska, North Dakota, South Dakota, Vermont, and Wyoming) are defined as single rural districts.⁴¹ Indeed, the Final Rule allows rural districts to include a state and all or part of any adjacent states. *See* JA192. As a result, the Rule defines enormous multi-state regions—for example, all of Wyoming and portions of six additional states—as single “rural districts.” JA351; NCUA Br. 39 & Fig. 1.

The residents of these vast “rural districts” may be predominantly *urban*, rather than rural. For example, in four of the five states defined as single rural districts under the Final Rule (all except Vermont), most of the population lives in urban areas.⁴² NCUA tries to sweep this problem under the rug, asserting (Br. 31) that “[n]o one challenges” its definition of a “rural” area as one with an average population density of less than 100 persons per square mile. But the problem arises from the *interaction* of NCUA’s 1-million person limit with the 100-person-per-square-mile standard. By greatly expanding the population limit, NCUA has allowed large cities to be included in “rural districts.” For example, the population of Anchorage, Alaska, is nearly 300,000, larger than the prior 250,00-person cap on

⁴¹ Each of these states has a population under one million and a population density under 100 per square mile. *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/02,38,46,50,56,00>.

⁴² U.S. Census, *Lists of Population, Land Area, and Percent Urban and Rural in 2010, Percent Urban and Rural in 2010 by State*, <https://www.census.gov/geo/reference/ua/urban-rural-2010.html>.

rural districts. Yet Anchorage (and every other urban area in Alaska) is deemed part of a “rural district” under the Final Rule.⁴³ As shown on the following page, under NCUA’s Final Rule an area that includes the cities of Denver and Salt Lake City—7.5 hours away—is one “rural district,” because these two large cities can be connected by a string of sparsely-populated counties.⁴⁴ Almost 90% of the population of this “rural district” lives in one of the two large cities.⁴⁵

⁴³ U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/0203000,00>.

⁴⁴ See U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/> (adding 2010 Census population of areas shown in blue below [885,216], and dividing by total land area of areas shown in blue [12,179.68 square miles], for a population density of 72.7 per square mile); see also JA301 (NCUA acknowledgement that thin strips of land can connect portions of a field of membership). Indeed, because the population density of the United States as a whole is less than 100 persons per square mile, NCUA’s definitional approach would allow it to define cities of any size, or even the entire United States, as a “rural district.” See U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/fact/table/US/PST040218>.

⁴⁵ Denver (population 600,158) and Salt Lake City (population 186,440) constitute 89% of the 885,216 person population of the “rural district.” See U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/>.

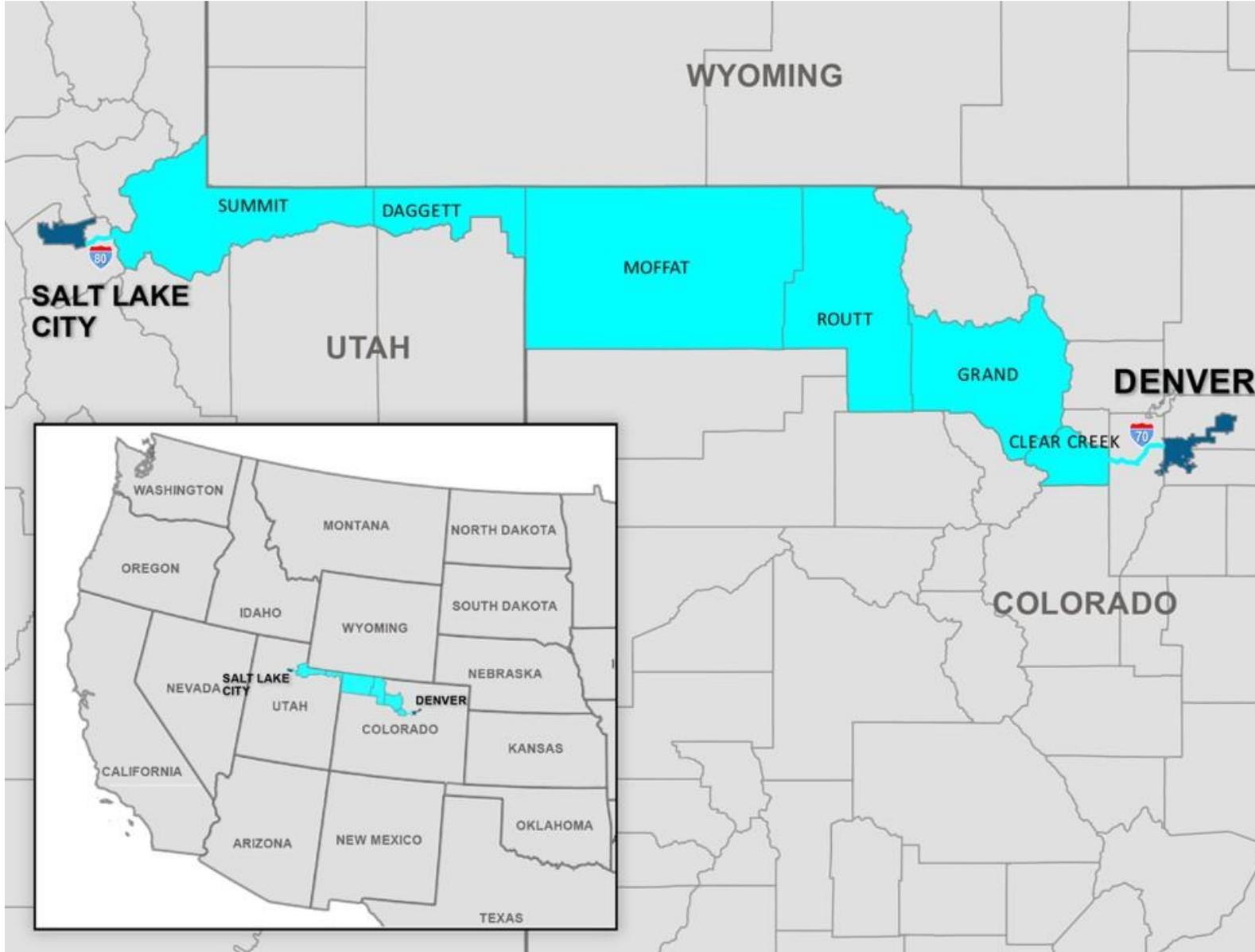


Figure 3: “Rural District” with ~90% of the Population in Denver and Salt Lake City

Other examples of rural districts approved under the Final Rule—including one for the entire state of Alaska and two for the entire state of Wyoming⁴⁶—are shown on the following pages. Metropolitan areas included within these “rural districts” are shown in darker shades.

⁴⁶ Matanuska Valley Credit Union was approved to serve the entire state of Alaska. *See* NCUA, *Monthly Activity Report - Insurance Related Activity* (Dec. 2017) 6 of 18, <https://www.ncua.gov/analysis/Documents/Insurance-Report-Activity/insurance-report-activity-dec-2017.pdf>. Reliant and WyHy Federal Credit Unions were approved to serve the entire state of Wyoming. *See id.* at 4 of 18; NCUA, *Monthly Activity Report - Insurance Related Activity* (Nov. 2017) 5 of 22, <https://www.ncua.gov/analysis/Documents/Insurance-Report-Activity/insurance-report-activity-nov-2017.pdf>.

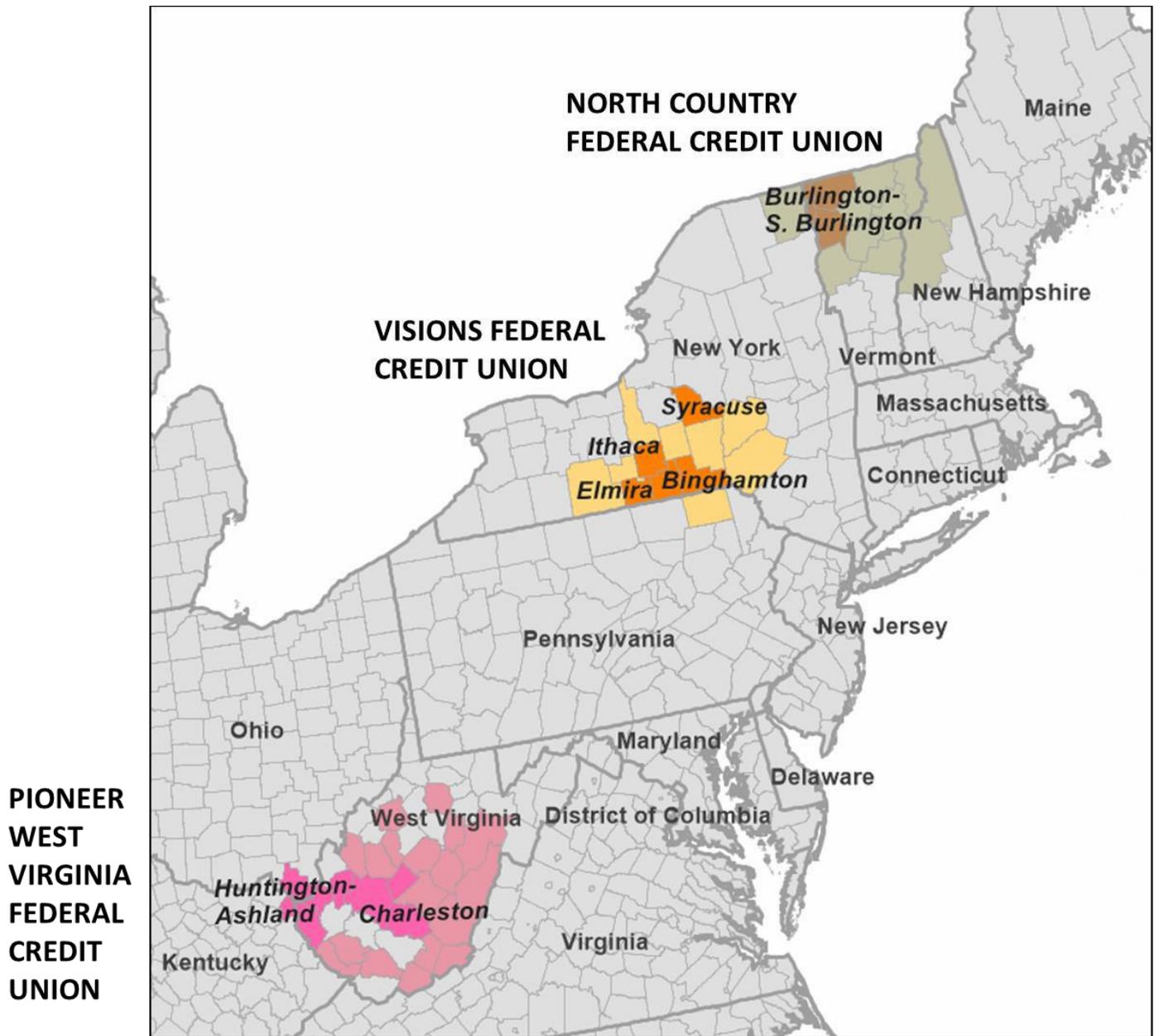


Figure 4A: Selected “Rural Districts” Approved Under the Final Rule, With Incorporated Metropolitan Areas

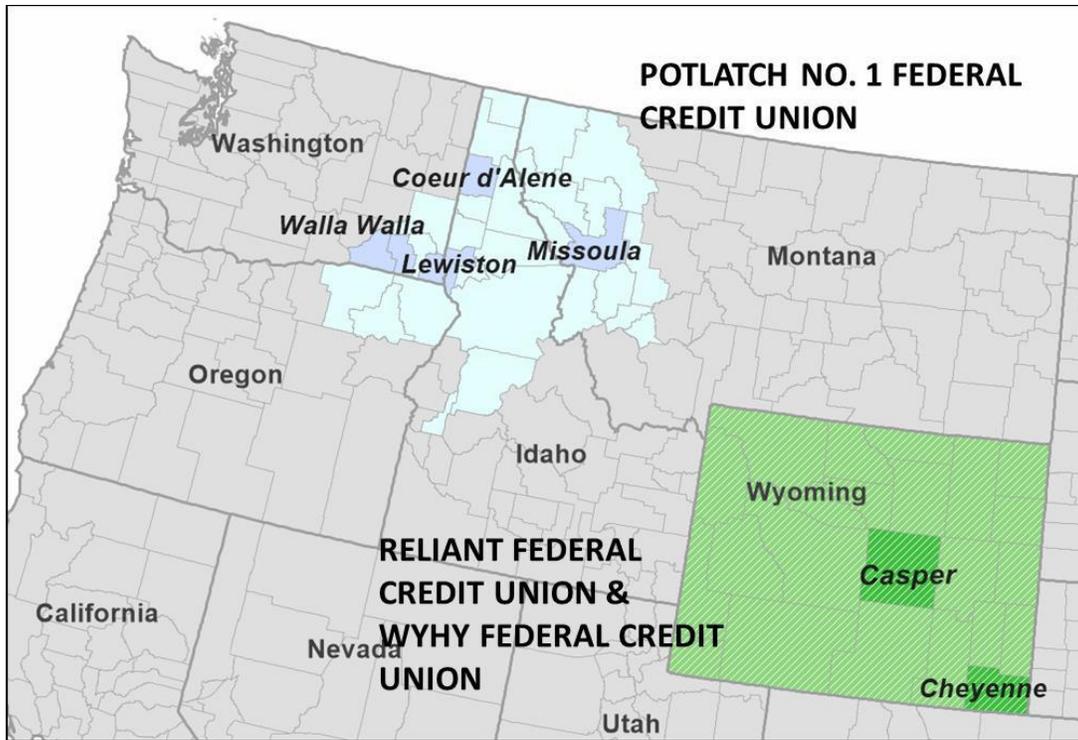


Figure 4B: Selected “Rural Districts” Approved Under the Final Rule, With Incorporated Metropolitan Areas

The district court correctly concluded that it is unreasonable to define such enormous regions, including major urban areas where most of the population resides, as single rural districts.

C. NCUA’s Broad Reading Of “Rural District” Departs, Without Adequate Explanation, From Its Own Prior Interpretations.

NCUA’s expanded definition of “rural district” is inconsistent with its own prior statements. In its 1999 rules, NCUA identified “[p]ersons who live or work in a state” as a paradigmatic example of an “unacceptable” field of membership that does not “meet the definition of a local community, neighborhood, or rural district.” 63 Fed. Reg. at 72,039; *accord id.* at 72,037. NCUA also rejected an application for a community credit union covering the entire state of Delaware, despite its relatively small size. *In re Del. Fed. Credit Union*, 2000 WL 36716365 (Sept. 7, 2000). NCUA has not adequately explained why the statutory language permits entire states, and multi-state areas, to serve as fields of membership. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

The Final Rule states that “interaction or common interests . . . do not apply to a Rural District.” JA172. But Congress found that “a meaningful affinity and bond” is essential for *all* credit unions, including those serving rural districts. 12

U.S.C. § 1751 note. NCUA thus erred in concluding that the interaction and common interest requirements “do not apply” to rural districts.

NCUA asserts that the Final Rule does not dramatically expand the population limit for rural districts. NCUA Br. 31–32, 39–41. But that is exactly what it does. A population of one million is four times bigger than a population of 250,000; 100% of a state’s population is 33 1/3 times larger than 3% of its population. NCUA nevertheless argues that it made no significant change because the 3% rule allowed credit unions in the most populous states, such as California, to serve rural districts containing more than 250,000 people. NCUA notes that in these large states it approved eight rural districts that “served an average [of] more than 536,000 people” under the prior rule. NCUA Br. 31. But one million is nearly double 536,000. And in less populous states, the size limit has been greatly expanded.

NCUA’s brief includes a map showing hypothetical rural districts that could have been approved under its prior rule. *Id.* 40 Fig. 2. NCUA’s prior rule, which was never subjected to judicial review, may itself have been unreasonable. Moreover, NCUA’s hypothetical rural districts are based in the largest states (so that 3% of the population is as large as possible) and they carve out any cities with more than 100,000 people, as shown on the map on the following page.

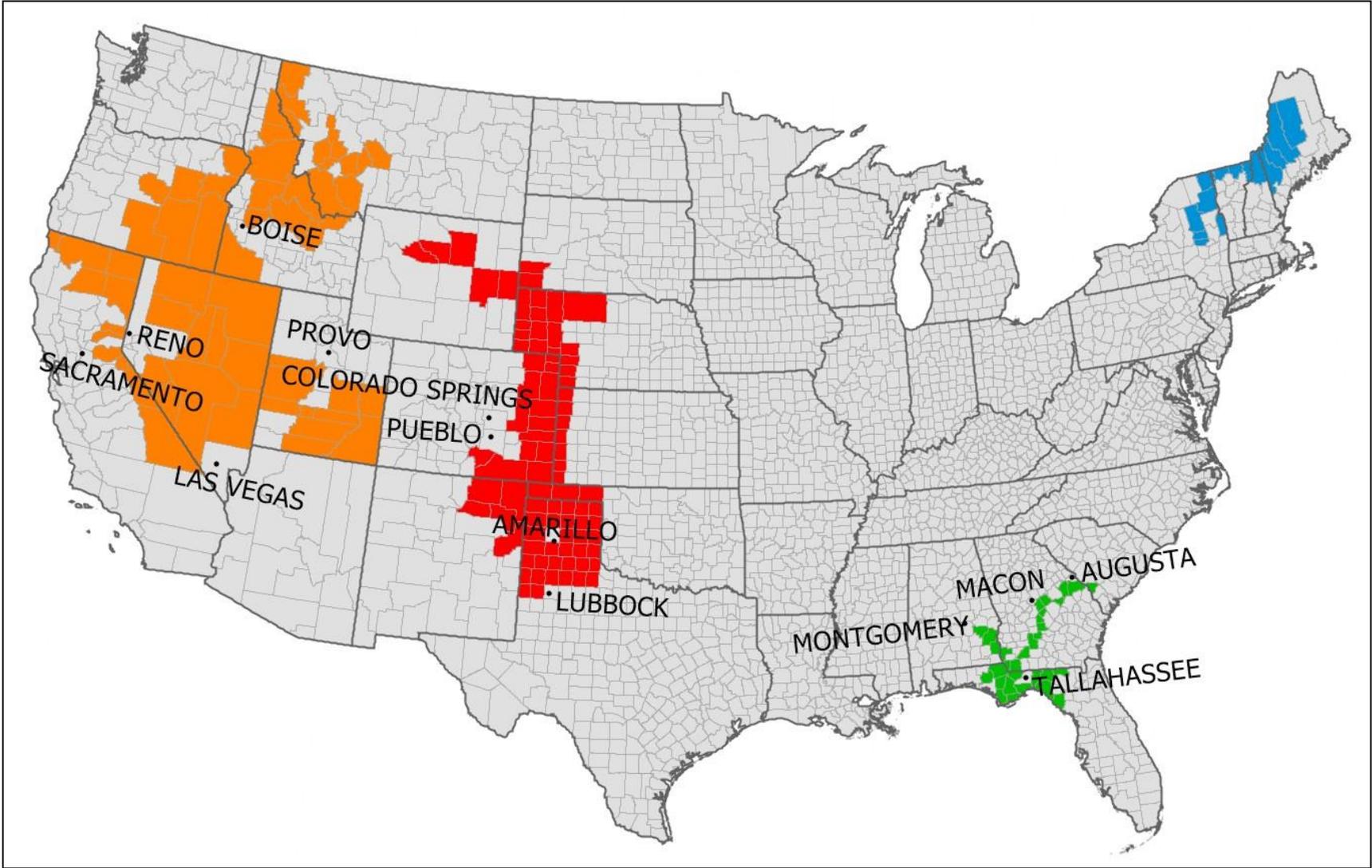


Figure 5: NCUA's Hypothetical Rural Districts Under the Prior Rule Avoid All Cities With Populations of 100,000+

NCUA has not pointed to any similar fields of membership actually approved under its prior rule. By contrast, under the new Rule, NCUA has approved several fields of membership the size of entire states or larger that incorporate multiple cities. *See supra* at 54–60.

NCUA attempted to justify its expansion of the limits on rural districts based on a desire to “‘provide a level of operating efficiencies and scale’ that would ‘make the area attractive as a strategic option.’” NCUA Br. 32 (quoting JA168). But Congress adopted a specific exception for “underserved areas” that is limited to multiple common-bond credit unions. *See* 12 U.S.C. § 1759(b)(2). “[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. Moreover, NCUA cannot plausibly argue that credit unions are unable to serve smaller rural areas, because community banks do so without a sweeping tax exemption. The FDIC reports that, in 2011, 46% of community banks operated in only one county, and 82%—more than 5,200 community banks—operated in three counties or fewer.⁴⁷ NCUA itself

⁴⁷ *See* FDIC, *Geography of Community Banks* (Dec. 2012) 3–4, <https://www.fdic.gov/regulations/resources/cbi/report/cbsi-3.pdf>. FDIC continues to rely on this report. *See, e.g.*, FDIC, *Community Bank Performance* (Sep. 2018), <https://www.fdic.gov/bank/analytical/qbp/2018sep/qbpcb.html>.

has described the benefits of smaller credit unions that are tailored to specific community needs.⁴⁸

For all these reasons, the Final Rule's expanded definition of a single "rural district is unreasonable.

IV. NCUA's Decision To Permit Credit Unions Serving A Core-Based Statistical Area To Deny Service To The Community's Urban Core Is Unreasonable.

When NCUA first defined Core-Based Statistical Areas as single local communities, it required credit unions to serve residents in the urban core of the community. JA165. The Final Rule eliminates this requirement, and permits credit unions to define as their service area *any* portion of a Core-Based Statistical Area containing up to 2.5 million people—even if the urban core is excluded. *See* JA192. NCUA's decision departs from the reasonable meaning of "a well-defined local community." It is also arbitrary and capricious, because it effectively allows credit unions to engage in "redlining" by denying service to urban areas with large numbers of minority and lower-income residents.

A. The Rule Departs From The Reasonable Meaning Of A Single "Local Community."

Core-Based Statistical Areas are defined by reference to commuting ties with the "core," *i.e.*, the most populated city or county in the area. 65 Fed. Reg. 82,228,

⁴⁸ *See* NCUA, *Small Credit Unions' Success Stories Highlighted in New NCUA Video* (Feb. 2014), <https://web.archive.org/web/20180802142920/https://www.ncua.gov/newsroom/Pages/NW20140212Video.aspx>.

82,238 (Dec. 27, 2000). By definition, outlying suburbs are included in a Core-Based Statistical Area solely because they have a commuting connection to the urban core; they need have no direct interaction with each other. *Id.* at 82,228–29, 82,238. Indeed, Core-Based Statistical Areas may contain “isolated rural communities” and outlying communities separated “by large distances or difficult terrain.” *Id.* at 82,229.

Yet the Final Rule deems *any* portion of *any* Core-Based Statistical Area containing up to 2.5 million people—including a portion that excludes the urban core—as a single local community. The Final Rule thus permits credit unions to serve multiple outlying communities that are separated by large distances and isolated from each other.⁴⁹

Under the Final Rule, credit unions are not required to serve counties in the Core-Based Statistical Area on an all-or-nothing basis. Instead, they are free to pick and choose the areas they wish to serve. Because Core-Based Statistical Areas are defined based on county-wide commuting ties with the urban core, there is no assurance of any level of interaction between an arbitrary *portion* of a county and

⁴⁹ NCUA asserts (Br. 18) that “[n]o one would . . . contest that the agency has authority to define “local community to include Core Based Statistical Areas.” That is incorrect. ABA contested this point in comments filed with the agency. *See* ABA Comment (Feb. 19, 2010), https://www.aba.com/archive/Comment_Letter_Archive/Comment%20Letter%20Archive/cl-NCUACharteringManual20100219.pdf. And the district court viewed this definition as “jarring, to say the least.” JA342.

the urban core. As OMB has noted, this level of interaction can vary widely. *See* 65 Fed. Reg. at 82,229. The Final Rule thus allows credit unions to serve multiple communities that do not interact with an (excluded) urban core, let alone with each other.

The problem is even worse for Core-Based Statistical Areas that contain more than 2.5 million people. Because these Core-Based Statistical Areas exceed NCUA's (current) population cap, NCUA has not determined that the Core-Based Statistical Area as a whole constitutes one local community. Consequently, there is no basis for asserting that any portion of a large Core-Based Statistical Area is part of one local community. Yet the Rule automatically deems portions of the largest Core-Based Statistical Areas as single local communities. JA340.

For example, the Washington-Arlington-Alexandria Core-Based Statistical Area, with a total population of 6.1 million, covers the District of Columbia, large areas of Maryland and Northern Virginia, and a county in West Virginia, as pictured on the following page.

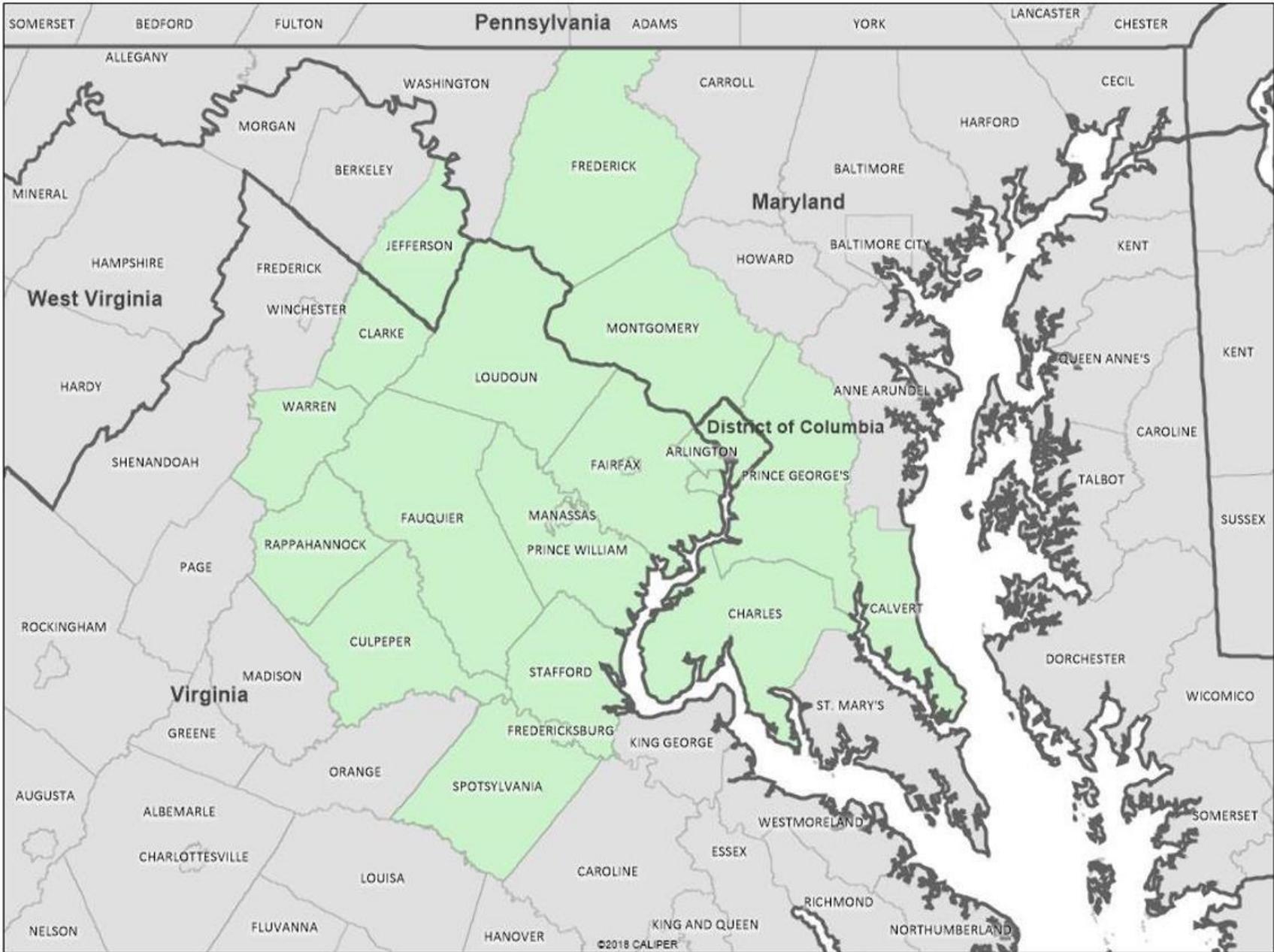


Figure 6: Washington–Arlington–Alexandria Core-Based Statistical Area

By definition, each county in the Core-Based Statistical Area has a commuting relationship with the District of Columbia. Once the District is eliminated from the service area, however, there is no assurance that the credit union serves one local community. A credit union could define its field of membership to include Frederick, Maryland and Fredericksburg, Virginia, connected by a thin strip of highway, even though Frederick and Fredericksburg have little, if anything, in common beyond the similarity of their names.

As another example, consider a 2.5-million-person portion of the New York-Newark-Jersey City Core-Based Statistical Area pictured on the following page with red cross-hatching.⁵⁰ It is unreasonable to define this assortment of counties, stretching from Staten Island to New Jersey to Pike County, Pennsylvania in the Poconos to New York's Hudson Valley as one "local community."

For these reasons, NCUA's determination that *any* 2.5-million portion of *any* Core-Based Statistical Area is a single local community, even if the urban core is excluded, is unreasonable.

⁵⁰ See U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/> (adding 2010 Census population of counties with red cross-hatching). The counties with red cross-hatching are all contained within the New York–Newark–Jersey City Core-Based Statistical Area. See OMB Bull. No. 15-01, *supra* note 14, at 43.

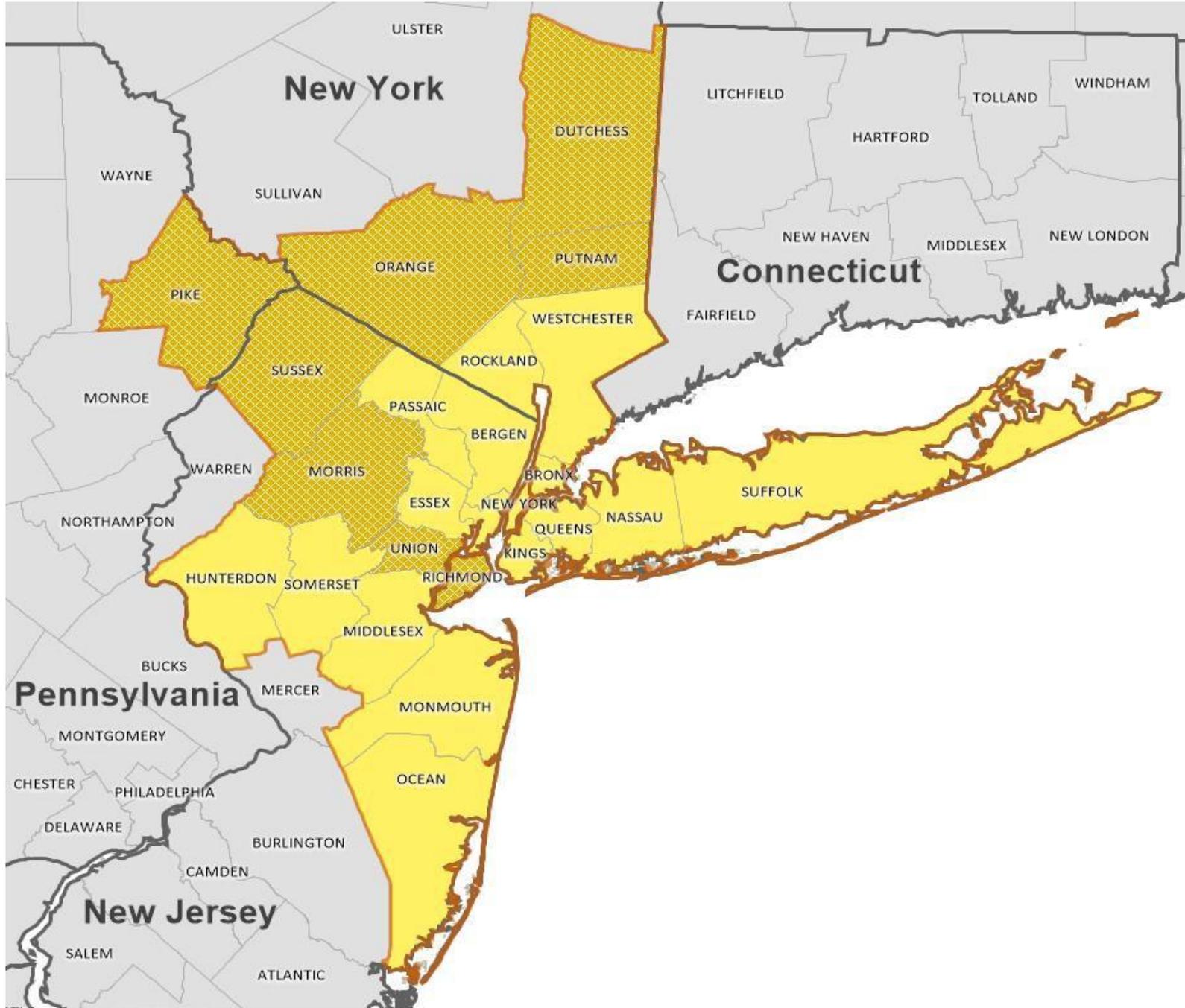


Figure 7: New York–Newark–Jersey City Core-Based Statistical Area

B. NCUA's Rule Is Arbitrary And Capricious Because It Effectively Permits Redlining.

Credit unions are charged with a special mission to serve people of “modest means.” *See supra* at 4. The Final Rule nevertheless permits community credit unions to serve only the most affluent parts of the community, denying service to the urban core that is home to a disproportionate number of persons of modest means and minority residents. The Final Rule thus effectively authorizes credit unions to engage in “redlining,” which is the practice of “intentionally not lending to certain neighborhoods or parts of a community.” *Crawford v. Signet Bank*, 179 F.3d 926, 928 n.4 (D.C. Cir. 1999).

Credit unions, unlike all other federally-insured financial institutions, are not subject to the Community Reinvestment Act, 12 U.S.C. § 2901 *et seq.*, which requires financial institutions help meet the needs of borrowers in all segments of their communities, including low- and moderate-income neighborhoods. Thus, responsibility for ensuring that credit unions fulfill their special mission of serving people of modest means thus rests with NCUA. It is shocking that NCUA would authorize credit unions to engage in a practice that is illegal for other financial

institutions, even those without a special mission of lending to persons of modest means.⁵¹

For example, the Cleveland–Elyria, Ohio Core-Based Statistical Area includes a less-affluent urban core and more-affluent suburban areas. Under the Rule, NCUA will automatically grant a community charter to a credit union seeking to serve the eastern suburb of South Russell, which has a median household income of \$104,219 and a 100% white population,⁵² and the western suburb of Avon, which has a median household income of \$92,883 and an 86% white population,⁵³ while simultaneously excluding the Cleveland city center, where the median household income is \$28,297 and the population is one-third white, 48% black, and 12% Hispanic.⁵⁴

NCUA justified its decision to allow credit unions to refuse to serve the urban core of the community on the ground that credit unions must submit a business plan showing that they are able to serve their proposed service area. JA130–31, 153–54.

⁵¹ If any other federally-insured financial institution were to refuse to serve residents of a lower-income urban area, their action would very likely be challenged. *See, e.g., United States v. Old Kent Fin. Corp.*, No. 04-71879, 2004 WL 1157779, at *1 (E.D. Mich. May 19, 2004); *United States v. Union Savings Bank*, No. 1:16-cv-1172 (S.D. Ohio Dec. 28, 2016), ECF No. 1 at 2.

⁵² *See* Census Reporter, *South Russell, OH*, <https://censusreporter.org/profiles/16000US3973684-south-russell-oh/>.

⁵³ *See* Census Reporter, *Avon, OH*, <https://censusreporter.org/profiles/16000US3903352-avon-oh/>.

⁵⁴ *See* Census Reporter, *Cleveland, OH*, <https://censusreporter.org/profiles/16000US3916000-cleveland-oh/>.

But even the best plan to serve residents of the affluent suburbs is no help to residents of the urban core, who are excluded from the credit union's service area and thus left out of the business plan.

NCUA also concluded that credit unions could be excused from serving inner-city residents because they are fulfilling their mission of serving people of modest means. JA166. The evidence is to the contrary. The Government Accountability Office has determined that “credit unions lag[] behind banks in serving low- and moderate-income households.” GAO-07-29 at 1. Only about 31% of credit unions customers are of “modest means,” as compared to 41% of bank customers. *Id.* at 27. Credit unions also provide fewer “mortgages to low-and moderate-income households than banks—27% compared with 34%—of comparable asset size.” GAO-04-91 at 5. NCUA does not dispute these facts, and it did not explain how they are consistent with the conclusion that credit unions are fulfilling their special mission. *See Motor Vehicle Mfrs Ass'n*, 463 U.S. at 43 (agency rule is arbitrary and capricious if the agency explanation “runs counter to the evidence before the agency”).

Moreover, banks and other financial institutions may not refuse to lend to residents of less-affluent areas on the ground that other lenders are willing to make loans in these areas. Yet remarkably, NCUA adopted a blanket rule that allows credit unions to deny service to urban parts of their community without any

particularized showing that the credit needs of lower-income people in these areas are being met.

In short, NCUA failed to provide an adequate basis for its determination that any 2.5-million person portion of Core-Based Statistical Area, excluding the urban core, constitutes a single local community. That determination is also arbitrary and capricious because it effectively authorizes community credit unions to engage in government-sanctioned redlining. Thus, this provision of the Rule must be vacated.

CONCLUSION

The judgment of the district court should be affirmed, except that the portion of the judgment upholding the provision of the Final Rule that permits a credit union serving a community defined as a Core-Based Statistical Area to refuse to serve residents of the urban core should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this Corrected Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e) because it contains 15,212 words, excluding the portions of the Corrected Brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). This Corrected Brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font.

January 23, 2019

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

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STATUTES

12 U.S.C. § 1751 note.

Pub. L. 105–219, § 2, Aug. 7, 1998, 112 Stat. 913, codified at 12 U.S.C. § 1751 note, provides:

The Congress finds the following:

- (1) The American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of modest means.
- (2) Credit unions continue to fulfill this public purpose, and current members and membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action.
- (3) To promote thrift and credit extension, a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity is essential to the fulfillment of the public mission of credit unions.
- (4) Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.
- (5) Improved credit union safety and soundness provisions will enhance the public benefit that citizens receive from these cooperative financial services institutions.

12 U.S.C. § 1759. Membership.

(a) In general

Subject to subsection (b), Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

(b) Membership field

Subject to the other provisions of this section, the membership of any Federal credit union shall be limited to the membership described in one of the following categories:

(1) Single common-bond credit union

One group that has a common bond of occupation or association.

(2) Multiple common-bond credit union

More than one group—

(A) each of which has (within the group) a common bond of occupation or association; and

(B) the number of members, each of which (at the time the group is first included within the field of membership of a credit union described in this paragraph) does not exceed any numerical limitation applicable under subsection (d).

(3) Community credit union

Persons or organizations within a well-defined local community, neighborhood, or rural district.

(c) Exceptions**(1) Grandfathered members and groups**

(A) In general.

Notwithstanding subsection (b)—

(i) any person or organization that is a member of any Federal credit union as of August 7, 1998, may remain a member of the credit union after August 7, 1998; and

(ii) a member of any group whose members constituted a portion of the membership of any Federal credit union as of August 7, 1998, shall continue to be eligible to become a member of that credit union, by virtue of membership in that group, after August 7, 1998.

(B) Successors

If the common bond of any group referred to in subparagraph (A) is defined by any particular organization or business entity, subparagraph (A) shall continue to apply with respect to any successor to the organization or entity.

(2) Exception for underserved areas

Notwithstanding subsection (b), in the case of a Federal credit union, the field of membership category of which is described in subsection (b)(2), the Board may allow the membership of the credit union to include any person or organization within a local community, neighborhood, or rural district if—

(A) the Board determines that the local community, neighborhood, or rural district—

(i) is an “investment area”, as defined in section 4702(16) of this title, and meets such additional requirements as the Board may impose; and

(ii) is underserved, based on data of the Board and the Federal banking agencies (as defined in section 1813 of this title), by

other depository institutions (as defined in section 461(b)(1)(A) of this title); and

(B) the credit union establishes and maintains an office or facility in the local community, neighborhood, or rural district at which credit union services are available.

(d) Multiple common-bond credit union group requirements

(1) Numerical limitation

Except as provided in paragraph (2), only a group with fewer than 3,000 members shall be eligible to be included in the field of membership category of a credit union described in subsection (b)(2).

(2) Exceptions

In the case of any Federal credit union, the field of membership category of which is described in subsection (b)(2), the numerical limitation in paragraph (1) of this subsection shall not apply with respect to—

(A) any group that the Board determines, in writing and in accordance with the guidelines and regulations issued under paragraph (3), could not feasibly or reasonably establish a new single common-bond credit union, the field of membership category of which is described in subsection (b)(1) because—

(i) the group lacks sufficient volunteer and other resources to support the efficient and effective operation of a credit union;

(ii) the group does not meet the criteria that the Board has determined to be important for the likelihood of success in establishing and managing a new credit union, including demographic characteristics such as geographical location of members, diversity of ages and income levels, and other factors that may affect the financial viability and stability of a credit union; or

(iii) the group would be unlikely to operate a safe and sound credit union;

(B) any group transferred from another credit union—

(i) in connection with a merger or consolidation recommended by the Board or any appropriate State credit union supervisor based on safety and soundness concerns with respect to that other credit union; or

(ii) by the Board in the Board's capacity as conservator or liquidating agent with respect to that other credit union; or

(C) any group transferred in connection with a voluntary merger, having received conditional approval by the Administration of the merger application prior to October 25, 1996, but not having consummated the merger prior to October 25, 1996, if the merger is consummated not later than 180 days after August 7, 1998.

(3) Regulations and guidelines

The Board shall issue guidelines or regulations, after notice and opportunity for comment, setting forth the criteria that the Board will apply in determining under this subsection whether or not an additional group may be included within the field of membership category of an existing credit union described in subsection (b)(2).

(e) Additional membership eligibility provisions

(1) Membership eligibility limited to immediate family or household members

No individual shall be eligible for membership in a credit union on the basis of the relationship of the individual to another person who is eligible for membership in the credit union, unless the individual is a member of the immediate family or household (as those terms are defined by the Board, by regulation) of the other person.

(2) Retention of membership

Except as provided in section 1764 of this title, once a person becomes a member of a credit union in accordance with this subchapter, that person or organization may remain a member of that credit union until the person or organization chooses to withdraw from the membership of the credit union.

(f) Criteria for approval of expansion of multiple common-bond credit unions

(1) In general

The Board shall—

(A) encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union; and

(B) if the formation of a separate credit union by the group is not practicable or consistent with the standards referred to in subparagraph (A), require the inclusion of the group in the field of membership of a credit union that is within reasonable proximity to the location of the group whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union.

(2) Approval criteria

The Board may not approve any application by a Federal credit union, the field of membership category of which is described in subsection (b)(2) to include any additional group within the field of membership of the credit union (or an application by a Federal credit union described in subsection (b)(1) to include an additional group and become a credit union described in subsection (b)(2)), unless the Board determines, in writing, that—

(A) the credit union has not engaged in any unsafe or unsound practice (as defined in section 1786(b) of this title) that is material during the 1-year period preceding the date of filing of the application;

(B) the credit union is adequately capitalized;

(C) the credit union has the administrative capability to serve the proposed membership group and the financial resources to meet the need for additional staff and assets to serve the new membership group;

(D) any potential harm that the expansion of the field of membership of the credit union may have on any other insured credit union and its members is clearly outweighed in the public interest by the probable beneficial effect of the expansion in meeting the convenience and

needs of the members of the group proposed to be included in the field of membership; and

(E) the credit union has met such additional requirements as the Board may prescribe, by regulation.

(g) Regulations required for community credit unions

(1) Definition of well-defined local community, neighborhood, or rural district

The Board shall prescribe, by regulation, a definition for the term “well-defined local community, neighborhood, or rural district” for purposes of—

(A) making any determination with regard to the field of membership of a credit union described in subsection (b)(3); and

(B) establishing the criteria applicable with respect to any such determination.

(2) Scope of application

The definition prescribed by the Board under paragraph (1) shall apply with respect to any application to form a new credit union, or to alter or expand the field of membership of an existing credit union, that is filed with the Board after August 7, 1998.

12 U.S.C. § 1768.

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

REGULATIONS

63 Fed. Reg. 71,998 (Dec. 30, 1998), excerpts from 72,012, 72,037–39.

NCUA Board Analysis and Decision on Community Charters. CUMAA modified NCUA's community chartering policy. It requires that a community charter be based on "a well-defined local community, neighborhood, or rural district." Although Congress did not provide specific guidance on what constituted a "local community, neighborhood or rural district," the Board concluded that the addition of the word "local" to the previous statutory language was intended as a limiting factor and that additional clarification was required relative to what would qualify as a community charter. The Board further concluded that a more circumspect and restricted approach to chartering community credit unions appeared to be the congressional intent. Accordingly, recognizing that "local" was a limiting factor, NCUA staff reviewed those community charter applications approved by the Board in the last three years in an effort to more narrowly define what will constitute a community charter based not only on operational feasibility, but also historical data that tended to support whether a particular well-defined area would qualify as a local community, neighborhood or rural district.

Although the proposal did not completely define interaction or common interests, the Board stated that in determining interaction and/or common interests, a number of factors, are relevant. The Board continues to believe those factors remain valid. These factors are limiting in the sense that they clearly require a community charter applicant proposing to serve multiple trade areas, etc., to demonstrate more definitively how it meets the local requirement. The Board believes that increased documentation requirements need to be met when either the geographic size or the population of the area is large.

The Board stated that, in general, a large population in a small geographic area or a small population in a large geographic area, may meet community chartering requirements. Conversely, the Board stated that a large population in a large geographic area will not normally meet community chartering requirements. In so doing, however, the Board has not summarily dismissed or prejudged any potential application. While an area with a large population may require additional documentation, it still may meet the definition of a local community. Similarly, multiple counties, particularly in rural areas, may qualify for a community charter.

* * *

V—Community Charter Requirements

V.A. 1—General

Community charters must be based on “a well-defined local community, neighborhood, or rural district.” NCUA policy is to limit the community to a single, geographically well-defined area where individuals have common interests or interact.

NCUA recognizes four types of affinity on which a community charter can be based—persons who live in, worship in, attend school in, or work in the community. Businesses and other legal entities within the community boundaries may also qualify for membership. More than one credit union may serve the same community. Given the diversity of community characteristics throughout the country and NCUA's goal of making credit union service available to all eligible groups who wish to have it, NCUA has established the following requirements for community charters:

- The geographic area's boundaries must be clearly defined;
- The charter applicant must establish that the area is a “well-defined local, community, neighborhood, or rural district;” and
- The residents must have common interests or interact.

V.A.2—Documentation Requirements

In addition to the documentation requirements set forth in Chapter 1 to charter a credit union, a community credit union applicant must provide special documentation addressing the proposed area to be served and community service policies.

A community credit union is unique in that it must meet the statutory requirements that the proposed community area is (1) well-defined, and (2) a local community, neighborhood, or rural district.

“Well-defined” means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (or its political equivalent), or clearly identifiable neighborhood. Although congressional districts or other political boundaries which are subject to occasional change, and state boundaries are well-defined areas, they do not meet the second requirement that the proposed area be a local community, neighborhood, or rural district.

The meaning of local community, neighborhood, or rural district includes a variety of factors. Most prominent is the requirement that the residents of the proposed community area interact or have common interests. In determining interaction and/or common interests, a number of factors become relevant. For example, the existence of a single major trade area, shared governmental or civic facilities, or area newspaper is significant evidence of community interaction and/or common interests. Conversely, numerous trade areas, multiple taxing authorities, and multiple political jurisdictions, tend to diminish the characteristics of a local area.

Population and geographic size are also significant factors in determining whether the area is local in nature. A large population in a small geographic area or a small population in a large geographic area, may meet NCUA community chartering requirements. For example, an ethnic neighborhood, a rural area, a city, and a county with 300,000 or less residents will generally have sufficient interaction and/or common interests to meet community charter requirements. While this may most often be true, it does not preclude community charters consisting of multiple counties or local areas with populations of any size from meeting community charter requirements.

Conversely, a larger population in a large geographic area may not meet NCUA community chartering requirements. It is more difficult for a major metropolitan city, a densely populated county, or an area covering multiple counties with significant population to have sufficient interaction and/or common interests, and to therefore demonstrate that these areas meet the requirement of being “local.” In such cases, documentation supporting the interaction and/or common interests will be greater than the evidence necessary for a smaller and less densely populated area.

In most cases, the “well-defined local community, neighborhood, or rural district” requirement will be met if (1) the area to be served is in a recognized single political jurisdiction, i.e., a county or its political equivalent or any contiguous political subdivisions contained therein, and if the population of the requested well-defined area does not exceed 300,000, or (2) the area to be served is in multiple contiguous political jurisdictions, i.e. a county or its political equivalent or any political subdivisions contained therein and if the population of the requested well-defined area does not exceed 200,000. If the proposed area meets either of these this criteria, the credit union must only submit a letter describing how the area meets the standards for community interaction or common interests.

If NCUA does not find sufficient evidence of community interaction or common interests, more detailed documentation will be necessary to support that the proposed area is a well-defined community. The credit union must also provide evidence of the political jurisdiction(s) and population. Evidence of the political jurisdiction(s) should include maps designating the area to be served. One map must be a regional or state map with the proposed community outlined. The other map must outline the proposed community and the identifying geographic characteristics of the surrounding areas.

If the area to be served does not meet the political jurisdiction(s) and population requirements of the preceding paragraph, or if required by NCUA, the application must include documentation to support that it is a well-defined local community, neighborhood, or rural district. It is the applicant's responsibility to demonstrate the relevance of the documentation provided in support of the application. This must be provided in a narrative summary. The narrative summary must explain how the documentation demonstrates interaction or common interests. For example, simply listing newspapers and organizations in the area is not sufficient to demonstrate that the area is a local community, neighborhood, or rural district.

Examples of acceptable documentation may include:

- The defined political jurisdictions;
- Major trade areas (shopping patterns and traffic flows);
- Shared/common facilities (for example, educational, medical, police and fire protection, school district, water, etc.);
- Organizations and clubs within the community area;
- Newspapers or other periodicals published for and about the area;
- Maps designating the area to be served. One map must be a regional or state map with the proposed community outlined. The other map must outline the proposed community and the identifying geographic characteristics of the surrounding areas;
- Common characteristics and background of residents (for example, income, religious beliefs, primary ethnic groups, similarity of occupations, household types, primary age group, etc.); or
- Other documentation that demonstrates that the area is a community where individuals have common interests or interact.

A community credit union is frequently more susceptible to competition from other local financial institutions and generally does not have substantial support from any single sponsoring company or association. As a result, a community credit union will often encounter financial and operational factors that differ from an occupational or associational charter. Its diverse membership may require special marketing programs targeted to different segments of the community. For example, the lack of payroll deduction creates special challenges in the development of savings promotional programs and in the collection of loans.

Accordingly, it is essential for the proposed community credit union to develop a detailed and practical business and marketing plan for at least the first two years of operation. The proposed credit union must not only address the documentation requirements set forth in Chapter 1, but also focus on the accomplishment of the unique financial and operational factors of a community charter.

Community credit unions will be expected to regularly review and to follow, to the fullest extent economically possible, the marketing and business plan submitted with their application.

* * *

V.A.6—Sample Community Fields of Membership

A community charter does not have to include all four affinities (i.e., live, work, worship, or attend school in a community). Some examples of community fields of membership are:

- Persons who live, work, worship, or attend school in, and businesses located in the area of Johnson City, Tennessee, bounded by Fern Street on the north, Long Street on the east, Fourth Street on the south, and Elm Avenue on the west;
- Persons who live or work in Green County, Maine;
- Persons who live, worship, or work in and businesses and other legal entities located in Independent School District No. 1, DuPage County, Illinois;
- Persons who live, worship, work, or attend school at the University of Dayton, in Dayton, Ohio; or
- Persons who work for businesses located in Clifton Country Mall, in Clifton Park, New York.

Some examples of insufficiently defined community field of membership definitions are:

- Persons who live or work within and businesses located within a ten mile radius of Washington, DC (using a radius does not establish a well-defined area); or
- Persons who live or work in the industrial section of New York, New York (not a well-defined neighborhood, community, or rural district).

Some examples of unacceptable local communities, neighborhoods, or rural districts are:

- Persons who live or work in the Greater Boston Metropolitan Area (does not meet the definition of local community, neighborhood, or rural district).
- Persons who live or work in the State of California (does not meet the definition of local community, neighborhood, or rural district).

65 Fed. Reg. 82,228 (Dec. 27, 2000), excerpt from 82,228–38.*1. Concept and Uses*

The general concept of a Metropolitan Statistical Area or a Micropolitan Statistical Area is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus. The purpose of the Standards for Defining Metropolitan and Micropolitan Statistical Areas is to provide nationally consistent definitions for collecting, tabulating, and publishing Federal statistics for a set of geographic areas. To this end, the Metropolitan Area concept has been successful as a statistical representation of the social and economic linkages between urban cores and outlying, integrated areas. This success is evident in the continued use and application of Metropolitan Area definitions across broad areas of data collection, presentation, and analysis. This success also is evident in the use of statistics for Metropolitan Areas to inform the debate and development of public policies and in the use of Metropolitan Area definitions to implement and administer a variety of nonstatistical Federal programs. These last uses, however, raise concerns about the distinction between appropriate uses—collecting, tabulating, and publishing statistics as well as informing policy—and inappropriate uses—implementing nonstatistical programs and determining program eligibility. OMB establishes and maintains these areas solely for statistical purposes.

In order to preserve the integrity of its decision making with respect to reviewing and revising the standards for designating areas, OMB believes that it should not attempt to take into account or anticipate any public or private sector nonstatistical uses that may be made of the definitions. It cautions that Metropolitan Statistical Area and Micropolitan Statistical Area definitions should not be used to develop and implement Federal, state, and local nonstatistical programs and policies without full consideration of the effects of using these definitions for such purposes.

Metropolitan and Micropolitan Statistical Areas—collectively called Core Based Statistical Areas (CBSAs)—should not serve as a general purpose geographic framework for nonstatistical activities and may or may not be suitable for use in program funding formulas. The Metropolitan and Micropolitan Statistical Area Standards do not equate to an urban-rural classification; all counties included in Metropolitan and Micropolitan Statistical Areas and many other counties contain both urban and rural territory and populations. Programs that base funding levels or eligibility on whether a county is included in a

Metropolitan or Micropolitan Statistical Area may not accurately address issues or problems faced by local populations, organizations, institutions, or governmental units. For instance, programs that seek to strengthen rural economies by focusing solely on counties located outside Metropolitan Statistical Areas could ignore a predominantly rural county that is included in a Metropolitan Statistical Area because a high percentage of the county's residents commute to urban centers for work. Although the inclusion of such a county in a Metropolitan Statistical Area indicates the existence of economic ties, as measured by commuting, with the central counties of that Metropolitan Statistical Area, it may also indicate a need to provide programs that would strengthen the county's rural economy so that workers are not compelled to leave the county in search of jobs.

Program designs that treat all parts of a CBSA as if they were as urban as the densely settled core ignore the rural conditions that may exist in some parts of the area. Under such programs, schools, hospitals, businesses, and communities that are separated from the urban core by large distances or difficult terrain may experience the same kinds of challenges as their counterparts in rural portions of counties that are outside CBSAs. Although some programs do permit large Metropolitan Area counties to be split into "urban" and "rural" portions, smaller Metropolitan Area counties also can contain isolated rural communities.

Geographic information systems technology has progressed significantly over the past 10 years, making it practical for government agencies and organizations to assess needs and implement appropriate programs at a local geographic scale when appropriate. OMB urges agencies, organizations, and policy makers to review carefully the goals of nonstatistical programs and policies to ensure that appropriate geographic entities are used to determine eligibility for and the allocation of Federal funds.

* * *

Section 12. Definitions of Key Terms

* * *

Core.—A densely settled concentration of population, comprising either an urbanized area (of 50,000 or more population) or an urban cluster (of 10,000 to 49,999 population) defined by the Census Bureau, around which a Core Based Statistical Area is defined.

Core Based Statistical Area (CBSA).—A statistical geographic entity consisting of the county or counties associated with at least one core (urbanized area or urban cluster) of at least 10,000 population, plus adjacent counties having a high degree of social and economic integration with the core as measured through commuting ties with the counties containing the core. Metropolitan and Micropolitan Statistical Areas are the two categories of Core Based Statistical Areas.

68 Fed. Reg. 18,334 (Apr. 15, 2003), excerpt from 18,357.

V—Community Charter Requirements

* * *

V.A. 2—Documentation Requirements

In addition to the documentation requirements set forth in Chapter 1 to charter a credit union, a community credit union applicant must provide additional documentation addressing the proposed area to be served and community service policies.

A community credit union must meet the statutory requirements that the proposed community area is (1) well-defined, and (2) a local community, neighborhood, or rural district.

“Well-defined” means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (or its political equivalent), or a clearly identifiable neighborhood. Although congressional districts and state boundaries are well-defined areas, they do not meet the requirement that the proposed area be a local community.

The well-defined local community, neighborhood, or rural district requirement *is met* if:

- The area to be served is in a recognized single political jurisdiction, *i.e.*, a city, county, or their political equivalent, or any contiguous portion thereof.

The well-defined local community, neighborhood, or rural district requirement *may be met* if:

- The area to be served is in multiple contiguous political jurisdictions, *i.e.*, a city, county, or their political equivalent, or any contiguous portion thereof and if the population of the requested well-defined area does not exceed 500,000; or
- The area to be served is a Metropolitan Statistical Area (MSA) or its equivalent, or a portion thereof, where the population of the MSA or its equivalent does not exceed 1,000,000.

If the proposed area meets either the multiple political jurisdiction or MSA criteria, the credit union must submit a letter describing how the area meets the standards for community interaction and/or common interests.

75 Fed. Reg. 36,257 (June 25, 2010), excerpts from 36,258–64.

These examples are helpful but the Board's experience is that very often in situations involving multiple jurisdictions, where it has determined that a WDLC exists, interaction or common interests are evidenced by a major trade area that is an economic hub, usually a dominant city, county or equivalent, containing a significant portion of the area's employment and population. This central core often acts as a nucleus drawing a sufficiently large critical mass of area residents into the core area for employment and other social activities such as entertainment, shopping, and educational pursuits. By providing jobs to residents from outside the dominant core area, it also provides income that then generates further interaction both in the hub and in outlying areas as those individuals spend their earnings for a wide variety of purposes in outlying counties where they live. This commonality through interaction and/or shared common interests in connection with an economic hub is conducive to a credit union's success and supports a finding that such an area is a local community.

* * *

Certain areas, however, do not have one dominant economic hub, but rather may contain two or more dominant hubs. These situations diminish the persuasiveness of the evidence and make it inappropriate to automatically conclude that they qualify as WDLCs.

* * *

V.A.2—Definition of Well-Defined Local Community and Rural District

In addition to the documentation requirements in Chapter 1 to charter a credit union, a community credit union applicant must provide additional documentation addressing the proposed area to be served and community service policies.

An applicant has the burden of demonstrating to NCUA that the proposed community area meets the statutory requirements of being: (1) well-defined, and (2) a local community or rural district.

“Well-defined” means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (single, multiple, or portions of a county) or their political equivalent, school districts, or a clearly identifiable neighborhood. Although congressional districts and state boundaries

are well-defined areas, they do not meet the requirement that the proposed area be a local community or rural district.

The well-defined local community requirement is met if:

- Single Political Jurisdiction—The area to be served is in a recognized single political jurisdiction, *i.e.*, a city, county, or their political equivalent, or any contiguous portion thereof.
- Statistical Area—
 - The area is a designated Core Based Statistical Area (CBSA) or allowing part thereof, or in the case of a CBSA with Metropolitan Divisions, the area is a Metropolitan Division or part thereof; and
 - The CBSA or Metropolitan Division must have a population of 2.5 million or less people.

The rural district requirement is met if:

- Rural District—
 - The district has well-defined, contiguous geographic boundaries;
 - More than 50% of the district's population resides in census blocks or other geographic areas that are designated as rural by the United States Census Bureau; and
 - The total population of the district does not exceed 200,000 people; *or*
 - The district has well-defined, contiguous geographic boundaries;
 - The district does not have a population density in excess of 100 people per square mile; and
 - The total population of the district does not exceed 200,000 people.

The affinities that apply to rural districts are the same as those that apply to well defined local communities. The OMB definitions of CBSA and Metropolitan Division may be found at 65 FR82238 (Dec. 27, 2000). They are incorporated herein by reference. Access to these definitions is available through the main page of the Federal Register Web site at [http:// www.gpoaccess.gov/fr/index.html](http://www.gpoaccess.gov/fr/index.html) and on NCUA's Web site at <http://www.ncua.gov>.

The requirements in Chapter 2, Sections V.A.4 through V.G. also apply to a credit union that serves a rural district.

75 Fed. Reg. 37,246 (June 28, 2010), excerpts from 37,248–51.*1. Recommendations Concerning Combined Statistical Areas*

* * *

The 2000 standards provided for combined statistical areas to recognize ties between contiguous metropolitan and/or micropolitan statistical areas that are less intense than those captured by mergers, but still significant. (Mergers occur when adjacent CBSAs become a single CBSA because the central county or counties (as a group) of one CBSA qualify as outlying to the central county or counties (as a group) of the other CBSA.) These combinations were based on the employment interchange measure between two CBSAs, defined as the sum of the percentage of commuting from the smaller area to the larger area and the percentage of employment in the smaller area accounted for by workers residing in the larger area.

* * *

Section 3. Outlying Counties

A county qualifies as an outlying county of a CBSA if it meets the following commuting requirements:

- (a) At least 25 percent of the workers living in the county work in the central county or counties of the CBSA; or
- (b) At least 25 percent of the employment in the county is accounted for by workers who reside in the central county or counties of the CBSA.

A county may be included in only one CBSA. If a county qualifies as a central county of one CBSA and as outlying in another, it falls within the CBSA in which it is a central county. A county that qualifies as outlying to multiple CBSAs falls within the CBSA with which it has the strongest commuting tie, as measured by either 3(a) or 3(b) above. The counties included in a CBSA must be contiguous; if a county is not contiguous with other counties in the CBSA, it will not fall within the CBSA.

Section 11. Definitions of Key Terms

* * *

Combined Statistical Area—A geographic entity consisting of two or more adjacent Core Based Statistical Areas with employment interchange measures of at least 15.

78 Fed. Reg. 13,460 (Feb. 28, 2013), excerpts from 13,461–63.

C. How is the final rule different from the proposed rule?

The proposal would have allowed rural districts of up to 200,000 people or three percent of a state's population, whichever is greater. As discussed in more detail below, the final rule allows rural districts of up to 250,000 people or three percent of a state's population, whichever is greater.

* * *

V.A.2—Definition of Well-Defined Local Community and Rural District

The rural district requirement is met if:

- Rural District—
 - The district has well-defined, contiguous geographic boundaries;
 - More than 50% of the district's population resides in census blocks or other geographic areas that are designated as rural by the United State Census Bureau; and
 - The total population of the district does not exceed the greater of 250,000 people or three percent of the population of the state in which the majority of the district is located; *or*
 - The district has well-defined, contiguous geographic boundaries;
 - The district does not have a population density in excess of 100 people per square mile; and
 - The total population of the district does not exceed the greater of 250,000 people or three percent of the population of the state in which the majority of the district is located.

81 Fed. Reg. 78,748 (Nov. 9, 2016), excerpt from 78,751.

B. Increase in Statistical Area Population Limit to 10 Million

The proposed rule would increase to 10 million the 2.5 million population limit that presently applies to a community consisting of a CBSA or Combined Statistical Area (each a "statistical area") or other area an FCU designates, subject to an FCU's ability and commitment to adequately serve the area. Despite having just affirmed a 2.5 million population limit, the Board anticipates that many areas that would qualify as a WDLC will experience population growth over time. The Board therefore believes that its policy should anticipate and accommodate inevitable growth, to the extent permissible under the Act, in order to maximize the potential membership base available to community credit unions.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2019, I caused the foregoing Corrected Brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

January 23, 2019

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2019

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 18-5154, 18-5181

AMERICAN BANKERS ASSOCIATION,

Plaintiff-Appellee-Cross-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLEE-CROSS-APPELLANT

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GLOSSARY

ABA American Bankers Association

GAO Government Accountability Office

NCUA National Credit Union Administration

INTRODUCTION AND SUMMARY OF ARGUMENT

When NCUA expanded its definition of a “well-defined local community” to include Core-Based Statistical Areas, it required credit unions serving such areas to provide financial services to residents of the urban core of the community. JA165. NCUA established this requirement “to ensure that credit unions ‘adequately serv[e] the intended beneficiaries of the requirement—namely low-income and underserved populations.’” NCUA Response & Reply Br. 24 (quoting JA165).

The Final Rule eliminates this requirement. Instead, it permits credit unions serving a Core-Based Statistical Area to make a unilateral decision to refuse to serve all, or any part, of the community’s urban core. The district court found this aspect of the Final Rule to be “troubling” and “jarring, to say the least.” JA340, 342. It is all that and more.

NCUA “has consistently defined ‘local community’ to mean geographic areas that share common social and economic interactions.” NCUA Opening Br. 17; *see also* 63 Fed. Reg. 71,998, 72,037 (Dec. 30, 1998) (interaction among residents is the “[m]ost prominent . . . requirement” of a local community). This requirement follows directly from the Federal Credit Union Act, which provides that “a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity is

essential to the fulfilment of the public mission of credit unions.” 12 U.S.C. § 1751 note. By eliminating the requirement that credit unions serve the urban core of a Core-Based Statistical Area, the Final Rule fails to ensure meaningful social and economic interaction among credit union members. Because Core-Based Statistical Areas include outlying communities separated by large distances or difficult terrain as well as isolated rural communities, residents of such outlying communities may have little or no commuting relationship with the urban core and no other meaningful affinity and bond.

NCUA’s decision is also arbitrary and capricious because it effectively authorizes credit unions to engage in redlining. NCUA does not dispute that credit unions have a special mission of serving people of modest means, and that urban areas often include high concentrations of low-income individuals and racial minorities. Nor does NCUA dispute that if a bank engaged in exactly the behavior its Final Rule authorizes for credit unions—refusing to provide any financial services to low-income and minority neighborhoods in the urban core of the community—it would likely be sued by the U.S. Department of Justice for unlawful redlining. Yet the Final Rule gives credit unions complete freedom to deny service to all or any part of the urban core of the communities they serve. NCUA sought to justify its decision on the ground that credit unions, considered as a whole, do an adequate job of serving low-income individuals. NCUA reached that conclusion

even though: (1) under the Final Rule, the agency has no discretion to consider whether low-income urban residents in the urban community at issue have adequate access to financial services, and it cannot reject a credit union's application on that ground; (2) it is not a defense to redlining to argue that other financial institutions are doing an adequate job of serving the community in question; and (3) the Government Accountability Office has concluded that federal credit unions, despite their special mission, lag behind banks in providing financial services to low-income individuals and families.

For these reasons, NCUA's determination that a credit union serving a Core-Based Statistical area may, at its own option, exclude all or any part of the urban core from its service area, should be vacated.

ARGUMENT

I. The Final Rule's Provisions Concerning Core-Based Statistical Areas Are Inconsistent With The Requirement That A Community Credit Union Must Serve A Single, Well-Defined Local Community.

The Final Rule allows credit unions to serve *any* portion of a Core-Based Statistical Area so long as the population of the area served does not exceed 2.5 million. JA192. The area to be served is chosen *unilaterally* by the credit union; NCUA has no discretion to consider whether the credit union's proposed field of membership lacks a meaningful affinity and bond among members. Instead, NCUA has limited itself to considering the adequacy of the credit union's business plan for

serving whatever parts of the community it has chosen to serve. Thus, for example, NCUA does not dispute that the Final Rule allows a credit union to define its field of membership to include Frederick, Maryland and Fredericksburg, Virginia (because both are within the Washington, DC Core-Based Statistical Area), so long as these cities are connected by a thin strip of highway. *See* ABA Br. 69. Similarly, NCUA does not contest that the Final Rule allows a credit union to serve an assortment of counties stretching from Staten Island to Pike County, Pennsylvania to the Hudson Valley, simply because these far-flung areas are part of the New York–Newark–Jersey City Core-Based Statistical Area and their total population does not exceed 2.5 million. ABA Br. 69–70 & Fig. 7.

As the ABA’s opening brief explains, the language of the rule does not even require the credit union to serve a single contiguous area within a Core-Based Statistical Area. *See* ABA Br. 39–40.¹ NCUA addresses this issue only in a footnote that never discusses the language of the Final Rule. Instead, NCUA states only that its “policy” is to require community credit unions to serve a single contiguous area. NCUA Response & Reply Br. 15 n.6. NCUA does not dispute that it is free to change its policy at any time, and can do so without going through notice-and-comment rulemaking. And in any event, there is no dispute that a “contiguous” area

¹ The relevant language in the Final Rule is the same for Combined Statistical Areas and Core-Based Statistical Areas. *See* JA192.

consisting of two or more widely separated cities connected by “thin strips” of territory, such as the Frederick, Maryland and Fredericksburg, Virginia example discussed above, satisfies the Final Rule.

NCUA nevertheless argues that the Final Rule is consistent with the statute because a Core-Based Statistical Area, considered as a whole, is a single local community, and there is no statutory requirement that a community credit union must serve the entire local community. NCUA Response & Reply Br. 25. This argument is unpersuasive for multiple reasons.

First, members living on the periphery of a Core-Based Statistical Area may not share the meaningful affinity and commonality of routine interaction that is “the cement that unite[s] credit union members,” *First Nat’l Bank & Trust Co. v. NCUA*, 988 F.2d 1272, 1276 (D.C. Cir. 1993); *see also* 63 Fed. Reg. at 72,037 (interaction among residents is the “[m]ost prominent . . . requirement” of a local community). The Office of Management and Budget (the agency that defines Core-Based Statistical Areas) has cautioned that Core-Based Statistical Areas contain outlying communities separated “by large distances or difficult terrain” as well as “isolated rural communities.” 65 Fed. Reg. 82,228, 82,229 (Dec. 27, 2000). The Final Rule nevertheless allows credit unions to select *any* area within a Core-Based Statistical Area, without regard to whether the area selected consists of isolated communities separated by large distances or difficult terrain.

Second, the Final Rule allows credit unions to serve *portions* of counties rather than entire counties. Core-Based Statistical Areas are defined based on the commuting relationship between an urban core and an outlying county, considered as whole. *See* 75 Fed. Reg. 37,246, 37,250 (June 28, 2010). *Within* a county, however, the commuting relationship may vary widely from one portion of the county to another. As a result, a portion of a county within a Core-Based Statistical Area may have little or no commuting relationship with the urban core.

For instance, the Boise City Core-Based Statistical Area includes the five counties in Idaho pictured in Figure 1.² These large counties include isolated wilderness and mountain areas that are much too far from Boise for significant commuting, like Dickshooter, Idaho—more than four hours’ drive southwest of Boise’s urban core—and Grandjean, Idaho—around two and a half hours’ drive northeast of Boise.³ Under the Final Rule, Dickshooter could be automatically united in a field of membership with Grandjean—nearly six and a half hours’ drive and 230 miles away. These two isolated communities—which are farther apart than

² *See* OMB, Exec. Office of the President, OMB Bull. No. 15-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas*, Appendix at 26 (2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/bulletins/2015/15-01.pdf> [hereinafter OMB Bull. No. 15-01].

³ All driving times and distances were calculated using Google Maps.

Washington, DC and New York City—cannot reasonably be considered a single “well-defined local community.”

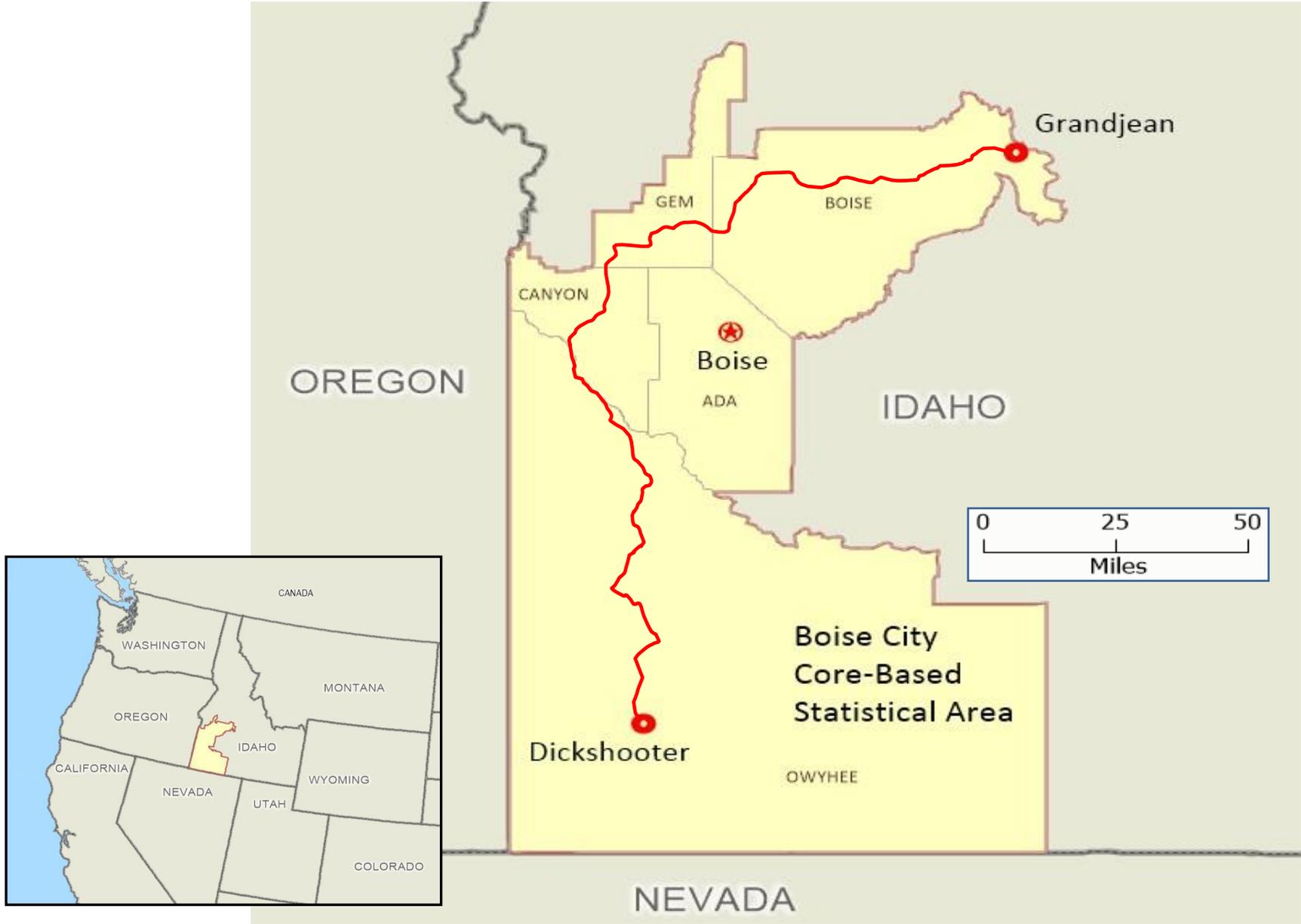


Figure 1: Automatically Approved “Local Community” Comprised of Portions of the Boise City Core-Based Statistical Area Without the Core

Third, the problem is worse for the twenty-one Core-Based Statistical Areas with a population of more than 2.5 million.⁴ NCUA has not determined that these twenty-one Core-Based Statistical Areas, considered as a whole, constitute one local community. Consequently, there is no basis for concluding that one portion of the Core-Based Statistical Area is part of a single local community simply because it is part of the Core-Based Statistical Area.

Fourth, as the district court noted, JA340–42, NCUA’s decision to eliminate the requirement that credit unions serve the urban core of Core-Based Statistical Areas makes it much easier to unite far-distant edges of a large Core-Based Statistical Area while remaining within the 2.5 million population limit. An area that includes such widely-separated peripheral areas is not reasonably viewed as a single local community.

For instance, *not a single person* commutes from Frederick County, Maryland to Fredericksburg, Virginia on opposite sides of the Washington–Arlington–Alexandria, DC–VA–MD–WV Core-Based Statistical Area, and the six commuters the Census estimates from Fredericksburg to Frederick are within the margin of

⁴ U.S. Census, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017 - United States—Metropolitan and Micropolitan Statistical Area; and for Puerto Rico*, <https://www.census.gov/data/tables/2017/demo/popest/total-metro-and-micro-statistical-areas.html>.

error.⁵ Likewise, *not a single person* commutes from Staten Island to Pike County, Pennsylvania across the New York–Newark–Jersey City, NY–NJ–PA Core-Based Statistical Area, and the trivial number of commuters the Census estimates from Pike County to Staten Island is again within the margin of error.⁶

Fifth, NCUA does not even attempt to argue that the Final Rule ensures that “those making lending decisions would know more about applicants and that borrowers would be more reluctant to default,” even though this Court has twice stated that Congress assumed this would be the result of the common bond requirement. *First Nat’l Bank & Trust Co. v. NCUA*, 90 F.3d 525, 526 (D.C. Cir. 1996); *First Nat’l Bank & Trust Co. v. NCUA*, 988 F.2d at 1276. Indeed, NCUA’s brief never acknowledges these statements by the Court.

Although NCUA asserts that residents of a Core-Based Statistical Area share “clear common ties,” NCUA Response & Reply Br. 25, Core-Based Statistical Areas are defined *solely* on the basis of commuting ties, considered on a county-wide basis. Nothing in the definition of a Core-Based Statistical Area requires the existence of any other ties. Instead, NCUA chose to rely exclusively on the existence of commuting ties as a proxy for other ties. Because the Final Rule allows credit unions

⁵ See U.S. Census, *Residence County to Workplace County Commuting Flows for the United States and Puerto Rico Sorted by Residence Geography: 5-Year ACS, 2009-2013*, <https://www.census.gov/data/tables/time-series/demo/commuting/commuting-flows.html> (follow “Table 1” hyperlink for “County to County Commuting Flows for the U.S. and Puerto Rico: 2009-2013”).

⁶ See *id.* (Staten Island is coterminous with Richmond County, New York.)

to carve out parts of a Core-Based Statistical Area that have few or no commuting ties, the Final Rule provides no assurance the credit union members will have a meaningful affinity and bond. Indeed, if commuting ties are a proxy for other ties, the absence of commuting ties suggests an absence of a meaningful affinity.

NCUA's final argument is that its Rule is consistent with the statute because a Core-Based Statistical Area "cannot expand without limit." NCUA Response & Reply Br. 25. But the fact that a geographical concept has *some* limit is no guarantee that it constitutes a single local community. For example, "an area not larger than the largest state" cannot be expanded without limit, but it does not satisfy the requirement of a single local community.

In short, when a community has been defined as an urban core and surrounding counties with a defined commuting relationship with the core, excising the urban core does more than simply eliminate a part of the community. A ham sandwich without the ham is no longer a ham sandwich; the human circulatory system without the heart is no longer a circulatory system; and "Hamlet" without the Prince is no longer "Hamlet." Similarly, when the urban core that defines a community is eliminated, what is left is a collection of individuals who may or may not share a meaningful affinity and bond. Consequently, NCUA's Final Rule does not satisfy the requirement that a community credit union must serve a single local

community composed of individuals who share a “meaningful affinity and bond.”

12 U.S.C. § 1751 note.

II. The Final Rule’s Provisions Authorizing Credit Unions To Engage In Redlining Are Arbitrary And Capricious.

Even if the Final Rule’s provisions concerning Core-Based Statistical Areas could be squared with the statutory language, they would be arbitrary and capricious. NCUA acknowledges that credit unions have a special mission of serving people of modest means. NCUA Response & Reply Br. 27. NCUA also does not dispute that the urban core of a Core-Based Statistical Area is likely to have a high concentration of people of modest means. *See* ABA Br. 72. Yet the Final Rule gives credit unions *carte blanche* authorization to deny service to people of modest means living in the urban core—including by drawing lines that surgically exclude low-income and majority-minority neighborhoods while retaining higher-income neighborhoods.

The Final Rule effectively authorizes credit unions to engage in redlining, which this Court has defined as “intentionally not lending to certain neighborhoods or parts of a community.” *Crawford v. Signet Bank*, 179 F.3d 926, 928 n.4 (D.C. Cir. 1999). NCUA does not deny that this is the effect of the Final Rule, or that the Final Rule violates a clear government policy against redlining. This result alone is so startling and implausible as to be arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious when the agency’s view is “so implausible” that it

cannot reasonably “be ascribed to a difference in view or to the product of agency expertise”).

The Detroit–Warren–Dearborn Core-Based Statistical Area illustrates the problem with the Final Rule.⁷ This Core-Based Statistical Area includes a lower-income, majority-minority urban core and affluent, largely white suburbs. The city of Detroit has a median household income of \$30,344 and is 79% black, 7% Hispanic, and 11% white.⁸ By contrast, Detroit’s suburbs include Bloomfield Hills, with a median household income of \$186,586—more than six times higher than Detroit’s—and an 82% white, 2% black, and 1% Hispanic population, and Huntington Woods, with a median household income of \$125,873 and a 92% white, 1% black, and 1% Hispanic population.⁹ There is no dispute that the Final Rule allows a credit union to choose to serve only affluent, predominantly white suburban areas like Bloomfield Hills and Huntington Woods, while redlining out the city of Detroit from its service area. It is also undisputed that the agency retains no discretion to deny an application that redlines out the city of Detroit, so long as the

⁷ The Detroit Core-Based Statistical Area is discussed in the Amicus Brief of State Bankers Associations and Community Bankers Associations. *See* Amicus Br. 10 & Ex. D.

⁸ *See* Census Reporter, *Detroit, MI*, <https://censusreporter.org/profiles/06000US2616322000-detroit-city-wayne-county-mi/>.

⁹ *See* Census Reporter, *Bloomfield Hills, MI*, <https://censusreporter.org/profiles/16000US2609180-bloomfield-hills-mi/>; Census Reporter, *Huntington Woods, MI*, <https://censusreporter.org/profiles/16000US2640000-huntington-woods-mi/>.

area it applied for has a population under 2.5 million and is part of a Core-Based Statistical Area.

If a bank were to attempt to do what the Final Rule authorizes credit unions to do, the bank would almost certainly be sued for redlining. Indeed, Detroit-area banks *have* been sued by the U.S. Department of Justice in response to *the very same line-drawing the Final Rule facilitates*. In one case, Old Kent Bank agreed to pay \$3.2 million and take a number of remedial steps, including opening branches in Detroit, to resolve an enforcement action under the Fair Housing Act and the Equal Credit Opportunity Act based on its decision to serve Detroit suburbs like Bloomfield Hills, but not the City of Detroit.¹⁰ In another case, Citizens Republic Bancorp and Citizens Bank of Flint, Michigan (collectively “Citizens Bank”) agreed to pay \$3.6 million and take a number of remedial steps, including opening at least one office in Detroit, to resolve an enforcement action under the same statutes based on their decisions to serve affluent suburbs of Detroit, but not the urban core.¹¹

¹⁰ See Complaint, *United States v. Old Kent Fin. Corp.*, No. 04-71879, 2004 WL 2627849 (E.D. Mich. May 19, 2004); U.S. Dep’t of Justice, *Detroit Bank Charged With Discriminatory “Redlining” Lending* (May 19, 2004), https://www.justice.gov/archive/opa/pr/2004/May/04_crt_342.htm.

¹¹ See Complaint, *United States v. Citizens Republic Bancorp, Inc.*, No. 2:11-cv-11976 (E.D. Mich. May 5, 2011); U.S. Dep’t of Justice, *Justice Department Reaches Settlement with Citizens Republic Bancorp Inc. and Citizens Bank Regarding Alleged Lending Discrimination in Detroit* (May 5, 2011), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-citizens-republic-bancorp-inc-and-citizens-bank>.

Pictured on the following pages are the Citizens Bank branch locations in the Detroit–Warren–Dearborn Core-Based Statistical Area at the time of the enforcement action against that bank, overlaid on maps showing Census data on median household income and black population percentage by Census tract. Citizens Bank’s decision to avoid low-income, black-majority areas resulted in a multi-million-dollar settlement with the Department of Justice; a community credit union’s decision to serve *the same locations* as Citizens Bank is entirely permissible under the Final Rule, because the credit union would be serving a less-than-2.5- million-person portion of the Core-Based Statistical Area, excluding the urban core.¹²

¹² The population of the field of membership outlined in red in these maps is slightly under 2.5 million. See U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/> (adding 2010 Census population of Livingston, Macomb, and Oakland counties; and Canton, Plymouth, and Northville townships and the cities of Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Woods, Northville, and Plymouth in Wayne County).

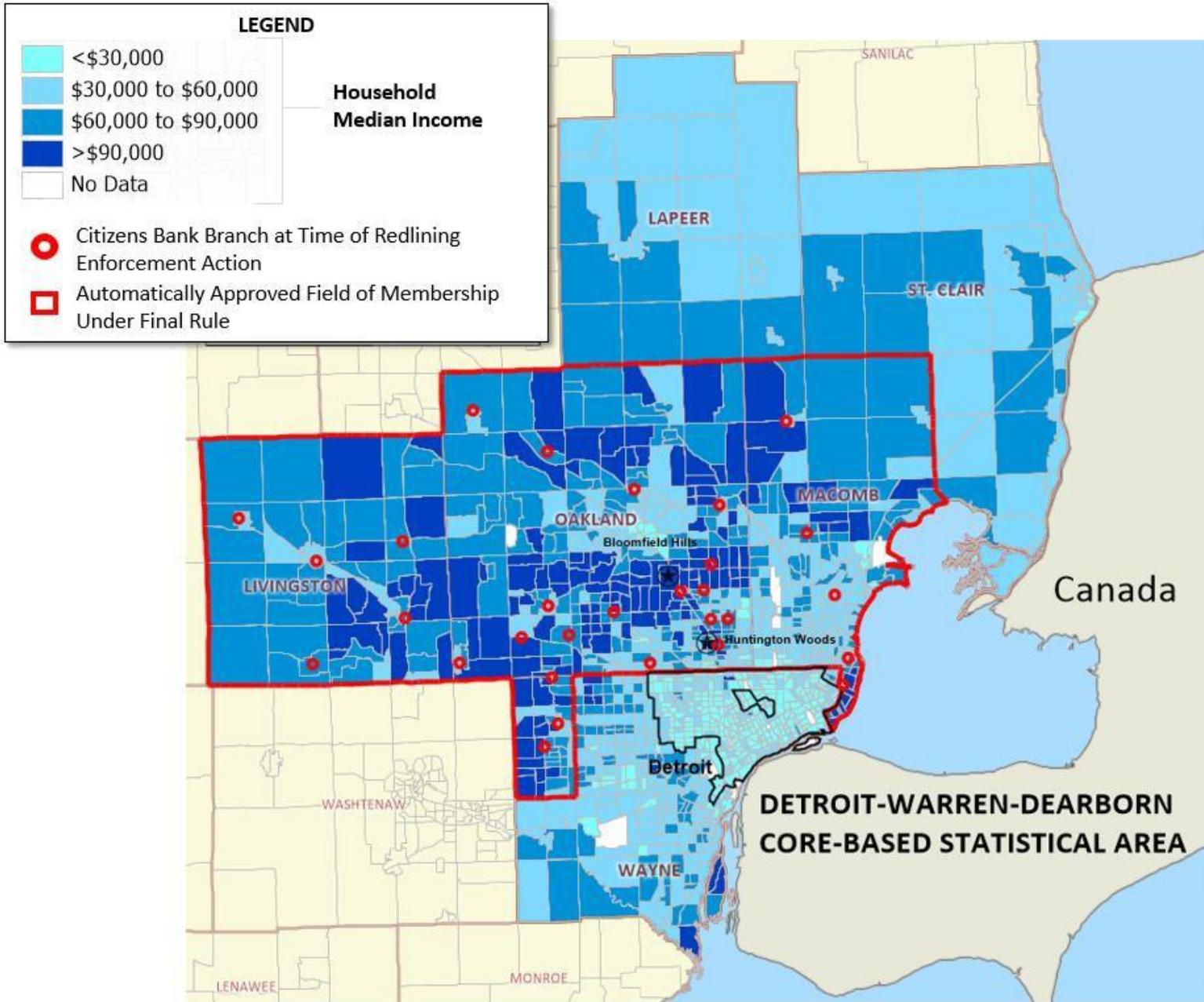


Figure 2: Median Household Income in Automatically Approved Redlined Field of Membership

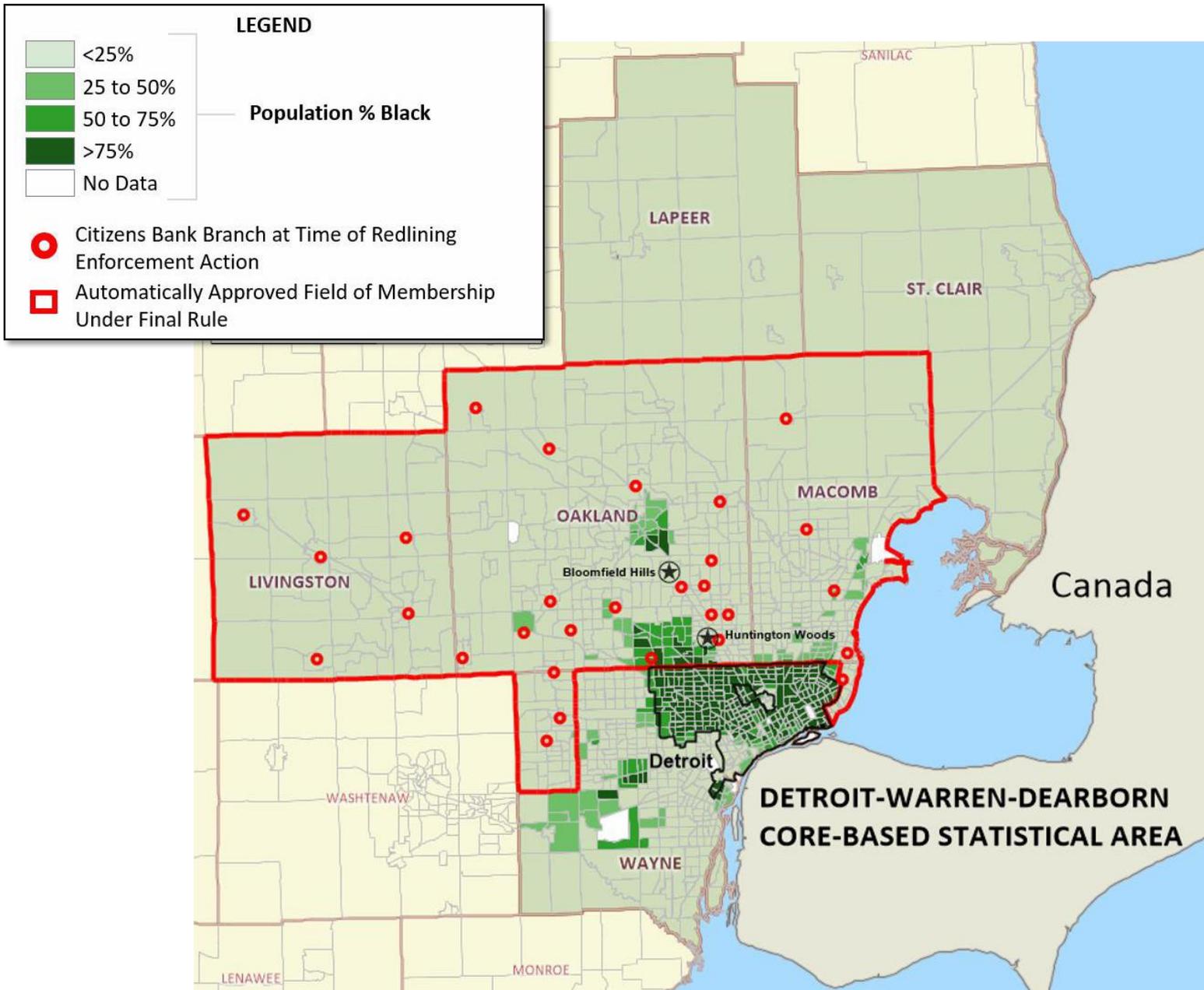


Figure 3: Black Population Percentage in Automatically Approved Redlined Field of Membership

Strikingly, this redlined field of membership is not only permissible under the Final Rule, but would be *automatically approved* by the agency. At a minimum, one would expect NCUA to retain the authority to review and reject a credit union's proposal to redline a specific urban area. Yet under the Final Rule, NCUA *must* approve the credit union's application to serve any part of a Core-Based Statistical Area so long as the population to be served does not exceed 2.5 million, and the credit union submits an adequate business plan to serve the residents it chooses to serve. *See* JA192.

The problem is compounded because the Community Reinvestment Act does not apply to credit unions, making NCUA's oversight even more essential. Under that statute, federally insured financial institutions other than credit unions must delineate "assessment areas," which are analogous to fields of membership. *See* 12 C.F.R. § 228.41(e). These assessment areas "[m]ay not reflect illegal discrimination" and "[m]ay not arbitrarily exclude low- or moderate-income geographies." *Id.* NCUA does not dispute that if a financial institution subject to the Community Reinvestment Act excluded a low-income, majority-minority urban core from its assessment area, it would very likely be subject to an enforcement action.¹³ Yet the Final Rule authorizes credit unions to engage in exactly the

¹³ *See, e.g., United States & CFPB v. Bancorp South Bank*, No. 1:16-cv-118, Consent Order at 21, 23 (N.D. Miss. July 25, 2016) (bank agrees not to "eliminate majority-minority neighborhoods from its [Community Reinvestment Act] assessment area

behavior that is forbidden to other financial institutions that have not been assigned a special mission of serving people of modest means, and have not been granted a sweeping exemption from federal, state, and local taxes to achieve that special mission.

NCUA offers two responses: first, that the agency evaluates individual credit unions' service to the entire community through its supervisory powers, NCUA Response & Reply Br. 26–27; and, second, that credit unions as a whole do an adequate job serving people of modest means, NCUA Response & Reply Br. 27–28. Neither response withstands scrutiny.

First, NCUA states that it “has in place a supervisory process to assess management’s efforts to offer service to the entire community [a Federal Credit Union] seeks to serve.” JA165; NCUA Response & Reply Br. 4, 26–27. This process involves “an annual evaluation that encompasses a community [Federal Credit Union]’s implementation of its business and marketing plans, extending for three years after the credit union either is chartered, converts, or expands.” JA165. But NCUA’s evaluation considers only whether the credit union is adequately serving residents of the areas within the community that the credit union “seeks to

within the Memphis MSA” and to “open[] a full service branch in a majority-minority neighborhood in the Memphis MSA”); *United States v. Eagle Bank and Trust Co. of Missouri*, No. 4:15-cv-01492, Consent Order at 5 (E.D. Mo. Oct. 1, 2015) (bank agrees to serve a Community Reinvestment Act assessment area that “includes all of the City of St. Louis, and all of Jefferson and St. Louis Counties”).

serve.” JA165. There is no consideration of community residents living outside the boundaries unilaterally drawn by the credit union. *See* JA166 (NCUA will conduct evaluations “to ensure fair and adequate service to the low-income and underserved populations within a community *consisting of a portion of a [Core-Based Statistical Area]*” (emphasis added)). Once a credit union decides to exclude low-income and minority urban neighborhoods from its field of membership, those neighborhoods are excluded from the business plan evaluated by the NCUA and receive no service at all from the credit union. Indeed, the credit union is *prohibited* from making loans or providing other financial services to residents of areas that it has redlined out of its designated service area. *See* 12 U.S.C. § 1759(b), (c) (providing that “the membership of any Federal credit union shall be limited” to statutorily defined fields of membership and designated areas).

The Niagara Regional Federal Credit Union illustrates the point. Pursuant to the Final Rule, that credit union expanded its existing field of membership in Niagara County, New York, to include three affluent, largely white towns in Erie County that are in the same Buffalo–Cheektowaga–Niagara Falls Core-Based Statistical Area.¹⁴ But the credit union chose *not* to serve the neighboring city of Buffalo in Erie

¹⁴ *See* NCUA, *Monthly Activity Report - Insurance Related Activity* (Jan. 2018) 2 of 14, <https://www.ncua.gov/files/publications/analysis/insurance-report-activity-jan-2018.pdf>; OMB Bull. No. 15-01, *supra* note 2, at 27.

County, i.e., the core of the Core-Based Statistical Area.¹⁵ In doing so, as shown on the maps on the following pages, the credit union effectively redlined out of its service area lower-income, majority-minority areas. Indeed, a bank that failed to serve these same low-income, minority areas of Buffalo was recently the subject of a redlining enforcement action that resulted in a settlement with the State of New York requiring the bank to revise its service area and pay \$825,000 to promote homeownership and affordable housing in Buffalo.¹⁶ NCUA's supervisory process did not prevent the automatic approval of Niagara Regional Federal Credit Union's similarly redlined field of membership, and NCUA's ongoing supervision will do nothing to support service to low-income, minority neighborhoods in Buffalo, because they are not part of the field of membership the credit union is permitted to serve.

¹⁵ See NCUA, *Monthly Activity Report - Insurance Related Activity* (Jan. 2018) 2 of 14, <https://www.ncua.gov/files/publications/analysis/insurance-report-activity-jan-2018.pdf>.

¹⁶ Complaint and Jury Demand, *People v. Evans Bancorp, Inc.*, No. 1:14-cv-00726 (W.D.N.Y. Sept. 2, 2014); N.Y. Attorney General, *A.G. Schneiderman Secures Agreement with Evans Bank Ending Discriminatory Mortgage Redlining in Buffalo* (Sept. 10, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining>.

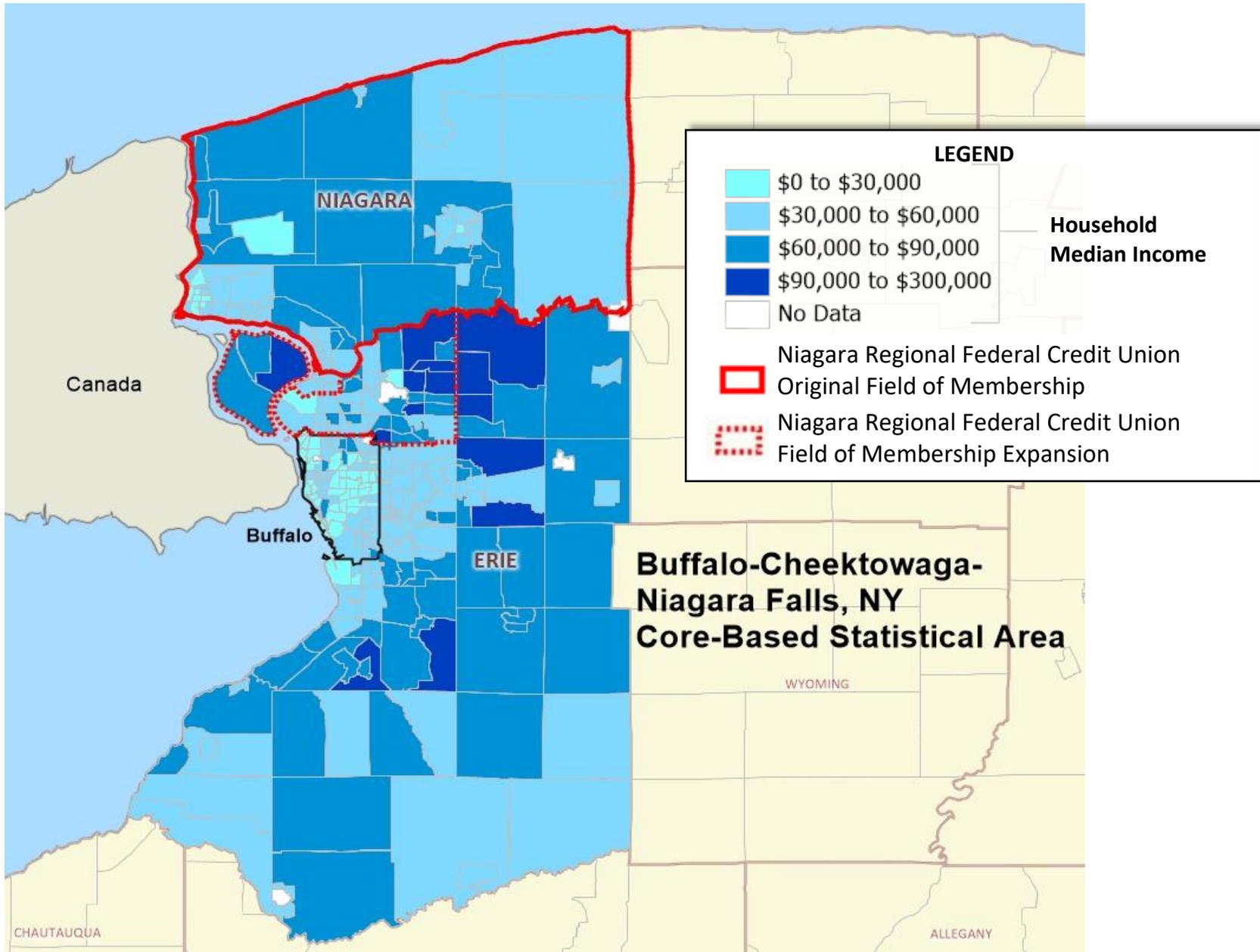


Figure 4: Niagara Regional Federal Credit Union Expansion Pursuant to Final Rule Avoids Low-Income Urban Core

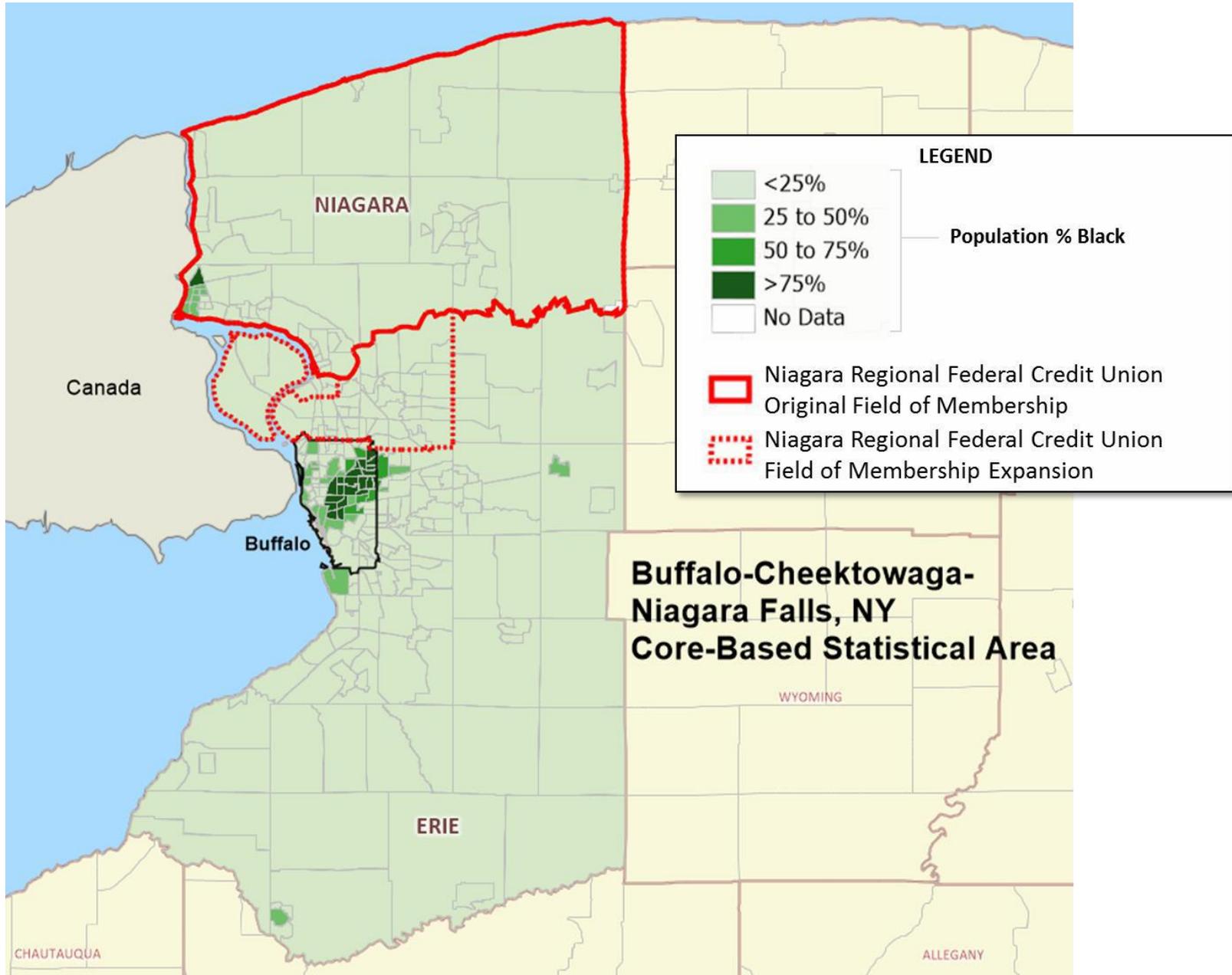


Figure 5: Niagara Regional Federal Credit Union Expansion Pursuant to Final Rule Avoids Majority-Minority Urban Core

NCUA also stated that the agency would consider member complaints alleging discriminatory practices affecting low-income and underserved populations. JA166; NCUA Response & Reply Br. 27–28. Again, this response fails to address redlining. Only those residing *within* the credit union’s self-designated service area are eligible to be members of the credit union. Low-income and minority residents outside the credit union’s self-designated area are not eligible to receive any services at all from the credit union, but they are in no position to complain because that result is specifically authorized and approved by the Final Rule.

NCUA’s response thus fails to address the redlining concern raised by commenters. An agency explanation that fails to address an important objection to the course chosen by the agency is arbitrary and capricious. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (“An agency’s ‘failure to respond meaningfully’ to objections raised by a party renders its decision arbitrary and capricious.” (quoting *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001))).

Second, NCUA says credit unions as a whole are providing adequate service to low-income communities. But that is no defense to a charge of redlining: an individual financial institution is not permitted to discriminate against particular neighborhoods or areas, regardless of whether those areas are served by *other*

financial institutions. *See, e.g.,* Complaint, *United States v. Old Kent Fin. Corp.*, 2004 WL 2627849, ¶ 39 (pursuing redlining complaint even though, “[u]nlike Old Kent Bank, many banks and other lenders issued loans to persons or businesses residing in the City of Detroit”); Complaint and Jury Demand, *People v. Evans Bancorp, Inc.*, No. 1:14-cv-00726, ¶¶ 63, 68–74 (similar).

In any event, NCUA lacks an adequate basis even for its broad-brush conclusion that credit unions, considered as a whole, are adequately serving low-income and majority-minority communities. In its opening brief, the ABA noted that the Government Accountability Office (“GAO”) has determined that “credit unions lag[] behind banks in serving low- and moderate income households.” GAO-07-29 at 1; ABA Br. 73. The GAO found that credit unions lag behind banks not only in the percentage of customers that are of modest means (31% versus 41%), but also in the percentage of mortgage loans made to low- and moderate-income households (27% versus 34%). *See* GAO-07-29 at 5; GAO-04-91 at 5. The ABA’s brief notes that the NCUA did not explain how, in view of these facts, it could conclude that credit unions are adequately fulfilling their special mission of serving persons of modest means. ABA Br. 73.

Remarkably, NCUA’s brief not only fails to discuss the GAO’s conclusions or attempt to square them with the Final Rule, it never even acknowledges the GAO’s report. When an agency closes its eyes to important facts that run contrary

to the agency's conclusion, it engages in arbitrary and capricious decisionmaking. *See State Farm*, 463 U.S. at 43 (agency rule is arbitrary and capricious if the agency “failed to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency”); *PPL Wallingford Energy*, 419 F.3d at 1198 (similar).¹⁷

Rather than discussing the GAO Report, NCUA cites a 23-year old decision of the First Circuit and a 24-year old law review article. NCUA Response & Reply Br. 27–28 (citing *T I Federal Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 Harv. L. Rev. 1463 (1994)). The relevance of these older sources to current conditions is limited at best, and in any event neither source casts any doubt on the conclusions of the GAO report. The First Circuit, in the course of deciding an issue under the Bankruptcy Code, noted that federal credit unions “provide credit at reasonable rates to millions of individuals who—because they lack security or, as

¹⁷ NCUA contends that “plaintiff does not seriously contest” that credit unions are adequately meeting the needs of poor Americans. NCUA Response & Reply Br. 28. NCUA makes that assertion even though a respected federal agency has determined that federal credit unions lag behind banks in meeting the needs of low-income individuals and families, and even though credit unions have a special mission of serving persons of modest means and enjoy a sweeping tax exemption to assist them in achieving that mission. In asserting that the adequacy of credit unions’ service to low-income persons is not “seriously contest[ed],” NCUA closes its eyes to relevant facts.

recent studies show, reside in low income areas or in communities primarily inhabited by racial minorities—would otherwise be unable to acquire it.” *Id.* at 932. That statement says nothing about the number or percentage of lower-income neighborhoods and individuals who still lacked adequate access to credit in 1995 or 2016. Nor does it suggest that it is appropriate for credit unions to lag behind banks in serving lower-income individuals and neighborhoods. Similarly, the law review article, in the course of an examination of competing public policy paradigms, discussed community-development banks (which have bank charters) and community development credit unions. The article actually discussed community-development banks first, and noted that they “incorporate[] a broad range of services” and therefore are the “most comprehensive” model of a community development financial institution. Taibi, 107 Harv. L. Rev. at 1522. Again, nothing in this discussion casts doubt on the conclusions of the GAO Report.

NCUA notes that Congress has authorized a category of “low-income credit unions,” and that there are nearly 2,500 such credit unions with nearly 40 million members. NCUA Response & Reply Br. 27. Again, however, the point is not that credit unions do not serve any people of modest means, but that they lag behind banks that have not been assigned this special mission. If anything, the fact that Congress created a special category of low-income credit unions, and granted such credit unions special benefits in addition to a sweeping tax exemption, only

reinforces the conclusion that it is not “adequate” for credit unions to lag behind banks in serving low-income individuals and neighborhoods.

NCUA observes in a footnote that commenters favoring the Final Rule argued that requiring inclusion of the urban core would “place unnecessary constraints on who credit unions could serve,” “hinder their ability to adapt and establish a market footprint in a chosen area,” “divide and exclude portions of viable communities,” “require credit unions to sacrifice service to non-core areas,” and “provide a disincentive to serve Core-Based Statistical Areas that include highly populated urban areas.” NCUA Response & Reply Br. 26 (quoting JA165). NCUA itself did not adopt these arguments as reasons for its action, and therefore the Final Rule cannot be upheld on these grounds. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). But even if that were not the case, these arguments are simply ways of saying that community credit unions should be allowed to serve the people and areas of the community they wish to serve. Other financial institutions could make exactly the same arguments in support of redlining, and yet redlining is unlawful even for financial institutions that are not charged with a special mission of serving people of modest means.

In sum, NCUA’s refusal to acknowledge basic facts is arbitrary and capricious, and requires that this aspect of the Final Rule be vacated and remanded.

CONCLUSION

The portion of the district court's judgment that upholds the provision of the Final Rule that permits credit unions serving a Core-Based Statistical Area to refuse to serve residents of the urban core of the community should be reversed, and that portion of the Final Rule should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e) because it contains 5,306 words, excluding the portions of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). This Brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font.

March 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2019, I caused the foregoing Brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

March 18, 2019

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN BANKERS ASSOCIATION,)	
)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-02394-KBJ
)	
NATIONAL CREDIT UNION)	
ADMINISTRATION,)	
)	
Defendant.)	
)	

**COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT’S CROSS-MOTION
FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Congress created federal credit unions to provide basic financial services to individuals with low and moderate incomes. To achieve this purpose, and to justify a sweeping tax exemption and other special advantages, Congress limited credit unions to serving individuals with a common bond of occupation or association or those “within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b). These limitations on the field of membership of each credit union serve important purposes: they are the “cement” that unites credit union members in a cooperative venture, and they make it possible for credit unions to provide loans to individuals who would not otherwise have access to financial services by reducing the costs of small consumer loans and discouraging default.

The National Credit Union Administration (“NCUA”), the agency responsible for ensuring that these statutory limitations are observed, has acted instead as a cheerleader for the entities it regulates, repeatedly seeking to erode statutory restrictions on credit unions’ field of membership. On at least three occasions, federal courts (including the Supreme Court) have vacated NCUA’s actions because they disregarded congressional limits on credit unions’ field of membership.

In the Final Rule, NCUA once again failed to recognize that it “cannot act as a rubber stamp or cheerleader” for the industry it regulates. *Am. Bankers Ass’n v. NCUA*, 347 F. Supp. 2d 1061, 1070 (D. Utah 2004). The Final Rule stretches “a well-defined local community, neighborhood, or rural district” well past its breaking point. *First*, a Combined Statistical Area does not satisfy any reasonable definition of a single “local community” because it is a “larger region” that combines multiple Core-Based Statistical Areas that need not have any interaction with each other or with a single urban area. *Second*, a Core-Based Statistical Area without its core is missing the only element—an urban core with which the outlying areas all interact—that could possibly make it reasonable to regard such a large area as a single local community, and allows

credit unions to engage in redlining that excludes the very people of “modest means” that Congress intended them to serve. *Third*, an area adjacent to a local community is not part of the community just because there is interaction along the community boundary line. *Fourth*, an entire state, or an entire state plus most of a second state, does not satisfy any reasonable definition of a single “rural district,” particularly when the so-called “rural district” includes large cities and a primarily urban population.

NCUA urges the Court to defer to its interpretation of the statute. But NCUA is not authorized to redefine “local community” and “rural district” to mean vast regions encompassing up to 2.5 million people or an entire state. When Congress uses a term such as “red,” the agency is not free to define “red” to mean “purple” or “blue.” The agency may define “red” as “light red” or “dark red,” but it must stay within the reasonable meaning of the words Congress used in the statute. The same limits apply to “a well-defined local community, neighborhood, or rural district.”

NCUA argues that statutory restrictions on credit unions’ field of membership are undesirable as a matter of policy because they prevent credit unions from growing faster and achieving maximum efficiency. But NCUA’s policy views do not justify an unreasonable construction of the language Congress used. Moreover, NCUA’s policy arguments lack factual support. Even without the Final Rule, credit unions are expanding rapidly—more rapidly than banks.

NCUA’s Final Rule adopts an unreasonably expansive definition of “a well-defined local community, neighborhood, or rural district,” and therefore it does not withstand scrutiny.

ARGUMENT

I. The Statutory Requirement That Community-Based Credit Unions Serve “A Well-Defined Local Community, Neighborhood, or Rural District” Imposes Significant Limits on Community-Based Credit Unions.

This case requires the Court to interpret the meaning of the statutory phrase “[p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3). As in any statutory interpretation case, the Court begins with the statutory language. *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Here, multiple aspects of NCUA’s Final Rule are inconsistent with that language.

A. NCUA’s Definition of “A Well-Defined Local Community, Neighborhood, or Rural District” Must Be Reasonable.

NCUA urges the Court to defer to the agency’s interpretation under the *Chevron* doctrine. NCUA Br. 18 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). As NCUA acknowledges, however, the *Chevron* doctrine does not give an agency *carte blanche* to interpret statutory language in any way it pleases. “[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.” *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *see also AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 392 (1999) (vacating rule because agency failed to interpret statutory terms “in a reasonable fashion”); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (“where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow”); *Global Tel*Link v. FCC*, 859 F.3d 39, 60 (D.C. Cir. 2017) (Silberman, J., concurring) (where Congress used statutory term that is not defined and could refer to (a) or (b) but not (c), agency may not “pursue a (c), (d), or (f) interpretation that accord[s] with policy objectives”). To be “within the bounds of reasonable interpretation,” the agency’s interpretation “must account for both the specific context in which language is used and the broader context of

the statute as a whole.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (internal quotation marks and alteration omitted).

NCUA suggests that it is entitled to an extra measure of deference in this case because Congress expressly directed NCUA to define “a local community, neighborhood, or rural district” by regulation. NCUA Br. 19 (citing 12 U.S.C. § 1759(g)). While this statutory provision confirms that the statutory language has a range of reasonable meanings, it does not authorize NCUA to adopt a definition that falls outside that reasonable range, and thus does not alter the basic *Chevron* framework. *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 6 (1985) (even where Congress has expressly delegated to an agency authority to define a statutory term, the term must be within its “normal meaning”).¹

Ultimately, NCUA agrees that “[p]laintiff is of course correct that ‘NCUA’s definition must be reasonable and consistent with the terms Congress used’ and ‘the agency is hardly free to write its own law.’” NCUA Br. 23 (quoting *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985)). Exactly so. In this case, NCUA’s definition of “a well-defined local community, neighborhood, or rural district” is neither reasonable nor consistent with the terms Congress used.

B. “A Well-Defined Local Community, Neighborhood, or Rural District” Refers to a Relatively Small Community.

NCUA agrees that “a well-defined local community, neighborhood, or rural district” means a *single* community, and not multiple communities. *See* Opening Br. 18; *NCUA v. First Nat’l*

¹ NCUA cites *Atrium Medical Center v. U.S. Department of Health & Human Services*, 766 F.3d 560 (6th Cir. 2014). In that case, the court noted that if a delegation of authority to an agency is express, the agency’s regulations “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 566 (quoting *Chevron*, 467 U.S. at 844). This is the *Chevron* framework. *See id.* The case thus provides no support for a claim that agencies should receive additional deference beyond *Chevron* when expressly delegated interpretive authority.

Bank & Trust Co., 522 U.S. 479, 502 (1998). Even before Congress amended the statute to add the term “local,” the statutory language was designed to limit membership to communities that are small enough so that lenders will know loan applicants and borrowers will be more reluctant to default. *See First Nat’l Bank & Trust Co.*, 988 F.2d at 1276; *see also* 78 Cong. Rec. 7259, 12,223–25 (1934). As NCUA acknowledges, the addition of the word “local” placed a further limitation on community credit unions’ field of membership. *See* 63 Fed. Reg. 71,998, 72,012 (Dec. 30, 1998) (“local” “was intended as a limiting factor” that requires NCUA to take a “more circumspect and restricted approach to chartering community credit unions”). *See generally Stone v. INS*, 514 U.S. 386, 397 (1995) (when Congress amends a statute, “we presume it intends its amendment to have real and substantial effect”).

In the same legislation that added the word “local” to “local community,” Congress specified that for “multiple common-bond” credit unions, separate groups sharing their own common bond of occupation or association must (with limited exceptions) have fewer than 3,000 members because groups of 3,000 or more presumptively are able to form a standalone credit union. *See* CUMAA, Pub. L. No. 105–219, 112 Stat. 913 (1998) (codified at 12 U.S.C. § 1759(d)(1); 12 U.S.C. § 1759(f)(1)). In adopting the presumption that groups of 3,000 or more should create a separate credit union, Congress articulated a strong preference for keeping credit unions local. 12 U.S.C. § 1759(f)(1); H.R. Rep. No. 105–472, at 20 (1998) (discussing Congress’s “local preference” and “strong policy towards placing groups which cannot form their own credit unions with a local credit union”). Congress explained that the 3,000-person limit and proximity requirement is critical because it “strongly believes credit union members who live, work and interact in the same geographic area are likely to have more of a meaningful affinity and common bond than those who do not.” H.R. Rep. No. 105–472, at 20 (1998).

Congress used the term “neighborhood” immediately after “local community” and immediately before “rural district.” NCUA does not dispute that a “neighborhood” is a small area. See ABA Opening Br. 20 (collecting definitions of “neighborhood”). NCUA argues, however, that the term “neighborhood” sheds no light on the meaning of “local community” or “rural district” because the *noscitur a sociis* canon of construction is inapplicable when Congress “pair[s] a broad statutory term with a narrow one.” NCUA Br. 21 n.8 (quoting *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006)). But “local community” and “rural district” are not “broad” statutory terms—they connote relatively small communities.² Thus, it is entirely appropriate to use the “commonsense canon of *noscitur a sociis*,” which “counsels that a word is given more precise content by the neighboring words with which it is associated.” *United States v. Williams*, 553 U.S. 285, 294–95 (2008); see also *Maracich v. Spears*, 133 S. Ct. 2191, 2201 (2013) (observing that statutory phrases “can be construed in light of their accompanying words” to avoid giving a statutory provision “unintended breadth” (internal quotation marks omitted)). As NCUA’s amici recognize, statutory terms must be read in context to “divine the meaning of the whole.” CU Amicus Br. 11, 13.³

² In *S.D. Warren*, unlike this case, the party relying on *noscitur a sociis* strained “to extrapolate a common feature from what amounts to a single [vague] item.” *Id.* at 379–80. Here, in contrast, “local community,” “neighborhood,” and “rural district” all connote relatively limited areas. In addition, the *S.D. Warren* Court declined to apply the canon to “technical definitions . . . worked out with great effort in the legislative process.” *Id.* Here, Congress did not work out “technical definitions,” but instead used terms that are common in everyday speech.

³ Contrary to the assertion of the amici supporting NCUA, ABA is not focusing on “individual words of the statute in isolation.” CU Amicus Br. 11. Instead, it focuses on the meaning of the statutory terms considered as a whole, along with other relevant statutory provisions (such as the 3,000 person presumptive viability threshold for a new credit union) and the purpose of the field of membership restrictions.

C. A Single “Local Community” Is Not a Large Region.

As ABA explained in its opening brief, “local” means “not general or widespread,” “narrow,” “primarily serving the needs of a particular limited district, often a community or minor political subdivision,” “belonging to a town or some comparatively small district, as distinct from the state or country as a whole.” Opening Br. 19 (collecting dictionary definitions of “local”). In response, NCUA asserts that “communities can come in all shapes and sizes.” NCUA Br. 19. But Congress did not use the term “community” in isolation; it amended the statute to make clear that only a “local community” will do.

NCUA argues in a single paragraph that “the term ‘local’ does not necessarily connote any fixed restrictions in this context,” because it can mean nothing more than “pertaining to particular places.” NCUA Br. 20. NCUA did not rely on that interpretation in adopting the Final Rule, however, and for good reason. If the statutory term “local” means nothing more than “pertaining to a particular place or places,” it adds nothing to the term “community,” which already describes individuals living in a particular area or a common location. *See* Opening Br. 19–20 (collecting dictionary definitions of “community”). It is a basic principle of statutory interpretation that each term in a statute should be given independent meaning if possible. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). Similarly, the suggestion by NCUA’s amici (CU Amicus Br. 12) that “local law” can in some contexts refer to the law of an entire nation clearly does not support interpreting “local community,” in the context of this statute, to mean the entire United States. *See Util. Air*, 134 S. Ct. at 2442 (interpretation must take account of context). Accordingly, these proposed interpretations of “local” are untenable.⁴

⁴ NCUA suggests (Br. 20) that some of the dictionary definitions collected in ABA’s opening brief “seem to describe local in its particular rather than geographic sense.” If “local” has such a

NCUA's primary argument is that "local community" does not have "any precise meaning." NCUA Br. 19. In NCUA's view, the statutory language "begs the question of *how* broad something may be before it can no longer be plausibly described as local." *Id.* at 20; *see also id.* at 23 (statutory language is "open-ended"); *id.* at 22 (unclear "what restrictions, if any, Congress intended to apply to the determination of what is a local community or rural district"). But the statutory language is not "open-ended" or "unclear" about the restrictions on NCUA's interpretive authority. Congress used terms like "local community" and "neighborhood" that are commonly used in everyday speech. These terms may be somewhat fuzzy around the edges, but that does not mean they are "open-ended." By employing common terms used in everyday language, Congress limited the agency's interpretive authority. For example, if a statute provided that briefs filed in federal court must have a "red" cover, and delegated to a federal agency authority to define the precise meaning of "red," the agency could specify light red, dark red, or medium red covers. But it does not follow that the statutory term "red" is open-ended or begs the question of whether a cover can be "plausibly described as red." That is because the term "red" has meaning. If an agency reasoned that there is no sharp dividing line marking where red shades off into purple and blue, and therefore "red" shall be deemed to include purple and blue, the agency would have exceeded its delegated authority. That is so even though the rule does not specify how "red" the cover must be to count as "red." The same principle applies to statutory terms such as "local community" and "neighborhood." When Congress uses terms that are commonly used in everyday language, the agency must define the statutory term in a way that is consistent with its common usage. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

bifurcated meaning, it does not help NCUA, because the geographically-based definition of "local" is no less restrictive than arguably non-geographic definitions. *See* Opening Br. 19.

NCUA offers three examples of “common usages” that, according to NCUA, indicate that a single local community may be very large. First, NCUA asserts that it is common for newspapers to have a “local” section that covers an entire metropolitan area. NCUA Br. 20. Yet, while NCUA cites the example of the *Washington Post*, that newspaper in fact offers twelve different zoned local sections covering separate portions of Washington, DC and surrounding counties in Virginia and Maryland.⁵ Moreover, none of the *Post*’s zoned local sections covers areas on the periphery of the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Combined Statistical Area (“CSA”) like Chambersburg, Pennsylvania or Martinsburg, West Virginia.⁶

Second, NCUA contends that residents of McLean, Virginia or Bethesda, Maryland may refer to the Washington Wizards as their “local” basketball team. NCUA Br. 20. That does not mean, however, that residents of the much larger Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA consider the Wizards their “local” team. Indeed, in most of the CSA, the Wizards are *not even among the top three* most popular teams.⁷

Finally, NCUA asserts that it “would be unremarkable to refer to the ‘local cuisine’ of the Pacific Northwest.” NCUA Br. 20. But no one who lives in or visits the Pacific Northwest would consider that large region of the country to be a single “local community.” That reality is emphasized by the lone source NCUA cites for its position: a 2008 article from USA TODAY

⁵ 2017 Ad Book, Wash. Post, at 2, 9 (Jan. 2017), https://www.washingtonpost.com/wp-stat/ad/public/static/media_kit/16-3365-01-AdBook.pdf.

⁶ *See id.*

⁷ *See Mapping Basketball Nation: Estimated “Like” by Team*, N.Y. Times, <https://www.nytimes.com/interactive/2014/05/12/upshot/basketball-map.html#4,42.169,-109.925> (last visited July 19, 2017).

noting that some retailers have adopted unusually expansive definitions of “locally grown.” And even that article does not assert that the Pacific Northwest is a single local community.

NCUA also argues that the system of “locality-based comparability pay” for federal employees supports its expansive definition of “local community.” NCUA Br. 20–21. But “locality,” which means “the fact or quality of having a place, that is of having position in space”⁸ and “a place or district, of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities,”⁹ is not a synonym for “local,” let alone “local community.” Moreover, the statutorily prescribed “locality based pay” for federal government employees is a very different concept from “local community.” “Locality pay areas” are established and modified under 5 U.S.C. § 5304 in order to identify places in which a pay disparity exists between the annual rates generally paid to non-federal workers.¹⁰ A pay disparity need not be limited to a single “local community,” and therefore the existence of locality pay areas does not support NCUA’s expansionary definition of “local community.”¹¹

⁸ Oxford English Dictionary (Compact ed. 1971).

⁹ *Id.*

¹⁰ See 5 C.F.R. § 531.602 (defining “locality pay area”); see also U.S. Office of Personnel Mgmt., *Report on Locality-Based Comparability Payments for the General Schedule: Annual Report of the President’s Pay Agent*, at 14 (2014), <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/pay-agent-reports/2014report.pdf> (describing how pay areas are measured).

¹¹ See 5 C.F.R. § 531.603 (describing “locality pay areas”). Other, more relevant federal statutory and regulatory provisions provide additional evidence that NCUA has gone beyond the reasonable meaning of “local community” and even of “local.” Multiple statutory provisions specify that “local” refers solely to a “political subdivision of a State,” such as a city or county. See, e.g., 15 U.S.C. § 2203(7); 42 U.S.C. § 3716, note (3); 18 U.S.C. § 666(c)(3); see also 13 C.F.R. § 119.2 (“‘Local community’ means an identifiable area and population constituting a political subdivision of a state.”).

In short, the words “local community” have a limited meaning, and NCUA must adhere to the limits imposed by Congress.¹²

II. NCUA’s Interpretation of “A Well-Defined Local Community, Neighborhood, or Rural District” Is Unreasonable.

A. A Combined Statistical Area Is Not “A Well-Defined Local Community.”

1. No Interaction Is Required Across a Combined Statistical Area.

A Combined Statistical Area is an OMB-defined area combining two or more adjacent Core-Based Statistical Areas (“CBSAs”) with an “employment interchange” rate of at least fifteen percent. *See* Opening Br. 11.¹³ ABA’s opening brief explained why a CSA does not satisfy any reasonable definition of a single “local community.” Opening Br. 21–33. In its response, NCUA does not dispute that CSAs are defined by OMB as “larger regions” that “combine” multiple CBSAs that each retain their own “separate component identities.” NCUA Br. 26.¹⁴

NCUA contends that CSAs are single local communities because “adjacent CBSAs within a CSA” share ties that, though “less intense than those captured by [CBSAs],” are “still significant.” NCUA Br. 24 (quoting 75 Fed. Reg. 37,246, 37,248 (June 28, 2010)). This argument

¹²The meaning of “rural district” is further discussed in Part II.D below.

¹³Employment interchange is the sum of (i) the percentage of the population that commutes from a smaller CBSA to a larger CBSA and (ii) the percentage of employment in the smaller CBSA represented by commuters from the larger CBSA. *See* 75 Fed. Reg. at 37,248.

¹⁴*See* 80 Fed. Reg. 76,748, 76,749 (Dec. 10, 2015); Office of Mgmt. & Budget, OMB Bull. No. 15-01, Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas, at 2 (2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/bulletins/2015/15-01.pdf> [hereinafter OMB Bull. No. 15-01]. Not only are CSAs “larger regions,” they require much less interaction than is necessary to qualify as a CBSA. While adjacent CBSAs in a CSA must have a combined total commuting rate to and from the CBSAs of fifteen percent, *see* 75 Fed. Reg. at 37,248, CBSAs require at least twenty-five percent of the workers living in outlying counties to commute to the core, *or* twenty-five percent of the workers employed in the outlying counties to commute from the core, *see id.* at 37,250.

misses the point. While it is true that a CBSA must have a modest amount of employment interchange with an *adjacent* CBSA in order to be included in a CSA, CSAs also include CBSAs that are not adjacent to each other, and OMB requires *no ties at all* between non-adjacent CBSAs within the CSA region. *See id.* In fact, even adjacent CBSAs need not have any ties, so long as each CBSA is adjacent to another CBSA in the CSA with a fifteen-percent employment interchange rate. *See id.*¹⁵ Thus, CSAs may have *no* employment interchange—or any other ties—across the CSA as a whole. A combination of separate metropolitan areas that share no ties across the region is not “a well-defined local community.”

Consider, for example, the eight CBSAs in the Washington-Baltimore-Arlington DC-MD-VA-WV-PA CSA.¹⁶ While fourteen percent of workers in the Chambersburg-Waynesboro, PA CBSA commute to the adjacent Hagerstown-Martinsburg, MD-WV CBSA, *not a single worker* in the Chambersburg-Waynesboro, PA CBSA commutes to the Cambridge, MD CBSA, the Easton, MD CBSA, or the California-Lexington Park, MD CBSA, all of which are in the same CSA.¹⁷ Similarly, while sixteen percent of workers in the Cambridge, MD CBSA commute to the adjacent Easton, MD CBSA, *not a single worker* in the Cambridge, MD CBSA commutes to the

¹⁵ For instance, the adjacent Worcester CBSA and Nashua-Manchester CBSA in the Boston-Worcester-Providence CSA have an employment interchange rate of only about one percent. *See* U.S. Census, *Residence County to Workplace County Commuting Flows for the United States and Puerto Rico Sorted by Residence Geography: 5-Year ACS, 2009-2013*, <https://www.census.gov/hhes/commuting/data/commutingflows.html> (follow “Table 1” hyperlink under 2009-2013 5-Year American Community Survey) (last visited July 19, 2017). The Worcester CBSA is Worcester County, MA and Windham County, CT. OMB Bull. No. 15-01, at 53. The Nashua-Manchester CBSA is Hillsborough County, NH. *Id.* at 40.

¹⁶ A map of the Washington-Baltimore-Arlington DC-MD-VA-WV-PA CSA appears at page 19 of this brief.

¹⁷ *See* U.S. Census, *Residence County to Workplace County Commuting Flows*, *supra* note 15. The Census information discussed in this paragraph is summarized in a table in the Appendix to this brief.

Chambersburg-Waynesboro, PA CBSA, the Winchester VA-WV CBSA, or the California-Lexington Park, MD CBSA, all of which are in the same CSA.¹⁸ Indeed, only a tiny proportion of commuters from these CBSAs commute *anywhere* in the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA other than an adjacent CBSA. In the Chambersburg-Waynesboro, PA CBSA, for example, only five percent of workers commute anywhere in the CSA other than the adjacent Hagerstown-Martinsburg, MD-WV CBSA.¹⁹ In the Cambridge, MD CBSA, only six percent commute anywhere else in the CSA other than the adjacent Easton, MD CBSA.²⁰ With such weak—or non-existent—ties to the larger CSA region, there is no reasonable basis to deem the whole CSA a single “well-defined local community.”

The credit union amici note OMB’s statement that CSAs may “reflect broader social and economic interactions, like wholesaling, commodity distribution, and weekend recreation activities.” OMB Bull. 15-01, at 2; CU Amicus Br. 19. But nothing in the definition of a CSA requires any showing of these ties. *See* 75 Fed. Reg. at 37,251. And to the extent that such broader “interactions” exist, they are not sufficient to create a single “well-defined local community.” For instance, Chicago is a center of wholesaling and commodity distribution for much of the Midwest, but that does not make the entire Midwest part of a single “local community.” Likewise, the fact that a limited number of families from Washington, DC, Philadelphia, Wilmington, and New York City engage in recreational activities on the same Delaware beaches does not make all those metropolitan areas part of one “local community.”

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

NCUA also argues that, in permitting CSA-based fields of membership, it “was not regulating on a blank slate,” because it already permitted fields of membership based on CBSAs and large political jurisdictions. NCUA Br. 25. But NCUA recognizes “that the addition of a CSA-based category represented an *expansion of the existing framework*.” NCUA Br. 26 (citing 80 Fed. Reg. at 76,749) (emphasis added). Indeed, CSAs are fundamentally different from CBSAs and single political jurisdictions. For one thing, CSAs are much bigger. As NCUA has acknowledged, “a CBSA is far more compact than a Combined Statistical Area.” 81 Fed. Reg. 78,748, 78,749 (Nov. 9, 2016). A CSA, by definition, combines multiple CBSAs, which in turn combine multiple political jurisdictions. *See* 75 Fed. Reg. at 37,251. NCUA asserts that the average *geographic* size of CSAs—after excluding the 22 largest in population that have more than 2.5 million people—is similar to the average geographic size of the CBSA-based fields of membership NCUA has approved since 2010. NCUA Br. 24–25 (citing 81 Fed. Reg. at 88,414–15). But the average *population* of CSAs is four times larger than the average of CBSAs— and more than three times larger even after the twenty-two most populous CSAs are excluded from the calculation. *See* Opening Br. 22 & n.36.²¹

Moreover, CSAs—unlike CBSAs and single political jurisdictions—do not share even the minimal common ties NCUA has previously required for a single “local community.” Single

²¹ *See also* U.S. Census, *American FactFinder*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt (following these steps: Add/Remove Geographies, Select Geographic Type “Combined Statistical Area,” Add “All Combined Statistical Areas within the United States,” Show Table) (average population of CSAs is approximately 1.4 million and average population of CSAs under 2.5 million is approximately 650,000); U.S. Census, *Population Change for Metropolitan and Micropolitan Statistical Areas in the United States and Puerto Rico (February 2013 Delineations): 2000 to 2010 (CPH-T-5)*, <https://www.census.gov/population/www/cen2010/cph-t/cph-t-5.html> (average population of CBSAs is approximately 300,000 and average population of CBSAs under 2.5 million is approximately 200,000).

political jurisdictions, *i.e.*, cities and counties, by definition share ties to the common jurisdiction. *See* NCUA Br. 6 (deeming a political jurisdiction “below the State level” to be a local community is “consistent with the . . . local, State and Federal government structure” (quoting 75 Fed. Reg. at 36,258)). Likewise, CBSAs require ties to a single core area across the whole CBSA. *See* 75 Fed. Reg. at 37,250. A county qualifies to join the core area in a CBSA only if it has a high level of commuting interchange with the core area. *See id.* The core serves as a single economic and cultural hub and population center for the whole CBSA. *See* 75 Fed. Reg. at 37,246 (“The general concept of a [CBSA] is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus.”).

CSAs, in contrast, require no common ties across the area. *See supra* at 12–13. Unlike CBSAs, a CSA is not required to have one central nucleus with which the whole CSA shares ties. The Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA is again instructive. While Washington serves as the hub for the Washington-Arlington-Alexandria CBSA and Baltimore for the Baltimore-Columbia-Towson CBSA, there is no one hub for commuting or other interaction across the whole CSA. *Well under one percent* of workers in the Chambersburg-Waynesboro, PA CBSA, for example, commute to *either* Washington, DC or Baltimore City. The same is true of workers in Cambridge, MD. *See infra* Appendix.

NCUA previously recognized that it is “inappropriate to automatically conclude” that an area that “do[es] not have one dominant economic hub, but rather may contain two or more dominant hubs”—like a CSA—“qualif[ies] as [a well-defined local community].” 75 Fed. Reg. 36,257, 36,258 (June 25, 2010). The agency has offered no satisfactory explanation for its change of position. Categorical approval of CBSAs and large single political jurisdictions pushes against

the reasonable limits of a single “well-defined local community”; categorical approval of CSAs is a bridge too far.²²

2. *No Interaction Is Required Across a 2.5-Million-Person Portion of a Combined Statistical Area.*

Because NCUA cannot show that an entire CSA is a single “well-defined local community,” it relies heavily on the requirement that a CSA-based field of membership must be limited to 2.5 million people. Br. 24-26. That limitation does not save NCUA’s Final Rule.

As an initial matter, NCUA proposed, at the same time it issued the Final Rule, to *quadruple* the population limit to 10 million, thereby deeming all but the very largest CSAs to be single “well-defined communities.” 81 Fed. Reg. at 78,751. Indeed, NCUA stated in the Final Rule that it “finds considerable merit in commenters’ suggestions to eliminate the population cap” altogether. *Id.* at 88,413. Unless checked by the courts, NCUA is thus well on its way to deeming all CSAs—including those with tens of millions of people spread across several states—to be single “well-defined local communities.”

Putting aside NCUA’s proposal to drop the 2.5-million-person limit, there is no reasonable basis for NCUA’s determination that 2.5-million-person portions of CSAs are single local communities. A population limit in and of itself, no matter how small—and 2.5 million is not small—cannot create a “local community.” Otherwise any area of 2.5 million (or some other arbitrary number) would be deemed a “local community.” Instead, as NCUA has recognized, a

²² NCUA briefly argues that OMB permits agencies to use CSA delineations to develop non-statistical programs. NCUA Br. 24. But the same OMB source that NCUA cites “cautions” that such “delineations should not be used to develop and implement . . . nonstatistical programs and policies without full consideration of the effects of using these delineations for such purposes.” OMB Bull. No. 15-01, at 3. “These areas should not serve as a general-purpose geographic framework for nonstatistical activities.” *Id.* In this case, the statutory constraint limiting fields of membership to single “well-defined local communities” makes CSAs a wholly inappropriate geographic framework for the reasons ABA has explained.

local community requires interaction and common ties. *See* Opening Br. 19; *see also id.* at 5 (“most prominent” requirement of a local community is that residents must “interact or have common interests” (quoting 63 Fed. Reg. at 72,037)). Yet portions of CSAs, like Chambersburg, Pennsylvania and the Eastern Shore of Maryland, may have no interaction and no common ties. *See supra* at 12–13. A field of membership combining these portions of the CSA would not even satisfy the single criterion that defines the CSA as a whole, *i.e.*, component units with a fifteen percent employment interchange rate.

NCUA’s brief asserts that the agency would not approve a credit union’s application to serve non-contiguous portions of a CSA. But the Final Rule, by its terms, does not require contiguity. NCUA argues that the Final Rule provides that CSA-based fields of membership must consist of a CSA or an “individual portion” thereof. *See* Br. 27 (citing 81 Fed. Reg. at 88,414). An “individual portion” is not the same as a “contiguous portion.” Indeed, in the Final Rule, NCUA *deleted* the term “contiguous” and inserted the term “individual.”²³ If “individual” means “contiguous” there would be no reason for NCUA to have made such a change. *Cf. Stone*, 514 U.S. at 397 (“The reasonable construction is that the amendment was . . . not just to state an already existing rule.”). Moreover, the Final Rule *retained* the term “contiguous” in the provision that applies to rural districts. *See* 81 Fed. Reg. at 88,440. When Congress or an agency uses different terms in the same statute or regulation, they are presumed to have different meanings.

²³ *Compare* 81 Fed. Reg. 88,412, 88,440 (Dec. 7, 2016) (Final Rule) (“The well-defined local community requirement is met if . . . [t]he area to be served is in a recognized Single Political Jurisdiction, *i.e.*, a city, county, or their political equivalent, or any individual portion thereof.”), *with* 75 Fed. Reg. at 36,264 (2010 rule) (“The well-defined local community requirement is met if . . . [t]he area to be served is in a recognized single political jurisdiction, *i.e.*, a city, county, or their political equivalent, or any *contiguous* portion thereof.” (emphasis added)).

See, e.g., Transbrasil S.A. Linhas Aereas v. Dep't of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986).²⁴ Thus, NCUA's interpretation of its rule is not consistent with the language of the Final Rule. NCUA's statement in its brief that contiguity will be required—a statement the agency can retract at any time without engaging in the notice and comment process—is insufficient to survive judicial review. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (judicial review limited to grounds on which agency relied); *Miller v. Clinton*, 687 F.3d 1332, 1340 (D.C. Cir. 2012) (“We do not . . . defer to post hoc interpretations contained in agency briefs.” (citing additional cases)).

Even if the Court were to accept NCUA's argument that the Final Rule requires contiguity for portions of CSAs, the Rule still would not satisfy “the well-defined local community” requirement. NCUA's own citations (Br. 27) to adjudications before the elimination of the contiguity requirement make this clear. In one case NCUA cites, the agency rejected a field of membership comprising an eight-county portion of the Cincinnati-Wilmington-Maysville, OH-KY-IN CSA, because, although the field of membership was contiguous, the evidence “failed to show adequate interaction or common interest” among the “residents of this large, highly populated area.” *In re Cinfed Fed. Credit Union*, 2007 WL 1958692, at *3–4 (Mar. 15, 2007). Under the Final Rule, however, this area would be categorically approved as a less than 2.5-million-person portion of the CSA. *See id.* at *2. Indeed, the *entirety* of the CSA—with nine *more* counties—would also be approved because the whole CSA has fewer than 2.5 million people.²⁵

²⁴ In addition, the “individual portion” language does not even apply to CSA-based fields of membership. The Rule states that a field of membership based on a portion of a *single political jurisdiction* may include “any individual portion thereof.” 81 Fed. Reg. at 88,440. But it says that a field of membership based on a CSA (or CBSA) may include any “portion thereof” (with a population of 2.5 million or less)—not any “individual portion.” *Id.*

²⁵ U.S. Census, *American FactFinder*, *supra* note 21 (following these steps: Add/Remove Geographies, Select Geographic Type “Combined Statistical Area,” Add “Cincinnati-Wilmington-Maysville, OH-KY-IN,” Show Table); *see also* OMB Bull. No. 15-01, at 29, 80, 97, 100 (listing

3. *Federal Courts Have Rejected Fields of Membership That Would Be Approved Under the Combined Statistical Area Rule.*

ABA showed in its opening brief that two federal courts have rejected fields of membership that would be automatically approved under the Combined Statistical Area rule. *See Am. Bankers Ass'n v. NCUA*, 2008 WL 2857678, at *7 n.7 (M.D. Pa. July 21, 2008) (rejecting Harrisburg-York-Lebanon, PA CSA as field of membership); *Am. Bankers Ass'n*, 347 F. Supp. 2d at 1063 (rejecting six-county portion of ten-county Salt Lake City-Provo-Orem, UT CSA as field of membership); Opening Br. 26–29. As one of those courts noted, any “casual observer” familiar with these areas would find it “remarkable” to consider such disparate locations “well-defined local communities.” *Am. Bankers Ass'n*, 2008 WL 2857678, at *10.

NCUA does not dispute that these courts rejected fields of membership that would be approved under the Final Rule. Instead, the agency strains to dismiss the cases as “fact-bound.” Br. 28, 29. NCUA’s effort to sweep these cases under the rug is unpersuasive. NCUA argues that the cases “have no relevance” because they were decided before NCUA adopted a categorical approach to fields of membership. NCUA Br. 28–30. But that simply underscores the reality that the categorical approach as applied to CSAs will approve fields of membership inconsistent with the statute. Applying a rigorous, individualized analysis (down to the level of detail of where residents shop, as NCUA notes (Br. 30)), these courts found that a CSA, and a less-than-2.5-million-person portion of a CSA, were too big and too weakly linked to be deemed single “well-defined local communities.” NCUA has provided no explanation for its failure to consider these federal courts’ admonition to read “well-defined local community more narrowly,” as the statute

requires, and not to “act as a rubber stamp or cheerleader” for credit unions seeking to expand their field of membership. 347 F. Supp. 2d at 1070.²⁷

4. *The Combined Statistical Area Rule Is Arbitrary and Capricious.*

ABA also demonstrated in its opening brief that the Final Rule deeming CSAs “well-defined local communities” is arbitrary and capricious because it reverses prior agency determinations without an adequate explanation. Opening Br. 29–33. NCUA’s primary response is simply that its rules have changed over time. NCUA Br. 30–33. But that is precisely what has been arbitrary and capricious: the agency’s rules have inexorably loosened without a reasoned explanation.

NCUA has never explained why the “Greater Boston Metropolitan Area” “d[id] not meet the definition of local community” in 1998, but it does today. *See* 63 Fed. Reg. at 72,039. Nor has NCUA explained why previously rejected fields of membership comprising portions of CSAs of 2.5 million people—or substantially fewer people—did not meet the definition of “local community” before, but they do today. *See, e.g., In re Hudson Valley Fed. Credit Union*, 1999 WL 35787082, at *2 (July 22, 1999) (rejecting approximately-850,000-person portion of New York-Newark, NY-NJ-CT-PA CSA); *In re Cinfed Fed. Credit Union*, 2007 WL 1958692, at *2 (rejecting less-than-2-million-person portion of Cincinnati-Wilmington-Maysville, OH-KY-IN CSA); *In re Bellco First Fed. Credit Union*, 1999 WL 34801880, at *2 (May 19, 1999) (rejecting 2.2-million-person portion of Denver-Aurora, CO CSA); *In re Vantage Credit Union Field of*

²⁷ NCUA suggests that the Utah decision considered only whether the field of membership was a “well-defined local community” “as that term is defined in the NCUA’s *regulations*.” NCUA Br. 28 (quoting 347 F. Supp. 2d at 1065) (emphasis added). That is incorrect. The court explicitly concluded that NCUA’s failure to “analyze any issue that may have tended to diminish the likelihood of finding more than one local community in the six-county area” was “contrary to the statute.” 347 F. Supp. 2d at 1074.

Membership Appeal, 2010 WL 11400686, at *1 (rejecting approximately 2.5-million-person portion of St. Louis-St. Charles-Farmington MO-IL CSA).²⁸

NCUA contends that its continuous expansion of the field of membership rule has been informed by the agency's "experience." NCUA Br. 32. But it never explains *how* the agency's experience now supports deeming CSAs "well-defined local communities." The only explanation in the Final Rule is that "a Combined Statistical Area simply unifies, as a single community, two or more contiguous CBSAs that each independently meet the existing rule's definition of a 'statistical area' that presumptively qualifies as a [well-defined local community]." 81 Fed. Reg. at 88,415. That each component CBSA meets the well-defined local community requirement, however, says nothing about whether the *combination* of CBSAs in a CSA still satisfies that requirement. A basket full of apples is not itself an apple. With this arbitrary expansion of the field of membership of community credit unions, NCUA is continuing its role as "cheerleader" for credit unions, rather than fulfilling its responsibility to ensure that congressional limitations on community credit unions are implemented. *See* 347 F. Supp. 2d at 1070.²⁹

NCUA does not dispute that CSAs fail to satisfy *any* of the criteria that the agency has accepted as indicia of a local community. *See* Opening Br. 32–33. Instead, NCUA asserts that these criteria are irrelevant because they are factors for considering additions of adjacent areas to fields of membership that are "more demanding" than those for identifying a "well-defined local community" in the first instance. NCUA Br. 33. But NCUA used virtually the same criteria to

²⁸ *See also* OMB Bull. No. 15-01, at 26, 29, 31, 37, 43, 47, 100–101, 109, 111 (confirming that counties included in rejected fields of membership are in respective CSAs).

²⁹ At times, NCUA comes close to arguing that because it has expanded the definition of "local community, neighborhood, or rural district" several times, it should be permitted to continue the process of expansion. NCUA's approach is reminiscent of the story of the frog that was placed in a pot of water in which the temperature was gradually raised until the frog was parboiled. Whether the process occurs at once or in gradual steps, the water is just as hot at the end.

identify well-defined local communities for years. *Compare, e.g.*, 81 Fed. Reg. at 88,440 (Final Rule) (listing criteria including presence of economic hub and population center and shared public services and facilities and government designations and quasi-governmental agencies), *with* 75 Fed. Reg. at 36,258 (presence of economic hub and population center and shared common facilities and organizations), 68 Fed. Reg. 18,334, 18,357 (Apr. 15, 2003) (major trade area and shared common facilities and organizations), *and* 63 Fed. Reg. at 72,038 (same); *see also* 81 Fed. Reg. at 78,750–51 (proposing similar criteria). And in adopting a “categorical” approach to defining local communities, NCUA did not state that it was adopting a two-tiered definition of local community, with one definition much more demanding than the other. Instead, NCUA emphasized the administrative convenience of the categorical approach, and concluded that it was a valid substitute for a case-by-case approach. *See* 75 Fed. Reg. at 36,260 (describing the case-by-case approach as “cumbersome” and “time-consuming”).

For all of these reasons, a Combined Statistical Area is not “a well-defined local community” and NCUA’s unjustified reversal of its own prior positions is arbitrary and capricious.

B. Allowing Credit Unions to Deny Service to the Urban Core of a Core-Based Statistical Area Is Unreasonable.

NCUA acknowledges (Br. 34) that the sole basis for deeming a Core-Based Statistical Area to be a single well-defined local community is that the peripheral counties in a CBSA have “commuting ties with the [c]ore.” *See* 65 Fed. Reg. 82,228, 82,228–29, 82,238 (Dec. 7, 2000) (CBSA includes “a recognized population nucleus” and “adjacent communities that have a high degree of integration *with that nucleus*” (emphasis added)). The peripheral counties in a CBSA need not interact with each other to be included in the CBSA; indeed, they may be separated “by large distances or difficult terrain.” 65 Fed. Reg. at 82,229. Consequently, there is no basis for concluding that an area on the periphery of a CBSA, considered apart from the urban core, can

NCUA asserts that excluding the core from the CBSA is not a problem because the peripheral counties interact with the urban core, and the CBSA as a whole can be viewed as a single well-defined local community. But as noted above, the peripheral counties need not interact with the other counties *that actually constitute the field of membership*. For instance, *not a single person* commutes from Frederick County, MD to Fredericksburg City, VA, or vice versa.³¹ Thus, such a field of membership cannot, in and of itself, constitute “a well-defined local community.” Moreover, NCUA does not require CBSA-based community credit unions to serve counties within the CBSA on an all-or-nothing basis. Instead, the credit union is free to define a service area consisting of portions of counties, including the most outlying portions, in the CBSA. The CBSA designation says nothing about the level of interaction between *portions* of a county (or portions of multiple counties) and the urban core, and OMB has noted that this can vary widely. *See, e.g.*, 65 Fed. Reg. at 82,229. Thus, NCUA’s rule not only fails to guarantee interaction between the peripheral areas actually served by the credit union, it does not even guarantee interaction between the area served and the (excluded) urban core.³²

In addition, the reasons NCUA gave for allowing credit unions to dispense with service to the urban core are inadequate, because they amount to allowing credit unions to exclude less affluent and minority customers they do not wish to serve—against Congress’s intent. *See* NCUA Br. 34 (citing 81 Fed. Reg. at 88,413). As ABA’s opening brief explains, NCUA’s rule effectively allows credit unions to engage in “redlining”—*i.e.*, excluding from their service areas urban cores

³¹ U.S. Census, *Residence County to Workplace County Commuting Flows*, *supra* note 15.

³² ABA’s opening brief noted (Br. 34) that these problems are exacerbated by the absence of a requirement that credit unions must serve a contiguous area within a CBSA. NCUA’s brief claims (Br. 36) that it does not allow non-contiguous service areas. But, as with CSAs, the rule itself imposes no such limitation. *See supra* at 17. Consequently, NCUA’s assertion in a brief that contiguity will be required is insufficient to survive judicial review. *See supra* at 18.

that contain a disproportionate number of minority residents and residents with limited means.³³ NCUA admits that the ABA has “raise[d] an important policy issue.” NCUA Br. 36. It also recognizes that Congress intended credit unions to meet the credit and savings needs of “persons of modest means.” CUMAA, Pub. L. No. 105–219, 112 Stat. 913 (1998); *see also* FCUA, Pub.L. No. 73–467, 48 Stat. 1216 (1934) (credit unions intended to serve “people of small means”). And NCUA does not dispute that government studies have concluded that credit unions actually serve *fewer* low-income individuals and families than banks. *See* ABA Opening Br. 15 (discussing GAO report). Given these facts, it is almost incredible that the federal agency responsible for ensuring that federal credit unions serve people of modest means has authorized these financial institutions to carve urban cores with the highest concentration of low-income and minority residents out of their service areas.

NCUA asserts (Br. 36–37) that it requires credit unions to submit a “business and marketing plan” demonstrating that the credit union is willing and able to serve its entire proposed service area. But once a credit union is permitted to *exclude* the urban core from its service area, it is no longer expected or even allowed to serve low-income and minority individuals in the urban core. *See* 81 Fed. Reg. at 88,414. Thus, NCUA’s assurances that it will check to ensure that the credit union is serving the relatively affluent suburban areas it has chosen to serve (for example, the McLean and Arlington areas NCUA mentions, Br. 35) are irrelevant to the question of redlining and of absolutely no help to residents in the urban core (such as Washington, DC).³⁴

³³ *See Crawford v. Signet Bank*, 179 F.3d 926, 928 n.4 (D.C. Cir. 1999) (“‘Redlining’ is the practice of financial institutions intentionally not lending to certain neighborhoods or parts of a community.” (internal quotation marks omitted)).

³⁴ NCUA asserts (Br. 36) that requiring credit unions to serve the urban core of CBSAs would “create a deterrent to credit unions serving CBSAs at all.” But, to the extent that a credit union lacks the resources to serve an entire CBSA, it can serve a smaller local community. All CBSAs

NCUA's rule is contrary to the statute, arbitrary, and capricious and must be vacated.

C. Allowing Credit Unions to Serve “Adjacent Areas” Based on Interactions Between Individuals Living Near a Community Boundary Line Is Arbitrary and Capricious.

NCUA recognizes (Br. 39) that a community-based credit union may serve only a single well-defined local community. It follows that a community-based credit union is *not* authorized to serve areas that are adjacent to its local community. NCUA's Final Rule is arbitrary and capricious because it allows expansion outside the credit union's original local community based merely on evidence of “common interests or interaction among residents on both sides” of the boundary line between a well-defined local community and an area adjacent to that community. 81 Fed. Reg. at 88,440; *see id.* at 88,415 (credit union may add adjacent area to its service area by showing “common interests or interaction among residents on both sides of the perimeter”); *see also* 80 Fed. Reg. at 76,750 (proposal for credit union to be able to add adjacent area to field of membership upon “a showing by subjective evidence that residents on both sides of the perimeter interact or share common interests”).

As ABA explained in its opening brief, individuals on either side of almost any geographic boundary line are likely to have some common interests or interaction. Opening Br. 36. To take a simple example, families that live near a town boundary line are likely to have some interaction with families that live a short distance outside town. But this type of interaction “on both sides of the perimeter” does not demonstrate that the adjacent area can reasonably be regarded as part of the original local community. If it did, any “local community” could be expanded indefinitely,

are made up of counties and smaller political jurisdictions, and each such smaller jurisdiction qualifies as a local community under NCUA's rules. *See* 81 Fed. Reg. at 88,440. Thus, there is no risk that credit unions will be forced to serve a local community that is too large—only that they may be required to fulfill their mission by serving urban customers of modest means and minorities in addition to more affluent suburban customers.

simply by showing that people on either side of the boundary line interact, and then repeating the process. NCUA's approach is inconsistent with the statute because it allows the agency to replace a statutory "limitation on credit union membership" with an essentially "limitless" rule. *NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. at 502 (emphasis in original).

1. *ABA's Challenge Is Ripe for Judicial Review.* NCUA urges the Court not to address this issue, on the ground that it is not yet ripe for judicial review. As NCUA recognizes, courts analyze ripeness by considering (i) "the fitness of the issues for judicial decision" and (ii) "the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Contrary to NCUA's argument, those factors point to the conclusion that the issue ABA has raised is ripe for this Court's review.

As to the first ripeness factor, NCUA acknowledges that ABA "seemingly presents a pure legal issue, which would generally be fit for review." Br. 38; *see also Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1106 (D.C. Cir. 2011). NCUA contends, however, that the legal issue is presented "at a very high level of generality." *Id.* NCUA frames the legal issue before the Court as "whether the FCUA permits NCUA to allow a community credit union to add *any* adjacent area, regardless of the facts and documentation the applicant submits in support of such an application." NCUA Br. 38. But that is not the legal issue actually presented by ABA. ABA is not contending that there are no possible circumstances in which it may be permissible for NCUA to deem an area adjacent to a political subdivision as part of a single local community. Instead, ABA is raising a different legal issue: whether it is appropriate to add an adjacent area to a local community based solely on evidence of interaction between individuals on either side of the community boundary line. That purely legal issue is not framed at an excessively high "level of generality."

In evaluating the fitness of an issue for judicial decision, courts also consider whether the agency's action is final and whether consideration of the issue would benefit from a more concrete setting. *Full Value Advisors*, 633 F.3d at 1106. Here, NCUA has promulgated a final rule—a quintessential final agency action—and NCUA does not dispute that its action is final. In addition, there is no reason to delay judicial review until NCUA actually begins adding adjacent areas to local communities. The answer to the legal question presented—whether interaction along a geographic boundary line shows that an adjacent area is part of an existing local community—does not turn on the thoroughness with which a credit union demonstrates such interaction. ABA's argument is that interaction “on both sides of the perimeter,” however thoroughly it is documented, is not enough to show that an adjacent area is reasonably deemed a part of the local community as a whole.

NCUA does not directly address the hardship to the parties of withholding review, but it notes (Br. 38) that ABA brought two successful challenges to particular community charters issued to credit unions in Utah and Pennsylvania. Requiring ABA to file separate lawsuits to challenge each expanded credit union charter granted under the NCUA's new rule would impose a considerable hardship on ABA. The hardship would be increased because NCUA does not permit third parties, such as the ABA or its members, to participate in proceedings at the agency to evaluate credit union charter applications. *See* 81 Fed. Reg. at 88,415 (concluding that giving third parties notice and an opportunity to comment on proposed adjacent area additions “would needlessly consume agency resources”).

In short, ABA has raised a legal issue on which NCUA has taken final action. Awaiting specific applications of the new rule would not materially assist this Court's resolution of the issue,

and would impose a significant hardship on ABA. Accordingly, the Court should reject NCUA's ripeness argument.

2 *NCUA's Rule Is Arbitrary and Capricious.* On the merits, NCUA argues that it is not precluded from adopting a "hybrid" approach under which local communities are identified partly on the basis of "presumptive categories" (political jurisdictions, CBSAs, and CSAs) and partly on the basis of a case-by-case demonstration of interaction between individuals on either side of the perimeter of the presumptive category. NCUA Br. 38–39. NCUA's argument largely ignores ABA's explanation in its opening brief that this approach permits fields of membership based not on "a" single well-defined local community, but, at best for NCUA, on *multiple* community bonds. *See* Opening Br. 37–38. If, for instance, a field of membership has been deemed "a well-defined local community" based on common residence in a single political jurisdiction and participation in that political community, individuals outside the jurisdiction by definition will not share the community bond that is the basis for the original community.³⁵

NCUA's approach—allowing the addition of adjacent areas based on evidence of interactions across the existing boundary line—is fatally flawed. NCUA asserts that it will not expand existing local communities to include adjacent areas based on "the sort of *de minimis* interaction that exists across any boundary line," but instead will consider "particular factors . . . that, although somewhat subjective and qualitative, set forth a rigorous framework for adjacent-area addition requests." Br. 40 (citing 81 Fed. Reg. at 88,440). This response fails to come to grips with ABA's argument, which is that consideration of whether there is interaction "among

³⁵ While NCUA asserts (Br. 38) that categories like single political jurisdictions, CBSAs, and CSAs can be "underinclusive," it does not explain how this can occur. Nor does NCUA acknowledge that, if such categories can be underinclusive, it would seem to follow that they also can be overinclusive and therefore NCUA should provide a method for petitioning to decrease the size of a field of membership based on a single political jurisdiction, a CBSA, or a CSA.

residents on both sides of the perimeter,” 81 Fed. Reg. at 88,415, no matter how thorough, is legally insufficient to demonstrate that the adjacent area is part of the original local community as a whole. It is the wrong legal “framework,” no matter how “rigorously” it is applied.

NCUA’s approach is also flawed because it largely erases any limit on the size of a single “local community.” NCUA’s response is that “the Final Rule does not permit such bootstrapping,” because it “applies only to the addition of an *immediately adjacent* area falling outside a Single Political Jurisdiction, [CBSA] or [CSA].” NCUA Br. 40 (quoting 81 Fed. Reg. at 88,440) (emphasis added in NCUA brief). But the Final Rule stops well short of imposing an “anti-bootstrapping” rule. It does not limit credit unions to adding one, and only one, adjacent area. And even if the boundaries of a field of membership could not be expanded infinitely in a single direction, the field of membership could be expanded all around the edge of the CBSA or CSA, through numerous adjacent area approvals. Each of these expansions could be based on different interaction across the different portions of the boundary line of the original community. Rather than a single community bond based on common ties to a single political jurisdiction or common levels of commuting to a single core area, the expanded field of membership could include any number of community bonds based on different interactions on each portion of the periphery of the original community.

For instance, a field of membership comprised of a portion of the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA could add adjacent counties linking Culpeper County to Charlottesville, based on the “interaction on both sides” of that perimeter. Then the same field of membership could add adjacent counties in Pennsylvania, like Gettysburg’s Adams County, based on “interaction on both sides” of that opposite perimeter—despite a total absence of ties to the Charlottesville addition. Then the same could happen on any other perimeter until the community

common-bond “*limitation* on credit union membership” becomes an essentially “limitless” rule. *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. at 502 (emphasis in original).

NCUA’s adjacent area rule is arbitrary, capricious, and not in accordance with law because it replaces the requirement that community-based credit unions serve only one local community with an approach that permits numerous community bonds in a single, distended field of membership.

D. NCUA’s Expansion of the Definition of “Rural District” Is Arbitrary, Capricious, and Contrary to the Statutory Language.

In the Final Rule, NCUA quadrupled the population limit for a single rural district from 250,000 individuals to one million individuals and completely eliminated the requirement that the population of a single rural district may include up to three percent of the population of the state in which it is located. NCUA does not dispute that, under its new Rule, a single rural district may for the first time encompass an entire state (such as Alaska, North Dakota, South Dakota, Vermont, or Wyoming) and indeed may now encompass an entire state and most of a second state (for example, all of Wyoming and most of Montana). NCUA also does not dispute that, because NCUA has authorized such enormous “rural districts,” and required only that the *average* population of the entire district not exceed 100 persons per square mile, a “rural district” may now include large urban areas. These aspects of NCUA’s Final Rule fail to satisfy any reasonable definition of a single “rural district.”

In its opening brief, ABA cited dictionary definitions demonstrating that a rural district must be both rural and relatively small. Opening Br. 38 (collecting definitions). NCUA dismisses these definitions as “defunct” and “foreign,” and contends that “rural district” has no established meaning. NCUA Br. 21–22. NCUA’s argument lacks merit. Congress used the term “rural district” in the original FCUA, and thus 1934, the date of the FCUA’s enactment, is “the most

relevant time for determining [the] statutory term’s meaning.” *MCI Telecomms. Corp.*, 512 U.S. at 228. As NCUA recognizes, for decades before and after 1934—from at least the 19th century through the 1970s—a “rural district” was a local government unit, *i.e.*, a subdivision of a county. NCUA Br. 22. Moreover, the authority cited in ABA’s opening brief makes clear that “rural district” was not a “foreign” term, but was used in the United States to describe small, rural areas. *See* Opening Br. 38 n.61; *Fin. Pac. Ins. Co. v. Silva*, 2004 WL 882101, at *7 (Cal. Ct. App. Apr. 26, 2004) (citing cases that used the term “rural district” “to refer to land outside an incorporated city or other urbanized area where farming and grazing were the primary uses”). Indeed, hundreds of U.S. cases, statutes, and local ordinances have used the term “rural district” in a similar sense—and continue to do so today.³⁶ “[W]here,” as here, “Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.” *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

Even if Congress did not adopt the recognized meaning of the term “rural district” when it enacted the FCUA, a “rural district” still must be both “rural” and a “district.” “Rural” means country or agrarian, as opposed to urban, *i.e.*, “of, pertaining to, or characteristic of the country or

³⁶ *See, e.g., Rissler v. Jefferson Cty. Bd. of Zoning Appeals*, 693 S.E.2d 321, 327 (W.V. 2010) (rural district “provide[s] a location for low density single family residential development in conjunction with providing continued farming activities” under local ordinance); *Bd. of Educ. of Butler Twp., Darke Cty., Centralized Sch. Dist. v. Campbell*, 143 N.E. 273, 274 (Ohio 1924) (“school territory not included within a city, exempted village, or village district constitutes a rural district” under Ohio statute); *Zoning Comm’n v. Grandieri*, 208 A.2d 357, 358 (Conn. Cir. Ct. 1964) (rural district zoned for “[f]arming, truck or nursery gardening, provided that no livestock or poultry except household pets shall be kept on any lot of less than three acres” under local ordinance).

country life as opposed to the town,”³⁷ “of, relating to, or involving country people, farmers, etc.,”³⁸ or “of, relating to, or involving a tenement in land adapted to and used for agricultural or pastoral purposes.”³⁹ “District” means a political subdivision, *i.e.*, “a territorial division (as for administrative or electoral purposes).”⁴⁰ “District” is “used in various specific and local senses,” such as a school district or a fire district.⁴¹ That “rural district” has a circumscribed meaning is especially clear when the term is read in the context of the neighboring words with which it is associated—“local community” and “neighborhood”—which also describe small, circumscribed areas. *See supra* at 6. A “rural district” cannot reasonably mean an entire state, a million people, or a predominantly urban population—let alone all three.

NCUA asserts (Br. 41) that the Final Rule does not effect a “dramatic expansion” of the prior population limit. But that is exactly what it does. A population of one million unquestionably is four times the size of a population of 250,000. Similarly, the entire population of a state is much larger than three percent of its population. Despite these undeniable facts, NCUA argues that it

³⁷ Oxford English Dictionary (Compact ed. 1971); *see* Black’s Law Dictionary (10th ed. 2014).

³⁸ Black’s Law Dictionary (10th ed. 2014).

³⁹ *Id.* Congress and federal agencies also have defined “rural” to exclude urban areas, and to include only areas with few inhabitants. *See, e.g.*, 6 U.S.C. § 124j(c) (defining “rural” to mean “an area that is not located in a metropolitan statistical area, as defined by the Office of Management and Budget”); 42 U.S.C. § 294d(d) (defining “rural areas” to mean “geographic areas located outside of standard metropolitan statistical areas”); 7 U.S.C. § 924 (defining “rural area” to mean “any area of the United States not included within the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 5,000 inhabitants”); 12 U.S.C. § 2075(b)(3) (setting a 2,500-person cap on “rural areas”); 7 C.F.R. § 1735.2 (defining “rural area” to mean any area “not included within the boundaries of any incorporated or unincorporated city, village or borough having a population exceeding 5,000 inhabitants”).

⁴⁰ Webster’s Ninth New Collegiate Dictionary (9th ed. 1987); *see also* Oxford English Dictionary (Compact ed. 1971) (defining district as “a portion of territory marked off or defined for some special administrative or official purpose, or as the sphere of a particular officer of administrative body”).

⁴¹ *See* Oxford English Dictionary (Compact ed. 1971).

made no significant change because the three-percent rule allowed credit unions in more populous states to serve rural districts containing more than 250,000 people. NCUA notes that in these larger states it approved eight rural districts “with an average population of 536,646” under the old rule. NCUA Br. 41. But one million is nearly double 537,000. And in less populous states, the size limit for rural credit unions has been quadrupled.

NCUA argues that the three-percent limitation was “redundant,” and therefore its elimination was not a significant change. But the three-percent limit became “redundant” only because NCUA quadrupled the numerical limit. As a result, credit union applicants will no longer need to invoke the three-percent limit, because they can rely on the greatly expanded numerical population limit. NCUA’s action allows rural districts in less populous states to grow enormously, and indeed to swallow up entire states. The Final Rule thus discards not only NCUA’s long-standing recognition that the population of a rural district should be relatively small, but also its equally long-standing recognition that a rural district “should not encompass an entire state.” *See, e.g.*, 78 Fed. Reg. 13,460, 13,461 (Feb. 28, 2013).

NCUA asserts that it is reasonable for it to deem entire states, and even multi-state areas, to be single rural districts, because it would not be unreasonable to refer to these states as “rural.” This ignores the fact that the Final Rule, by defining such enormous areas on the basis of average population, defines “rural districts” to include large *urban* areas. For example, as pictured in red below, Salt Lake City, by far Utah’s largest city, could be included in a “rural district,” along with half the counties in the Salt Lake City-Provo-Orem Combined Statistical Area and all five CBSAs outside the CSA.⁴² Some 85 percent of the population of this “rural district” would reside in

⁴² The total population of the area pictured in red is under one million and the population density of the area is approximately 12 people per square mile. *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/> (adding population of areas shown in red below, and dividing

CBSAs, while two-thirds would reside in metropolitan statistical areas, *i.e.*, undisputedly urban areas.⁴³



Moreover, the issue before the Court is not whether it is reasonable to refer to an entire state as “rural,” but whether it is reasonable to refer to an entire state as a single “rural district.” As already explained, the ordinary meaning of that phrase refers to an area that is not only rural, but also relatively small—typically a subdivision of a county or town. Yet the rural district shown above includes the entire state of Utah except for a couple of counties in the middle of the state; it is larger than the Netherlands, Belgium, Luxembourg, Denmark, and Switzerland *combined*.⁴⁴

total population by total land area of areas shown in red). This area includes the St. George, Cedar City, Vernal, and Price CBSAs, the portion of the Logan CBSA in Utah, and all or part of the following CBSAs included within the Salt Lake City-Provo-Orem CSA: Salt Lake City, Ogden-Clearfield, Provo-Orem, Summit Park, and Heber. OMB Bull. No. 15-01, at 43, 45, 47, 64, 73, 88, 93, 95, 111.

⁴³ See U.S. Census, *QuickFacts*, *supra* note 42 (dividing total population of areas in CBSAs by total population of areas shown in red, and dividing total population of areas in metropolitan statistical areas by total population of areas shown in red); OMB Bull. No. 15-01, at 43, 45, 47, 64, 73, 88, 93, 95, 111 (listing counties in CBSAs, including metropolitan statistical areas); *see also supra* note 39 (citing multiple federal statutes defining “rural” to mean areas *outside* metropolitan statistical areas).

⁴⁴ The total area of these countries is 160,028 sq. km., or approximately 62,000 sq. mi. *See* Central Intelligence Agency, *The World Factbook, Country Comparison: Area*,

NCUA says that increasing the numerical limit to one million people is reasonable because “it is only forty percent of the limit applicable to CBSA and CSA-based credit unions.” NCUA Br. 42. But urban areas, by definition, have a higher population density than rural areas. It is therefore reasonable to expect that a given number of individuals concentrated in a relatively small urban area will have more interaction than an equal number of individuals spread out over a much larger rural area. Indeed, NCUA itself has always recognized that the population limit for a rural district should be significantly smaller than the population limit for an urban community. *See, e.g.*, 78 Fed. Reg. at 13,462 (population limit for rural districts ranged from 200,000 to 250,000 in all but the most populous states); 75 Fed. Reg. at 36,259 (population limit for CBSAs was set at 2.5 million, at least ten times higher than for rural districts); 74 Fed. Reg. 68,722, 68,727 (Dec. 29, 2009) (“The Board continues to believe that a rural district should be less densely populated and smaller in population than those areas that qualify as a[n urban well-defined local community].”).

NCUA justified its expansion of the limits on rural districts based on a need for “a population sufficient to enable credit unions to achieve a sufficient level of operating efficiencies and scale to deliver products and services.” NCUA Br. 43 (quoting 80 Fed. Reg. at 76,751). But efficiency considerations cannot justify a departure from the reasonable meaning of the statutory terms Congress used. NCUA cites no statutory justification for considering this factor, and there is none.⁴⁵

<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html> (last visited July 19, 2017). The total area of the rural district is approximately 79,000 sq. mi. *See* U.S. Census, *QuickFacts*, *supra* note 42 (adding land area of areas shown in red above). For other examples of strikingly large areas that would qualify as rural districts under the Final Rule, see Brief of Amicus Curiae State Associations in Support of Plaintiff American Bankers Association, ECF No. 18, at 15–18.

⁴⁵ There also is no factual basis for NCUA’s assertion that it needs larger fields of membership for the credit unions to operate effectively, as explained in Part II.E below.

ABA's opening brief argued that the flaws in NCUA's definition of "rural district" are magnified by the possibility that a "rural" credit union may focus on serving urban areas within its "rural district." NCUA asserts that this will not happen, because it requires applicants for community charters to "demonstrate an intent and ability to serve the entire area." 81 Fed. Reg. at 88,417. But an "intent and ability" to serve an entire area at the time of the charter application does not ensure that the entire area will actually be served over the long term. For example, the 1st Community Federal Credit Union has a rural district charter to serve a large portion of West Texas.⁴⁶ However, the credit union has only eight branches, four of which are in two urbanized metropolitan statistical areas encompassed within the "rural" district: Midland and San Angelo.⁴⁷ Twenty-one of the twenty-seven counties in the field of membership have *no* branches at all.⁴⁸ In fact, members outside urban areas may have to travel more than 150 miles to the nearest branch.⁴⁹ Nor can NCUA reasonably argue that it is not feasible to have more branches serving the rural areas. There are some 117 community bank branches across 1st Community Federal Credit Union's field of membership.⁵⁰

⁴⁶ See 1st Community Federal Credit Union, *About Us*, <https://www.1cfcu.org/?Cabinet=Main&Drawer=Resources&Folder=About+Us&SubFolder=About+Us> (last visited July 19, 2017) (listing counties in field of membership).

⁴⁷ 1st Community Federal Credit Union, *Locations*, <https://www.1cfcu.org/?Cabinet=Main&Drawer=Resources&Folder=About+Us&SubFolder=Locations+and+Hours> (last visited July 19, 2017); OMB Bull. No. 15-01, at 41, 48 (listing Midland and San Angelo metropolitan statistical areas).

⁴⁸ See 1st Community Federal Credit Union, *Locations*, *supra* note 47; 1st Community Federal Credit Union, *About Us*, *supra* note 46.

⁴⁹ For instance, the drive from Lajitas, Texas to the nearest branch in Fort Stockton is approximately 160 miles and takes approximately 2 hours and 40 minutes. See *Google Maps*, <https://tinyurl.com/yb8raebe>.

⁵⁰ See FDIC, *Find Office: Summary of Deposits*, <https://www5.fdic.gov/sod/sodInstBranch.asp?barItem=1> (filtering by state and then by the counties in 1st Community Federal Credit Union's field of membership, and producing "set one");

For these reasons, the Final Rule’s expansion of rural districts is arbitrary, capricious, and inconsistent with any reasonable reading of the statutory language.

E. NCUA’s Policy-Based Arguments Do Not Justify Its Unreasonable Interpretation of the Statutory Language.

NCUA and its amici argue that NCUA’s ever-expanding definition of “local community, neighborhood, or rural district” is justified by policy considerations that favor loosening the field of membership restrictions on credit unions. *See, e.g.*, NCUA Br. 25 (Final Rule “provides additional options for a credit union to grow and survive once the credit union reaches a saturation point within its current field of membership”); CU Amicus Br. 2 (arguing that ABA’s arguments would “deny [credit unions] the opportunity to achieve the strength and stability necessary for continued success”). NCUA’s policy-based arguments are both legally flawed and factually unsupported.

As set forth above, *supra* at 3, an agency’s interpretation of a statute is not entitled to deference when the statute cannot bear the meaning the agency has adopted. *See MCI Telecomms.*, 512 U.S. at 229. Whether NCUA’s interpretation of the terms “well-defined local community, neighborhood, or rural district” helps credit unions grow is immaterial if those statutory terms cannot bear the meaning the agency has ascribed to them. Moreover, in pursuing credit union growth, NCUA is not free to ignore Congress’s intent that credit union members share “a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity.” 12 U.S.C. § 1751 note. An agency is

FDIC, *Download Data: Statistics on Depository Institutions*, <https://www5.fdic.gov/sdi/main.asp?formname=customddownload> (filtering for all banks in Texas, including a community bank identifier, and identifying which of the banks identified in set one are community banks).

not free to “throw[] away” the “parts of statutory context” it does not like. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). So too here. NCUA is not free to throw away meaningful limitations on the size of community credit unions.

NCUA’s policy arguments are also flawed as a factual matter. Credit unions are not at death’s door. In fact, they are thriving and growing faster than banks. In the first four months of 2016, credit unions grew by 1.78 million members, “more than the combined populations of Vermont and Rhode Island, and more than the population of Philadelphia, the nation’s fifth-largest city.”⁵¹ From the first quarter of 2016 to the first quarter of 2017, membership in federal credit unions grew by 4.3 million members, and loans grew by 10.6 percent, to \$885 billion.⁵² Today, there are 517 credit unions with \$500 million or more in assets, compared with 380 in 2011.⁵³ NCUA’s amici acknowledge the speed of credit union growth, and emphasize that “community credit union charters have been a key means for the growth of federal credit union membership in recent decades.” CU Amicus Br. 16–17.

Moreover, it is not true that financial institutions that serve truly local communities are not economically viable. Community banks, for example, manage to operate in limited geographic areas. According to the FDIC, in 2011, forty-six percent of community banks operated in only one county, and eighty-two percent—more than 5,200 community banks—operated in three

⁵¹ *CUs Report Impressive 2016 Membership Growth*, CUNA News (June 8, 2016), <http://news.cuna.org/articles/110398-cus-report-impressive-2016-membership-growth>; *see also* NCUA, Call Report Quarterly Data (June 2017), <https://www.ncua.gov/analysis/Pages/call-report-data/quarterly-data.aspx>.

⁵² *See* NCUA, Call Report Quarterly Data (Mar. 2017), <https://www.ncua.gov/analysis/Pages/call-report-data/quarterly-data.aspx>.

⁵³ *See* NCUA, Overall Trends Report (Mar. 2017), <https://www.ncua.gov/analysis/Pages/call-report-data/Reports/Chart-Pack/chart-pack-2017-03.pdf>.

counties or less.⁵⁴ Nor is the size of financial institutions' assets determinative of the success. For example, there are 1,912 farm banks that specialize in agricultural lending, which have a median of \$118 million in assets.⁵⁵ These smaller financial institutions supplied nearly thirty percent of agricultural loans in 2016, and are a major source of credit to small farmers.⁵⁶ NCUA itself has described the benefits of smaller credit unions that are tailored to specific community needs.⁵⁷

The growth of federal credit unions is aided by a sweeping exemption from federal, state, and local taxes, except on real or tangible personal property. *See* 12 U.S.C. § 1768. NCUA's amici suggest that the tax-exempt status of credit unions does not confer a significant advantage because banks can gain "similar" tax benefits by organizing themselves as Subchapter S corporations." CU Amicus Br. 22. That is incorrect. All banks' earnings are taxed—including those small banks that have elected to be taxed under Subchapter S, a tax provision available to any small business, which simply passes the tax liability on to owners of the small business, rather than taxing the business itself.⁵⁸

⁵⁴ *See* FDIC, *The Geography of Community Banks*, at 3–4, <https://www.fdic.gov/regulations/resources/cbi/report/cbsi-3.pdf>.

⁵⁵ *See* ABA, *2016 Farm Bank Performance Report*, at 4–5, <http://www.aba.com/Tools/Function/Ag/Documents/2016FarmBankPerformanceReport.pdf>.

⁵⁶ *See id.*

⁵⁷ *See* NCUA, *Small Credit Unions' Success Stories Highlighted in New NCUA Video* (Feb. 2014), <https://www.ncua.gov/newsroom/Pages/NW20140212Video.aspx>.

⁵⁸ The shareholders of a Subchapter S bank are required to pay taxes on the bank's earnings whether or not those earnings are paid out through dividends or capital gains. *See* 26 U.S.C. §§ 1366–68. Moreover, some of the income of a Subchapter S corporation (for example, income from the disposition of certain assets and certain passive investment income) is subject to double taxation—once at the corporate level and a second time at the shareholder level. *See id.* §§ 1374–75. Finally, Subchapter S status generally is available only to smaller banks, whereas even the largest credit unions enjoy tax-exempt status. *See id.* §§ 1361–62.

The tax-exempt status of credit unions thus confers a significant advantage on credit unions that is not available to other financial institutions, and that can be justified only by credit unions' special purpose of serving a limited field of membership with a common bond, particularly individuals with modest incomes.⁵⁹

ABA is not asking to be insulated from competition from tax-exempt credit unions. Rather, ABA is asking to compete on the playing field Congress specified, and for credit unions to pursue their special purposes while observing the field of membership restrictions established by statute, rather than continuing to transform themselves into tax-exempt banks.

CONCLUSION

For these reasons, as well as the reasons stated in Plaintiff's original memorandum in support of summary judgment, Plaintiff ABA's motion for summary judgment should be granted and Defendant NCUA's cross-motion for summary judgment should be denied.

⁵⁹ It is instructive to compare credit unions with mutual savings banks, which are similar in many respects. The primary differences are that mutual savings banks do not have a field of membership requirement—but do pay taxes. *See* 12 U.S.C. § 1461 *et seq.*; 26 U.S.C. § 581 *et seq.* The mutual savings bank example demonstrates that, as the field of membership restrictions on credit unions are progressively weakened, the justification for their sweeping tax exemption also grows weaker.

Dated: July 19, 2017

Respectfully submitted,

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APPENDIX

**Commuting Between Core-Based Statistical Areas in the Washington-Baltimore-Arlington
DC-MD-VA-WV-PA Combined Statistical Area***

Residence CBSA	Place of Work	Number of Commuters	Percent of Workers Commuting
Chambersburg- Waynesboro, PA	Hagerstown-Martinsburg MD-WV CBSA (adjacent)	9,592	14.01%
Chambersburg- Waynesboro, PA	Cambridge, MD CBSA	0	0.00%
Chambersburg- Waynesboro, PA	Easton, MD CBSA	0	0.00%
Chambersburg- Waynesboro, PA	California-Lexington Park, MD CBSA	0	0.00%
Chambersburg- Waynesboro, PA	Washington-Baltimore-Arlington DC-MD- VA-WV-PA CSA outside Chambersburg- Waynesboro, PA and Hagerstown- Martinsburg, MD-WV CBSAs	3,721	5.44%
Chambersburg- Waynesboro, PA	Washington, DC	148	0.22%
Chambersburg- Waynesboro, PA	Baltimore City	62	0.09%
Cambridge, MD	Easton, MD CBSA (adjacent)	2294	15.89%
Cambridge, MD	Chambersburg-Waynesboro PA CBSA	0	0.00%
Cambridge, MD	Winchester, VA-WV CBSA	0	0.00%
Cambridge, MD	California-Lexington Park, MD CBSA	0	0.00%
Cambridge, MD	Washington-Baltimore-Arlington DC-MD- VA-WV-PA CSA outside Cambridge, MD and Easton, MD CBSAs	850	5.89%
Cambridge, MD	Washington, DC	100	0.69%
Cambridge, MD	Baltimore City	52	0.36%

* Data in this Appendix are reported in U.S. Census, *Residence County to Workplace County Commuting Flows*, *supra* note 15. The Chambersburg-Waynesboro CBSA is Franklin County, PA. OMB Bull. No. 15-01, at 28. The Hagerstown-Martinsburg CBSA is Washington County, MD and Berkeley County, WV. *Id.* at 34. The Cambridge CBSA is Dorchester County, MD. *Id.* at 64. The Easton CBSA is Talbot County, MD. *Id.* at 68. The California-Lexington Park CBSA is St. Mary's County, MD. *Id.* at 27. The Winchester CBSA is Frederick County and Winchester City, VA and Hampshire County, WV. *Id.* at 53.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
AMERICAN BANKERS ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-02394-KBJ
)	
NATIONAL CREDIT UNION)	
ADMINISTRATION,)	
)	
Defendant.)	
_____)	

**[PROPOSED] ORDER GRANTING
PLAINTIFF AMERICAN BANKERS ASSOCIATION’S
MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT NATIONAL CREDIT UNION ADMINISTRATION’S
CROSS-MOTION FOR SUMMARY JUDGMENT**

Before this Court is Plaintiff American Bankers Association’s (“ABA”) Motion for Summary Judgment on all claims filed against Defendant National Credit Union Administration (“NCUA”) (Doc. 14) and NCUA’s Cross-Motion for Summary Judgment (Doc. 19). Having considered ABA’s Motion, NCUA’s Cross-Motion, and all memoranda and arguments offered in support of and in opposition to the motions, it is hereby **ORDERED** that:

1. Plaintiff ABA’s Motion for Summary Judgment is **GRANTED**;
2. Defendant NCUA’s Cross-Motion for Summary Judgment is **DENIED**;
3. The challenged provisions of the Final Rule, and the accompanying amendments to Chapters 2.V.A.2 and 2.V.B of Part 701 of Title 12 of the Code of Federal Regulations, are **DECLARED** to exceed NCUA’s statutory authority under 12 U.S.C. § 1759 and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of

5 U.S.C. §§ 702–706. The challenged provisions are those providing that: (a) the well-defined local community requirement is met if an area is designated a Combined Statistical Area or a portion thereof and the area to be served has a population of 2.5 million or less; (b) a community consisting of a portion of a Core Based Statistical Area (“CBSA”) need not include the CBSA’s core area; (c) a community credit union may expand its geographic boundaries to add an adjacent area, provided that persons on both sides of the boundary separating the existing community and the bordering area interact; and (d) an area of any geographic size qualifies as a rural district if the total population of the proposed district does not exceed 1,000,000 and the boundaries of the rural district do not exceed the outer perimeter of the layer of states immediately surrounding the headquarters state.

4. The challenged provisions of the Final Rule that amend Part 701 of Title 12 of the Code of Federal Regulations, specifically in Chapter 2.V.A.2 (“Definition of Well-Defined Local Community and Rural District”) and Chapter 2.V.B. (“Field of Membership Amendments”) are **VACATED** and **SET ASIDE**;

5. NCUA is **PERMANENTLY ENJOINED** from granting approval in whole or in part of any expansion of any federal credit union’s field of membership based on the challenged provisions of the Final Rule that The challenged provisions of the Final Rule that amend Part 701 of Title 12 of the Code of Federal Regulations, specifically in Chapter 2.V.A.2 (“Definition of Well-Defined Local Community and Rural District”) and Chapter 2.V.B. (“Field of Membership Amendments”); and

6. **JUDGMENT IS ENTERED** in ABA’s favor.

SO ORDERED.

DATED: _____, 2017

HON. KETANJI BROWN JACKSON
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN BANKERS ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-02394-KBJ
)	
NATIONAL CREDIT UNION)	
ADMINISTRATION,)	
)	
Defendant.)	

**PLAINTIFF AMERICAN BANKERS ASSOCIATION’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff American Bankers Association (“ABA”) moves for an order granting summary judgment in its favor on all of the claims it asserted against Defendant National Credit Union Administration (“NCUA”) (Counts I and II of the Complaint). As explained in the accompanying memorandum and supported by the accompanying declarations, ABA is entitled to summary judgment for the following reasons:

(1) There are no genuine issues of material fact, and ABA is entitled to judgment as a matter of law, on its claim against NCUA in Count I that the Final Rule exceeded NCUA’s statutory authority under the Federal Credit Union Act (“FCUA”), 12 U.S.C. § 1751 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*; and

(2) There are no genuine issues of material fact, and ABA is entitled to judgment as a matter of law, on its claim against NCUA in Count II that the Final Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA.

Accordingly, ABA respectfully requests that this Court grant this motion and enter judgment in ABA's favor on Counts I and II of the Complaint. A proposed order is attached.

Respectfully submitted,

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May 26, 2017

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN BANKERS ASSOCIATION,)	
)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-02394-KBJ
)	
NATIONAL CREDIT UNION)	
ADMINISTRATION,)	
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF
PLAINTIFF AMERICAN BANKERS ASSOCIATION'S
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Congress authorized the establishment of federal credit unions to make credit more widely available to “people of small means.” To assist credit unions, Congress granted them a sweeping tax exemption. But to ensure that credit unions remain focused on their special mission and do not take unfair advantage of their tax-exempt status, Congress limited their “field of membership.” For example, a credit union serving a specified geographic area is limited to serving a single “well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3).

Over a period of years, the National Credit Union Administration (“NCUA”), the agency that regulates federal credit unions, has sought to erode the statutory limitations on credit unions’ field of membership. On several occasions, federal courts (including the U.S. Supreme Court) have held that NCUA exceeded the limitations imposed by Congress.

Despite these judicial decisions, NCUA has adopted a Final Rule that expands the field of membership of community-based credit unions far beyond the limits imposed by Congress and previously recognized by NCUA. In the Final Rule, NCUA determined that:

- any “Combined Statistical Area” (“CSA”) identified by the Office of Management and Budget (“OMB”) is a single “local community,” even though CSAs are defined by OMB as “larger regions” that include multiple cities and towns, and frequently have a population in the millions or tens of millions;
- a credit union that is approved to serve a local community defined as an OMB-recognized “Core-Based Statistical Area” (“CBSA”) need not serve the urban core of the CBSA, even though excluding the urban core eliminates the sole basis for regarding the CBSA as a single community, and effectively authorizes redlining;
- a credit union may serve areas adjacent to a local community based on evidence that individuals on the periphery of the community interact with individuals outside the community’s boundary, even though Congress limited credit unions to serving a single local community;
- a credit union may serve a greatly expanded definition of a single “rural district,” including one that consists of an entire state, or an entire state and a large part of another state, and even one that has a predominantly urban population.

These aspects of the Final Rule go well beyond the limits established by Congress. In addition, NCUA failed to provide an adequate response to prior judicial decisions holding that the agency exceeded statutory restrictions, and failed to reconcile its latest determinations with other agency determinations. Consequently, each challenged aspect of NCUA's Final Rule should be vacated.

BACKGROUND

A. Origin and Purpose of Credit Unions

Federal credit unions are mutually-owned financial institutions chartered and regulated by the NCUA. Federal credit unions are distinguished from other depository institutions by their mandate to provide basic financial services to individuals of low and moderate incomes, and by the statutory requirement that their members must share a "common bond." *See* 12 U.S.C. § 1759(b); *NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Federal credit unions are exempt from federal, state, and local taxes, except on real or tangible personal property. *See* 12 U.S.C. § 1768. This sweeping tax exemption, which costs the federal government roughly \$2.68 billion a year in tax revenue,¹ gives credit unions a significant advantage over depository institutions that must pay taxes.

Credit unions are governed by the Federal Credit Union Act ("FCUA"), Pub. L. 73-467, 48 Stat. 1216, 12 U.S.C. § 1751 *et seq.*, as amended by the Credit Union Membership Access Act ("CUMAA"), Pub. L. No. 105-219, 112 Stat. 913 (1998). Congress enacted the FCUA during the Great Depression to make credit more widely available to "people of small means" and create a

¹ *See* Office of Mgmt. and Budget, *Appendix: Budget of the U.S. Government, Fiscal Year 2017*, 1311-15 (Feb. 9, 2016), <https://www.gpo.gov/fdsys/pkg/BUDGET-2017-APP/pdf/BUDGET-2017-APP.pdf>; *see also* U.S. Dep't of the Treasury, *Estimates of Total Income Tax Expenditures for Fiscal Years 2016-2026* (Sep. 28, 2016), <https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2018.pdf> (estimating that the credit union tax exemption will be worth \$35.3 billion from 2017 to 2026).

stable system of cooperative credit in the United States. FCUA, Pub. L. 73–467, 48 Stat. 1216 (1934). In the CUMAA, Congress reiterated that credit unions “are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors, and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.” CUMAA, Pub. L. No. 105–219, 112 Stat. 913 (1998).²

To ensure that credit unions focus effectively on their special mission of providing credit to “people of small means,” and to avoid giving them an undue competitive advantage over depository institutions that do not enjoy a tax exemption, Congress has imposed significant restrictions on the eligible field of membership of a federal credit union. Unlike other depository institutions, a federal credit union may not serve “just anyone from the general public.” U.S. Dep’t of the Treasury, *Comparing Credit Unions with Other Depository Institutions* 20 (Jan. 2001). Instead, a credit union’s members must share a “common bond” that distinguishes them from the general public. *Id.* This requirement of “a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion or identity is essential to the fulfillment of the public mission of credit unions.” 12 U.S.C. § 1751 note.

When Congress enacted the FCUA, it “assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.” *First Nat’l Bank & Trust Co.*

² See also 144 Cong. Rec. H1872 (daily ed. Apr. 1, 1998) (Statement of Rep. Leach) (CUMAA “would require credit unions to serve members of modest means”); *id.* at H1884 (statement of Rep. LaFalce, Ranking Democrat on the House Banking Committee) (describing “credit unions’ mission to serve people of modest means”); *id.* at H1876 (statement of Rep. Sanders) (“Congress chartered credit unions . . . to help people of modest means.”).

v. NCUA, 988 F.2d 1272, 1276 (D.C. Cir. 1993); *see also* 78 Cong. Rec. 7259, 12,223–25 (1934). Indeed, Congress viewed the common bond requirement as “the cement that united credit union members in a cooperative venture.” *First Nat’l Bank & Trust Co.*, 988 F.2d at 1276. By reducing the costs of originating small consumer loans and discouraging default, the common bond requirement made it economically feasible for credit unions to provide loan services to individuals who would not otherwise have had access to financial markets. *See NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. at 515–16 (O’Connor, J., dissenting) (citing A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 7–8 (2d ed. 1992)).

To achieve these goals, Congress authorized the NCUA to charter three types of credit unions: (i) single common-bond credit unions, (ii) multiple common-bond credit unions, and (iii) community common-bond credit unions. 12 U.S.C. § 1759(b). A single common-bond credit union is limited to members that share a single “common bond of occupation or association.” 12 U.S.C. § 1759(b)(1). A multiple common-bond credit union is composed of “[m]ore than one group” that “has (within the group) a common bond of occupation or association,” but each group is limited to 3,000 members. 12 U.S.C. § 1759(b)(2). This case concerns the third type of credit union, often referred to as a “community credit union.” By statute, membership in a community credit union “shall be limited to . . . [p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3).

B. NCUA’s Persistent Expansion of Credit Unions

Over the years, NCUA repeatedly has sought to expand the field of membership of federal credit unions. Although federal courts, including the Supreme Court, have held that the NCUA’s actions exceeded the limitations imposed by Congress, NCUA has continued its efforts to erode the statutory limitations on common bonds.

1. *The Supreme Court Rejects NCUA's Interpretation of the Common Bond Requirement*

For decades Congress limited membership in federal credit unions “to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.” *NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. at 484 (emphasis omitted). From 1934 through 1982, NCUA and its predecessor agencies “consistently interpreted” this provision to require a single common bond of occupation to unite every member of an occupationally defined credit union. *Id.* In 1982, however, “NCUA reversed its longstanding policy in order to permit credit unions to be composed of multiple unrelated employer groups.” *Id.*

The Supreme Court held that NCUA's new interpretation was contrary to the statutory limitations on credit unions. *Id.* at 500–03. The Court held that the statute required all members of an occupational credit union to share a single common bond. *Id.* at 503. Although NCUA read the statute to allow for multiple unrelated employer groups, the Supreme Court held “that is simply not what the statute provides.” *Id.* at 501.

2. *The CUMAA Limits Community Credit Unions to “Local” Communities*

Congress enacted the CUMAA in the wake of the Supreme Court's decision. The CUMAA provided greater flexibility to federal credit unions in some areas, while imposing greater restrictions in others. One of the limitations Congress adopted in the CUMAA was the addition of the word “local” to Section 1759(b)(3). Congress specified that membership in a community credit union is limited to “[p]ersons or organizations within a well-defined *local* community, neighborhood, or rural district.” Pub. L. No. 105–219, 112 Stat. 913 (1998) (emphasis added); *see also* H.R. Rep. No. 105-472, at 18 (1998). This restriction remains in place today. 12 U.S.C. § 1759(b)(3).

3. *NCUA Interprets the “Local” Requirement to Impose Substantial Restrictions on Credit Union Size*

NCUA addressed the meaning of a “well-defined local community, neighborhood, or rural district” shortly after the passage of the CUMAA. *See* Organization and Operations of Federal Credit Unions, 63 Fed. Reg. 71,998 (Dec. 30, 1998). NCUA acknowledged that the express requirement that a community be “local” “was intended as a limiting factor” and imposed a “more circumspect and restricted approach to chartering community credit unions.” 63 Fed. Reg. at 72,012. NCUA stated that, pursuant to the statute, its “policy is to limit the community to a single, geographically well-defined area where individuals have common interests or interact.” 63 Fed. Reg. at 72,037. NCUA required an institution seeking a charter to operate as a community credit union to satisfy three requirements: (1) the geographic area’s boundaries must be clearly defined; (2) the charter applicant must establish that the area is a well-defined local community, neighborhood, or rural district; and (3) the residents in the area must have common interests or interact. *Id.*

NCUA required an applicant for community credit union status to submit “documentation to support that [the area] is a well-defined local community, neighborhood, or rural district” and provide a “narrative summary” to “demonstrate the relevance of the documentation provided in support of the application [and] explain how the documentation demonstrates interaction or common interests.” 63 Fed. Reg. at 72,038. NCUA identified several factors that would be considered in deciding whether a proposed area qualified as a well-defined local community, including (i) the presence or absence of single major trade area, shared governmental or civic facilities, or an area newspaper, (ii) the population and geographic size of the proposed community, and (iii) the specific geographic boundaries used to define the community. 63 Fed. Reg. at 72,037.

NCUA noted that an applicant proposing to serve a large field of membership must “demonstrate more definitively how it meets the local requirement.” 63 Fed. Reg. at 72,012.

NCUA identified “examples of community fields of membership” and “unacceptable” fields of membership. 63 Fed. Reg. at 72,038. Acceptable fields of membership include:

- “Persons who live, work, worship, or attend school in, and businesses located in the area of Johnson City, Tennessee, bounded by Fern Street on the north, Long Street on the east, Fourth Street on the south, and Elm Avenue on the west”;
- “Persons who live or work in Green County, Maine”;
- “Persons who live, worship, or work in and businesses and other legal entities located in Independent School District No. 1, DuPage County, Illinois”;

63 Fed. Reg. at 72,038–39.

“[U]nacceptable local communities, neighborhoods, or rural districts” include:

- “Persons who live or work in the Greater Boston Metropolitan Area (does not meet the definition of local community, neighborhood, or rural district).”
- “Persons who live or work in the State of California (does not meet the definition of local community, neighborhood, or rural district).”

63 Fed. Reg. at 72,039.

4. *NCUA Expands Its Interpretation of “Local” and Introduces Categorical Fields of Membership*

In 2003, NCUA began to expand the limits of a “well-defined local community, neighborhood, or rural district.” *See Organization and Operations of Federal Credit Unions*, 68 Fed. Reg. 18,334 (Apr. 15, 2003). The agency decided that this statutory requirement is met if “[t]he area to be served is in a recognized single political jurisdiction, *i.e.*, a city, county, or their political equivalent, or any contiguous portion thereof.” 68 Fed. Reg. at 18,357. In addition, the NCUA determined that the statutory requirements may be met if:

- “The area to be served is in multiple contiguous political jurisdictions, *i.e.*, a city, county, or their political equivalent, or any contiguous portion thereof and if the population of the requested well-defined area does not exceed 500,000”; or

- “The area to be served is a Metropolitan Statistical Area (MSA) or its equivalent, or a portion thereof, where the population of the MSA or its equivalent does not exceed 1,000,000.”

*Id.*³ For the latter two categories, NCUA required credit unions to “submit a letter describing how the area meets the standards for community interaction and/or common interests.” *Id.*

5. *NCUA Further Expands Fields of Membership*

In 2010, NCUA further expanded its interpretation of the field of membership requirements. NCUA decided to abandon the narrative requirement altogether in favor of an approach that gave credit unions the choice between two presumptive well-defined local communities: (a) a “single political jurisdiction, i.e., a city, county, or their political equivalent, or any contiguous portion thereof”; or (b) a designated core-based statistical area (“CBSA”) or a portion of a CBSA with a population of no more than 2.5 million people. *Chartering and Field of Membership for Federal Credit Unions*, 75 Fed. Reg. 36,257, 36,264 (June 25, 2010). A CBSA is an OMB-defined geographic area that includes an urban core of at least 10,000 people, plus adjacent counties with “a high degree of social and economic integration with the core as measured through commuting ties.”⁴ NCUA relied on the importance of the central “core” in justifying its addition of CBSAs as presumptive local communities. 75 Fed. Reg. at 36,260. NCUA explained that the area’s “central core often acts as a nucleus drawing a sufficiently large critical mass of

³ An MSA is a geographic area defined by the Office of Management and Budget (“OMB”) that contains an urban area of at least 50,000 people, plus adjacent counties with “a high degree of social and economic integration with the core as measured through commuting ties.” U.S. Census, *Metropolitan and Micropolitan, Metropolitan and Micropolitan Glossary*, <https://www.census.gov/programs-surveys/metro-micro/about/glossary.html>.

⁴ *See id.* CBSAs include both metropolitan statistical areas and micropolitan statistical areas. *Id.* Metropolitan statistical areas must have a population of over 50,000, while micropolitan statistical areas have populations of 10,000 to 50,000 individuals. *Id.*

area residents into the core area for employment and other social activities such as entertainment, shopping, and educational pursuits.” *Id.* at 36,258.

C. Federal Courts Reject NCUA’s Expansive Definition of a Local Community

Following the enactment of the CUMAA, federal courts invalidated at least two attempts by NCUA to expansively interpret the field of membership for community credit unions.

In March 2003, NCUA granted a request from a community credit union in Utah to expand its charter from one county to six counties, an expansion that would have included 1.4 million residents—almost two-thirds of the state’s population—and encompassed an area extending to Utah’s borders with Nevada and Wyoming. *See Am. Bankers Ass’n v. NCUA*, 347 F. Supp. 2d 1061, 1069 (D. Utah 2004). In defense of its decision, NCUA contended that “there is no requirement that there be commonality and shared interest among all six counties.” 347 F. Supp. 2d at 1072. NCUA argued, rather, that “the fact that each county has ties to Salt Lake City is enough” for the area to be a well-defined local community. *Id.*

The federal district court disagreed. *See id.* at 1073. The court concluded that NCUA had failed to ensure that the new charter complied with Section 1759’s “local” requirement. *Id.* Observing that “[a]nyone familiar with the six-county area has an intuitive notion that the expanded community charter covers a large geographic area and population base,” the court held that the “type of reasoning” NCUA adopted “directly contradicts the insertion of the term ‘local’ in the regulations.” *Id.* at 1070, 1072. “Rather than limiting community charters,” the court concluded, the NCUA’s “argument favors an expansion of community charters.” *Id.* The court criticized the NCUA for failing “to recognize and critically assess the size of the community it was analyzing as ‘local.’” *Id.* at 1069–70. The court emphasized that NCUA “must have some gatekeeping responsibility to ensure that the ‘local’ requirement is satisfied,” and “cannot act as a rubber stamp or cheerleader” for the credit union industry. *Id.* at 1070.

Another federal court reached a similar result when NCUA determined that a six-county area in south-central Pennsylvania constituted a single “well-defined local community.” *Am. Bankers Ass’n v. NCUA*, No. 1:05-CV-2247, 2008 WL 2857678, at *10 (M.D. Pa. July 21, 2008). The court noted that, “[t]o a casual observer familiar with central Pennsylvania, it would likely be a remarkable finding that . . . a geographical area of more than 3,000 square miles with a population of over 1.1 million people and encompassing Harrisburg, Hershey, Carlisle, York, Lebanon, Gettysburg, and Shippensburg—constituted a ‘well-defined local community.’” *Id.* The court determined that NCUA’s decision to grant the community charter was arbitrary and capricious because the agency had failed to consider evidence in the record contrary to its conclusion, and had also failed to offer an adequate explanation for its conclusion that Pennsylvania’s recognition of the area as a unit for planning and administrative purposes constituted compelling evidence of interaction. *Id.* at *11–14.

In both cases, the courts criticized NCUA’s actions as biased and flawed. The Utah court observed that NCUA failed in its duty to “critically analyze the facts provided in the application to ensure that incomplete and erroneous information does not lead to an improper conclusion” by simply “rubber stamp[ing]” a credit union’s request to expand the field of membership of its charter.” *Am. Bankers Ass’n*, 347 F. Supp. 2d at 1070. The Pennsylvania court determined that NCUA’s “lopsided decision reflects a certain deafness to the unfavorable evidence in the record” suggesting that the six-county area was not a local community. *Am. Bankers Ass’n*, 2008 WL 2857678, at *14. The court concluded that the “unexplained shift in [NCUA’s] approach strongly suggests that determinism, not documentation, drove the NCUA’s decision.” *Id.* at *13–14.

D. NCUA’s Final Rule Greatly Expands the Field of Membership of Community Credit Unions

In December 2015, NCUA proposed a further, and substantial, loosening of the size limitation on community credit unions. *See* Proposed Rule, Chartering and Field of Membership Manual, 80 Fed. Reg. 76,748, 76,748–51 (Dec. 10, 2015).

First, NCUA proposed that any “combined statistical area” (“CSA”) would qualify as a single local community, so long as the CSA, or the portion of it served by the credit union, does not include more than 2.5 million people. A CSA is an OMB-defined area combining two or more adjacent CBSAs with an “employment interchange” rate of at least 15 percent.⁵ As NCUA noted, OMB—which NCUA itself relies upon in justifying the use of CSAs—describes CSAs not as “local communities” or even as “communities,” but as “larger regions.” 80 Fed. Reg. at 76,749. CSAs “represent groupings” of component CBSAs that each “retain their separate component identities.”⁶ For example, the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA includes nearly ten million people in seven CBSAs covering the District of Columbia, Northern Virginia, much of Maryland, and portions of West Virginia and Pennsylvania.⁷

⁵ U.S. Census, Metropolitan and Micropolitan, *Metropolitan and Micropolitan Glossary*, <https://www.census.gov/programs-surveys/metro-micro/about/glossary.html>; 80 Fed. Reg. at 76,749. The employment interchange rate is “the sum of the percentage of commuting from the smaller area to the larger area and the percentage of employment in the smaller area accounted for by workers residing in the larger area.” 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 Fed. Reg. 37,246, 37,248 (June 28, 2010). In other words, a 15 percent employment interchange rate in a CSA means 15 percent of commuters commute across component CBSA lines.

⁶ *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 15-01, Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas, Appendix at 4 (2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/bulletins/2015/15-01.pdf> [hereinafter OMB Bull. No. 15-01].

⁷ OMB Bull. No. 15-01, at 25, 27, 28, 34, 52, 53, 64, 68, 113.

Second, NCUA proposed to eliminate the requirement that community credit unions serving a CBSA-based field of membership serve the “core area” of the CBSA. A CBSA’s “core” includes the most populated county or municipality in the CBSA’s title and is the “focal point for common interests and interaction among residents.” 80 Fed. Reg. at 76,749. NCUA proposed that any portion of a CBSA with up to 2.5 million people would constitute “a well-defined local community,” even if the “focal point for common interests and interaction” is excluded from the credit union’s service area. *See id.*

Third, NCUA proposed that a field of membership based on a political jurisdiction, CBSA, or CSA could expand to include an “adjacent area.” 80 Fed. Reg. at 76,749–50. The original area and the adjacent area would then be deemed a single “well-defined local community.” *Id.*

Fourth, NCUA proposed to dramatically expand the definition of a “rural district” by quadrupling the rural district population limit from 250,000 to 1,000,000.⁸ 80 Fed. Reg. at 76,750–51. NCUA proposed that any area with a population of up to 1 million people would qualify as a single rural district if (1) at least half of the population resides in rural areas, or (2) the area’s population density does not exceed 100 persons per square mile. 80 Fed. Reg. at 76,750. Under this definition, five entire states (Alaska, North Dakota, South Dakota, Vermont, and Wyoming) would qualify as single rural districts. The proposed rule also permitted rural districts to cross state lines and serve predominantly—or even exclusively—urban populations.⁹

⁸ Prior to the Final Rule, NCUA’s regulations provided that the total field of membership population for a “rural district” could not exceed 250,000 or three percent of the state’s population, whichever was larger. Chartering and Field of Membership Manual for Federal Credit Unions, 78 Fed. Reg. 13,460, 13,461 (Feb. 28, 2013). In most states, the relevant limit was the 250,000 cap.

⁹ *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/02,38,46,50,56,00>.

Community credit unions welcomed the proposed rule as an opportunity to further expand their fields of membership, and overwhelmingly supported it.¹⁰ Credit unions with single or multiple common bond charters also advocated for adoption of the new rule, in some cases expressing their intention to change their charter to a community common bond in order to take advantage of the rule's opportunity for expansion.¹¹ In contrast, community banks and other financial institutions opposed the proposed rule. In its comments, ABA explained that NCUA's "proposal would eviscerate many major limitations placed on credit union field of membership expansion," and this "expansion of taxpayer subsidized financial institutions is inconsistent with the limited scope of credit union operations envisioned by Congress."¹² Furthermore, ABA noted that the proposed rules "would directly undermine the ability of taxpaying banks to serve their communities—replacing healthy, private sector financial services with government subsidized competition." *Id.* Several banks illustrated the practical effect of the proposed rule by describing how NCUA's continued expansion affects their ability to serve their communities.¹³

¹⁰ *See, e.g.*, ABNB Federal Credit Union Comment, Administrative Record ("AR") at 004640 (describing ABNB's history of attempting to add certain counties to their field of membership, and concluding "[n]ow, in this proposed rule, it appears that ABNB's 13 year quest . . . to define and gain NCUA approval to serve what we have always viewed as our natural local community may soon draw to a close").

¹¹ *See, e.g.*, CSE Federal Credit Union Comment, AR at 014984 ("CSE is currently a multiple common bond credit union. We do have plans in the immediate future to apply for a community charter and the ability to apply to serve combined statistical areas that are beyond our existing [Metropolitan Statistical Area] is a welcome and integral part of our plan.").

¹² *See* American Bankers Association Comment, AR at 010483.

¹³ *See, e.g.*, Farmers & Merchants Bank Comment, <https://www.ncua.gov/Legal/CommentLetters/CLFOM201623CHillesheim.pdf> ("About twelve years ago, a small state chartered credit union in a neighboring community flipped its charter to a federal credit union and expanded into Springfield and New Ulm. This credit union had previously had a very tight and strict common bond affiliated with the local Catholic Church. Upon switching charters, the credit union became very aggressive and dropped its common bond. You could now be a member if you lived or worked in one of five counties. The impact of these actions was noticed immediately."); Citizens State Bank of Waverly

In its Final Rule, published on December 7, 2016, NCUA adopted each of the proposals described above. *See* 81 Fed. Reg. 88,412, 88,413–18, 88,440–41 (Dec. 7, 2016); 80 Fed. Reg. at 76,749–51.¹⁴ The ABA filed this lawsuit, seeking a declaration that the Final Rule exceeds NCUA’s statutory authority and is arbitrary and capricious, and an injunction prohibiting any community charter expansions pursuant to the challenged portions of the Final Rule.

E. Consequences of NCUA’s Expansion of Community Credit Unions

NCUA’s efforts to erode the statutory restrictions on federal credit unions have allowed credit unions to expand their operations and focus on more affluent customers. Credit union membership has grown at more than three times the rate of other financial institutions.¹⁵ Federal credit unions now have \$1.29 trillion in assets.¹⁶ The NCUA’s expansive common bond regulations have enabled rapid consolidation in the credit union industry: the number of federal credit unions has decreased from 4,272 in 2012 to 3,608 in 2016.¹⁷ At the same time, membership

Comment, AR at 003315 (explaining that it had become “extremely difficult to serve our communities with financial services, particularly loans, when we are constantly getting beat-up by credit unions on interest rates”).

¹⁴ NCUA’s efforts to broaden the field of membership have not ceased. On the same day that it issued the Final Rule, NCUA proposed to quadruple the 2.5 million population cap for CSA- and CBSA-based fields of membership, allowing them to serve populations of up to *10 million* people. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 78,748, 78,751 (Nov. 9, 2016).

¹⁵ David Baumann, *Credit Unions Outpacing Banks in Membership Growth*, Credit Union Times (Aug. 2, 2016), <http://www.cutimes.com/2016/08/02/credit-unions-outpacing-banks-in-membership-growth>.

¹⁶ NCUA, *Industry at a Glance* (Dec. 31, 2016), <https://www.ncua.gov/analysis/Pages/industry/at-a-glance-dec-2016.pdf>.

¹⁷ NCUA, *Overall Trends Report* (2016), <https://www.ncua.gov/analysis/Pages/call-report-data/Reports/Chart-Pack/chart-pack-2016-12.pdf>.

in federal credit unions with \$500 million or more in assets increased by more than 30% between 2012 and 2016.¹⁸

As the membership fields for credit unions have expanded, credit unions have strayed from their statutory purpose of serving people with “small” or “modest” means. The U.S. Government Accountability Office (“GAO”) has reported that, “[w]hile it has been generally accepted that credit unions have a historical emphasis on serving people of modest means, [an] analysis of limited available data suggested that credit unions served a slightly *lower* proportion of low- and moderate-income households than banks.” U.S. Gov’t Accountability Office, GAO-04-91, 2 (emphasis added). Only about 31 percent of credit unions customers are of “modest means,” as compared to 41 percent of bank customers. U.S. Gov’t Accountability Office, GAO-07-29, 27. Moreover, 49 percent of credit union members are now considered “upper-income,” as compared with 41 percent of bank customers. *Id.* at 26. And “loan application records indicated that credit unions provided a slightly lower percentage of their mortgages to low-and moderate-income households than banks—27 percent compared with 34 percent—of comparable asset size.” U.S. Gov’t Accountability Office, GAO-04-91, at 5. In short, “the historical distinction between credit unions and other depository institutions has continued to blur.” U.S. Gov’t Accountability Office, GAO-06-220T, 3.

¹⁸ Compare NCUA, Overall Trends Report (2012), <https://www.ncua.gov/Legal/Documents/Reports/FT20121231.pdf>, with NCUA, Overall Trends Report (2016), <https://www.ncua.gov/analysis/Pages/call-report-data/Reports/Chart-Pack/chart-pack-2016-12.pdf>.

LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

Under the Administrative Procedure Act (“APA”), a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A), (C). Judicial review of agency action under the APA is “plenary.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The reviewing court “first ask[s] whether Congress has ‘directly spoken to the precise question at issue.’” *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. at 499 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)). “‘If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Id.* (quoting *Chevron*, 467 U.S. at 842–43). If Congress has “not directly spoken to the precise question at issue,” the Court proceeds to “inquire whether the agency’s interpretation is reasonable.” *Id.* at 500.

STANDING

ABA filed comments opposing NCUA’s Proposed Rule, and it has standing to challenge the Final Rule in this Court. To have standing under Article III, a plaintiff must have suffered injury-in-fact; there must be a causal connection between the injury and the conduct complained of; and it must be likely that an injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The Final Rule permits credit unions to expand their tax-exempt operations at the expense of other financial institutions. ABA’s member banks compete

with credit unions, and thus will suffer competitive injury as a result of provisions in the Final Rule that allow credit unions to serve larger areas and greater numbers of customers. *See* Exhibits 1–9. This competitive injury flows directly from the Final Rule and would be redressed by a favorable court ruling.

Prudential standing under the APA requires that the interest the plaintiff seeks to protect be “arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. at 488 (internal quotation marks omitted). The Supreme Court has held that ABA’s “interest in limiting the markets that federal credit unions can serve is arguably within the zone of interests to be protected” by the FCUA. *Id.*

An agency has standing to sue on behalf of its members if the members would have standing to sue in their own right, the interests the agency seeks to protect are germane to the agency’s purposes, and the claims asserted and relief requested do not require the participation of the agency’s members as parties. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). The ABA has associational standing because its members are affected by the Final Rule and thus would have standing to challenge the rule in their own right, the interests at stake are directly relevant to ABA’s purpose of representing the banking industry, and it is not necessary for individual banks to participate as a plaintiffs.

ARGUMENT

I. The Final Rule Fails to Limit Community Credit Unions to “A Well-Defined Local Community.”

A. Congress’s Use of the Term “Well-Defined Local Community” Imposes Significant Limits on the Size of Community Credit Unions

Congress limited the membership field of community credit unions to “[p]ersons or organizations within a well-defined local community, neighborhood, or rural district.” 12 U.S.C. § 1759(b)(3). Although Congress authorized NCUA to define these statutory terms by regulation, 12 U.S.C. § 1759(g), NCUA’s definition must be reasonable and consistent with the terms Congress used. Even where Congress delegates “broad discretionary authority” to an agency to define statutory terms, the agency is “hardly free to write its own law.” *Am. Fin. Servs. Ass’n v. F.T.C.*, 767 F.2d 957, 968 (D.C. Cir. 1985). Rather, “[t]he judiciary remains the final authority with respect to questions of statutory construction and must reject administrative agency actions which exceed the agency’s statutory mandate or frustrate congressional intent.” *Id.* And while an agency’s reasonable interpretation of statutory language is accorded deference, *see id.*, unreasonable interpretations are not. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) (“It does not matter whether the word ‘yellow’ is ambiguous when the agency has interpreted it to mean ‘purple.’”). Several aspects of the statutory language limit the geographic size of community credit unions’ membership fields.

First, the statute refers to “a” well-defined local community, not multiple local communities. 12 U.S.C. § 1759(b)(3). This limits community credit unions to serving a single local community. As the NCUA has recognized, “[c]ommunity charters must be based on *a single*, geographically well-defined local community, neighborhood, or rural district where individuals have common interests and/or interact.” *Chartering and Field of Membership Manual*, Chapter 2,

Section V.A.1 (emphasis added). In *NCUA v. First Nat'l Bank & Trust Co.*, the Supreme Court explained that “[t]he reason that the NCUA has never interpreted, and does not contend that it could interpret, the geographical limitation to allow a credit union to be composed of members from an unlimited number of unrelated geographic units, is that to do so would render the geographical limitation meaningless.” 522 U.S. at 502.

Second, Congress’s addition of the term “local” significantly limits the size and scope of the community that a credit union may serve. “Local” means “not general or widespread,”¹⁹ “not broad,”²⁰ “restricted,”²¹ “narrow,”²² “primarily serving the needs of a particular limited district,”²³ “belonging to a town or some comparatively small district, as distinct from the state or country as a whole,”²⁴ or “primarily serving the needs of a particular limited district, often a community or minor political subdivision.”²⁵ A “community” (without the “local” modifier) means “the people with common interests living in a particular area,”²⁶ “an interacting population of various kinds of individuals . . . in a common location,”²⁷ or “a group of people living in the same locality and under the same government.”²⁸ As NCUA recognized shortly after Congress enacted the

¹⁹ Webster’s Ninth New Collegiate Dictionary (9th ed. 1987); *see also* American Heritage Dictionary (4th ed. 2001) (“not broad or general; not widespread: *local outbreaks of flu*”).

²⁰ New World Dictionary of American English (3rd College ed. 1979); *see also* Webster’s Third New International Dictionary (3rd ed. 1993) (“not broad or general”).

²¹ New World Dictionary of American English (3rd College ed. 1979).

²² New World Dictionary of American English (3rd College ed. 1979).

²³ New World Dictionary of American English (3rd College ed. 1979); *see also id.* (“of, characteristic of, or confined to a particular place or district (items of *local* interest)”).

²⁴ Oxford English Dictionary (Compact ed. 1971).

²⁵ Webster’s Third New International Dictionary (3rd ed. 1993).

²⁶ Webster’s Ninth New Collegiate Dictionary (9th ed. 1987).

²⁷ Webster’s Ninth New Collegiate Dictionary (9th ed. 1987).

²⁸ American Heritage Dictionary (4th ed. 2001).

CUMAA, the express requirement that a well-defined community be “local” “was intended as a limiting factor” and imposed a “more circumspect and restricted approach to chartering community credit unions.” 63 Fed. Reg. at 72,012; *see also Am. Bankers Ass’n v. NCUA*, 271 F.3d 262, 273 (D.C. Cir. 2001).

Third, Congress’s use of the term “neighborhood” immediately following the term “local community” confirms that a “local community” is a relatively small community. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). More specifically, courts “rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to ‘avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.’” *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). “Neighborhood” means “the immediate vicinity,” “the area near or next to a specified place,” and “the condition of being close together.”²⁹ It also refers to “people living in a particular vicinity, usu[ally] forming a community within a larger group and having similar economic statuses and social interests,”³⁰ and “the people living near one another.”³¹ The inclusion of the term “neighborhood” in Section 1759(b)(3) indicates that Congress intended “local communities” to be relatively small and circumscribed areas.³²

²⁹ Black’s Law Dictionary (8th ed. 2004).

³⁰ Black’s Law Dictionary (8th ed. 2004).

³¹ New World Dictionary of American English (3rd College ed. 1979).

³² As discussed below, the ordinary meaning of the term “rural district” is a rural division of a county, which is also a relatively limited area. *See infra* at 38.

Fourth, the ordinary meaning of this statutory language is entirely congruent with Congress’s reasons for imposing field-of-membership restrictions on credit unions. “Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.” *First Nat’l Bank & Trust Co. v. NCUA*, 988 F.2d at 1276. Only in smaller and more circumscribed communities will those making loans have personal knowledge of the borrowers. And only in such communities will borrowers be more reluctant to default because they are personally acquainted with credit union members and employees.

In sum, Congress’s decision to restrict community credit unions to “a well-defined local community [or] neighborhood” significantly limits the permissible size of community credit unions. They may serve only one community, and it must be truly “local.”

B. A Combined Statistical Area Is Not “A Well-Defined Local Community.”

In its Final Rule, NCUA determined that OMB-designated Combined Statistical Areas (“CSAs”) are well-defined local communities, so long as the population served by the credit union does not exceed 2.5 million people. *See* 81 Fed. Reg. at 88,414–15. NCUA’s decision to treat CSAs as well-defined local communities goes well beyond the bounds of the statutory language. It is also arbitrary and capricious.

1. Combined Statistical Areas Are “Larger Regions,” Not Local Communities.

A CSA is larger than “a well-defined local community.” OMB—the federal agency that developed the concept of CSAs and is statutorily responsible for delineating them—defines CSAs as “larger regions.” 80 Fed. Reg. at 76,749.³³ The largest CSAs have as many as 24 million

³³ *See* OMB Bull. No. 15-01, at 1–2.

people—about one in every thirteen people in the United States.³⁴ By definition, CSAs include more than one CBSA.³⁵ The average CSA is more than four times larger than the average CBSA, and includes approximately 1.4 million people.³⁶ As OMB has emphasized, CSAs’ component CBSAs “retain their separate component identities.”³⁷ Because CSAs “represent *groupings*” of CBSAs, “in any combination,” “they should not be ranked or compared with individual [CBSAs].”³⁸

For example, the District of Columbia is part of the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA, which has a population of more than nine million spread across no fewer than forty counties and independent cities.³⁹ As pictured below, the CSA includes all of the District of Columbia, most of Maryland, a large portion of Northern Virginia, three counties in

³⁴ See U.S. Census, *American FactFinder*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt (following the following steps: Add/Remove Geographies, Select Geographic Type “Combined Statistical Area,” Add “All Combined Statistical Areas within the United States,” Show Table); U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/00>.

³⁵ U.S. Census, Metropolitan and Micropolitan, *Glossary of Metropolitan-Related Terms*, <https://www.census.gov/population/metro/data/glossary.html>; 80 Fed. Reg. at 76,749.

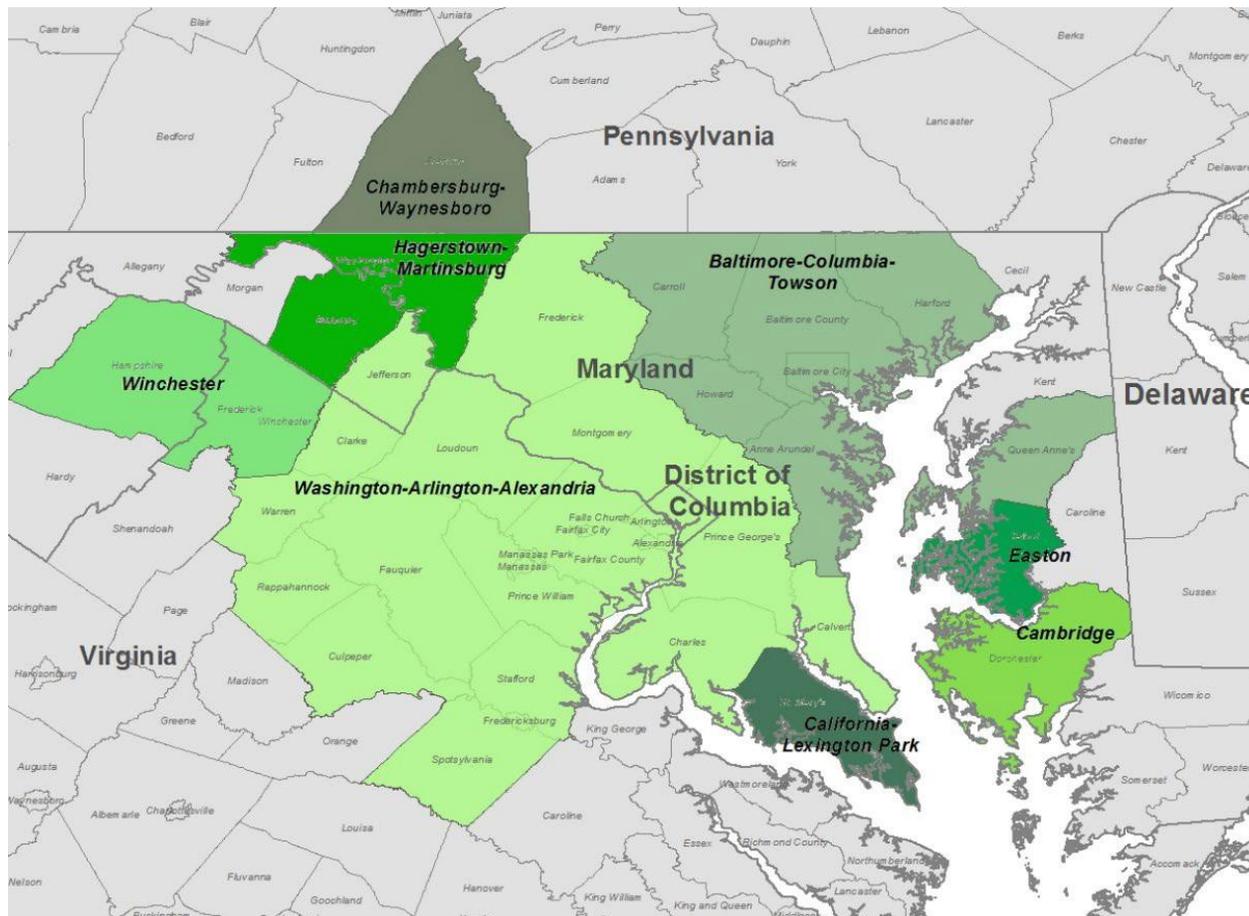
³⁶ See U.S. Census, *American FactFinder*, *supra* at n.34; U.S. Census, Population Change for Metropolitan and Micropolitan Statistical Areas in the United States and Puerto Rico (February 2013 Delineations): 2000 to 2010 (CPH-T-5), <https://www.census.gov/population/www/cen2010/cph-t/cph-t-5.html> (average population of a CBSA is approximately 300,000). In justifying the Final Rule, NCUA compared the average area of CSAs with that of CBSAs NCUA had approved as fields of membership. See 81 Fed. Reg. at 88,414. But NCUA did not compare the average populations of CSAs and CBSAs, which differ dramatically. Moreover, NCUA concluded that the average CSA area was comparable to the average CBSA area NCUA had approved only by excluding the 22 largest CSAs. See *id.* This is not a meaningful comparison.

³⁷ OMB Bull. No. 15-01, at 2 (emphasis added).

³⁸ OMB Bull. No. 15-01, Appendix at 4 (emphasis added).

³⁹ See OMB Bull. No. 15-01, at 25, 27, 28, 34, 52, 53, 64, 68, 113; U.S. Census, *American FactFinder*, *supra* at n.34.

West Virginia, and one county in Pennsylvania.⁴⁰ The CSA combines not only the entire Washington and Baltimore metropolitan areas, but also six additional CBSAs (pictured in varying shades of green below).⁴¹ No reasonable definition of “a well-defined local community” could include so many different local communities spread over such a large area.



⁴⁰ See OMB Bull. No. 15-01, at 25, 27, 28, 34, 52, 53, 64, 68, 113.

⁴¹ OMB Bull. No. 15-01, at 113.

Other examples of CSAs are equally striking:

- The New York-Newark, NY-NJ-CT-PA CSA contains nearly 24 million people across eight CBSAs and 35 counties, stretching from Allentown-Bethlehem, Pennsylvania to Montauk, Long Island, more than 200 miles away.⁴²
- The Los Angeles-Long Beach-Riverside, CA CSA contains approximately 19 million people from Los Angeles to sparsely populated desert on the Nevada and Arizona borders, spread across an area larger than *more than ten states*.⁴³
- The Boston-Worcester-Providence, MA-RI-NH-CT CSA contains approximately 8 million people spread across seven CBSAs covering roughly half of Massachusetts, all of Rhode Island, much of New Hampshire, and a portion of Connecticut.⁴⁴

2. *Limiting Combined Statistical Area-Based Credit Unions to Areas of 2.5 Million People Does Not Satisfy the “Well-Defined Local Community” Requirement.*

The Final Rule limits the field of membership for a CSA-based community credit union to 2.5 million people. *See* 81 Fed. Reg. at 88,440. For several reasons, that numerical limitation does not transform CSAs into single, well-defined local communities.

First, CSAs with fewer than 2.5 million people, like all CSAs, are by definition spread across multiple local communities. CSAs of any size are “larger regions” combining multiple CBSAs that “retain their separate component identities.”⁴⁵ For instance, the Albuquerque-Santa Fe-Las Vegas, NM CSA, with slightly more than a million people, combines *six* CBSAs covering

⁴² *See* OMB Bull. No. 15-01, at 27, 31, 37, 42, 43, 51, 94, 109; U.S. Census, *American FactFinder*, *supra* at n.34.

⁴³ *See* OMB Bull. No. 15-01, at 39, 44, 46, 106; U.S. Census, *American FactFinder*, *supra* at n.34; U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/06059,06111,06065,06071,06037,00> (land area of CSA component counties totals 33,955 square miles); U.S. Census, *State Area Measurements & Internal Point Coordinates*, <https://www.census.gov/geo/reference/state-area.html> (listing eleven states with land areas under 33,955 square miles).

⁴⁴ *See* OMB Bull. No. 15-01, at 25, 26, 40, 45, 53, 66, 77, 99; U.S. Census, *American FactFinder*, *supra* at n.34.

⁴⁵ OMB Bull. No. 15-01, at 2.

much of New Mexico, from Arizona and Colorado almost to Texas. This CSA includes urban Albuquerque, vast rural expanses, and several Indian reservations.⁴⁶ No reasonable interpretation of “a well-defined local community” includes such a large and heterogeneous area.

Second, the 2.5 million person limit does not actually preclude fields of membership based on the largest CSAs. Instead, the Final Rule deems any portion of any CSA to be a “well-defined local community” so long as the area served by the credit union has a population of 2.5 million people or less. 81 Fed. Reg. at 88,440. But the service territory area carved out of a CSA by a credit union may not be “a well-defined local community.” It can be gerrymandered in any way a credit union wishes. Indeed, it may not even be a single, contiguous area. *See id.* For rural districts, the Final Rule requires that the field of membership must have “*contiguous* geographic borders.” *Id.* (emphasis added). But NCUA imposed no such limitation on portions of CSAs, indicating that no such requirements exists. *See id.*; *see generally Russello v. United States*, 464 U.S. 16, 23 (1983) (where particular language is included in one section of a statute or rule, but omitted in another, “it is generally presumed that [the drafter] act[ed] intentionally and purposely in the disparate inclusion or exclusion”). A CSA-based field of membership thus may include scattered portions of a CSA. For example, the Final Rule deems any 2.5-million-person portion of the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA to be an acceptable field of membership. In other words, the Final Rule deems urban Baltimore City, Maryland and rural Hampshire County, West Virginia, more than 100 miles away, an appropriate field of membership

⁴⁶ *See* OMB Bull. No. 15-01, at 98; U.S. Census, *American FactFinder*, *supra* at n.34.

merely because they are in the same nine-million-person CSA.⁴⁷ These separate and very different communities cannot possibly constitute a single “well-defined local community.”⁴⁸

3. *The Combined Statistical Area Rule Permits Fields of Membership that Federal Courts Have Rejected.*

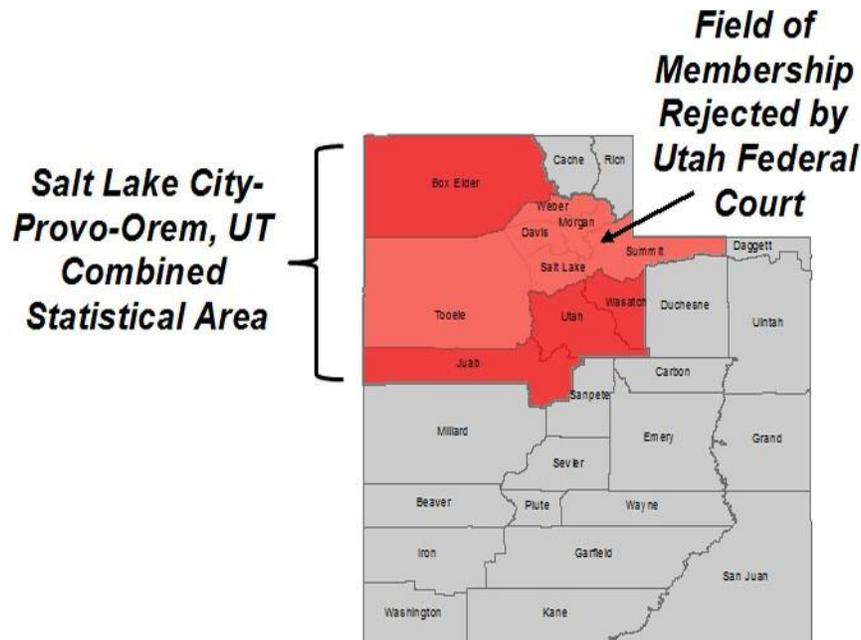
By deeming a CSA to be “a well-defined local community,” NCUA has disregarded, without adequate explanation or justification, decisions of federal courts rejecting similar expanded fields of membership for community credit unions. In *American Bankers Association v. NCUA*, 347 F. Supp. 2d 1061, 1067 (D. Utah 2004), the court invalidated NCUA’s approval of a six-county community charter in Utah because the agency had not shown that the area constituted “a well-defined local community.” The court observed that “[a]nyone familiar with the six-county area has an intuitive notion that the expanded community charter covers a large geographic area and population base.” *Id.* at 1069. Indeed, the area contains almost two-thirds of the state’s population, stretching “from the Nevada border to the Wyoming border,” and “cross[ing] two major mountain ranges.” *Id.* Yet, that six-county area contains only *part* of the Salt Lake City-Provo-Orem CSA (pictured below). The CSA also includes *four more large counties*.⁴⁹ The Final

⁴⁷ See OMB Bull. No. 15-01, at 25, 53, 113; U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST040216/54027,24510,00>.

⁴⁸ On the same day that NCUA issued the Final Rule, it proposed to quadruple the 2.5 million limit and allow a CSA-based community credit union to serve a population of up to *10 million*. See 81 Fed. Reg. at 78,751. If this proposed change is adopted, all but the very largest CSAs—including the entire Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA—would be deemed to be single local communities.

⁴⁹ The counties at issue in the litigation were Davis, Morgan, Salt Lake, Summit, Tooele, and Weber, 347 F. Supp. 2d at 1063, which cover the Salt Lake City and Summit Park CBSAs, and most of the Ogden-Clearfield CBSA, OMB Bull. No. 15-01, at 43, 47, 93. The Salt Lake City-Provo-Orem CSA also includes Box Elder, Juab, Utah, and Wasatch counties, which cover the remainder of the Ogden-Clearfield CBSA and the Heber and Provo-Orem CBSAs. OMB Bull. No. 15-01, at 43, 45, 73, 111.

Rule determines that all ten counties—which together contain more than 80% of Utah’s population—are a single “well-defined local community.”⁵⁰



In the Utah case, the court rejected the six-county field of membership because NCUA did not “critically assess the size of the community it was analyzing as ‘local,’ especially given its regulations recognizing that the term ‘local’ was intended to limit such charters.” *Id.* at 1070–71. The court explained that, “NCUA must have some gatekeeping responsibility to ensure that the ‘local’ requirement is satisfied.” *Id.* at 1070. “It cannot act as a rubber stamp or cheerleader for any application brought before it.” *Id.*⁵¹

⁵⁰ See U.S. Census, *American FactFinder*, U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST040216/49,00>. Because the CSA has only about 2.5 million people, the entire CSA could be deemed “a well-defined local community.” See U.S. Census, *American FactFinder*, *supra* at n.34.

⁵¹ The court believed NCUA’s “gatekeeper” role was especially important “[b]ecause the informal process in front of the NCUA does not allow for input by the public or other entities.” See 347 F. Supp. 2d at 1070.

The Utah court also emphasized the significance of crossing CBSA lines. It rejected NCUA's reliance "on Salt Lake City's prominence as a major trade area in determining that the six-county area was one local community." *Id.* at 1071. It did so because, although "Salt Lake City has state-wide importance, and, in some instances, regional importance, . . . the NCUA's decision contains no recognition of the economic and social importance of Ogden," the core of a separate CBSA in the larger Salt Lake City-Provo-Orem CSA region. *Id.* In contravention of the federal court's instruction, the Final Rule does not recognize the importance of CBSA hubs like Ogden in establishing multiple independent communities within CSAs. More generally, NCUA has staked out a position that is considerably more extreme than the one rejected by a federal court, without acknowledging or answering the court's objections.

The Final Rule also conflicts with the federal court's decision in *American Bankers Association v. NCUA*, 2008 WL 2857678 (M.D. Pa. July 21, 2008). In that case, the court rejected a field of membership comprising six counties in south-central Pennsylvania that together constitute the Harrisburg-York-Lebanon CSA. *Id.*⁵² The court explained that "[t]o a casual observer familiar with central Pennsylvania, it would likely be a remarkable finding that the [field of membership]—a geographic area of more than 3,000 square miles with a population over 1.1 million people and encompassing Harrisburg, Hershey, Carlisle, York, Lebanon, Gettysburg, and Shippensburg—constituted a 'well-defined local community.'" *Id.* at *10. Yet, under the Final Rule, this same area is deemed "a well-defined local community" because it is contained within a CSA.

⁵² See 2008 WL 2857678, at *7 n.7; OMB Bull. No. 15-01, at 33, 35, 38, 53, 103. The counties are Adams, Cumberland, Dauphin, Lebanon, Perry, and York. 2008 WL 2857678, at *7 n.7. Those counties cover four CBSAs: Gettysburg, Harrisburg-Carlisle, Lebanon, and York-Hanover. See OMB Bull. No. 15-01, at 33, 35, 38, 53.

In rejecting this field of membership, the court criticized NCUA for failing to explain why it “discredit[ed] evidence contrary to its finding that there is a single trade area in the [field of membership].” *Id.* The court found an “unexplained shift” in NCUA’s approach to the “well-defined local community” requirement, and concluded that this shift “strongly suggests that determinism, not documentation, drove the NCUA’s decision.” *Id.* at *14. NCUA’s even more sweeping shift in the Final Rule, deeming CSAs “well-defined local communities,” again without considering discrediting evidence or documentation, similarly suggests determinism, and ignores the Pennsylvania and Utah courts’ instructions that “reasoned, deliberative decision-making” is required. *Id.*

4. *The Combined Statistical Area Rule Is Arbitrary and Capricious.*

A court will vacate an agency’s decision when the agency has not “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Motor Vehicles Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). “An unexplained inconsistency in agency policy is a reason for holding an interpretation to be . . . arbitrary and capricious.” *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation and internal quotation marks omitted). Although an agency need not demonstrate “that the reasons for [a] new policy are better than the reasons for [an] old one,” the agency must show that a new policy “is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The “requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.” *Id.*

The Final Rule’s treatment of CSAs represents a significant departure from NCUA’s prior interpretation without adequate explanation. In its original interpretation of the “well-defined local

community” requirement, NCUA explained that it is “difficult for a major metropolitan city . . . or an area covering multiple counties with significant population to have sufficient interaction and/or common interests, and to therefore demonstrate that these areas meet the requirement of being ‘local.’” 63 Fed. Reg. 72,037. The Final Rule reverses this determination and deems every CSA—with *multiple* “metropolitan cities,” and sometimes *dozens* of counties—“a well-defined local community.” See 81 Fed. Reg. at 88,440. The Final Rule requires no demonstration of interaction or common interests across the region. See *id.* This reversal comes without meaningful explanation of why NCUA has changed its view. Similarly, in its original interpretation of the “well-defined local community” requirement, NCUA identified a field of membership based on a large metropolitan region, such as “[p]ersons who live or work in the Greater Boston Metropolitan Area,” as a prototypically “unacceptable” field of membership that does not “meet the definition of a local community.” 63 Fed. Reg. at 72,039. The Final Rule reverses that determination as well, again without adequate explanation. See generally *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (agency’s departure from established precedent without a reasoned explanation is arbitrary and capricious).

The Final Rule also reverses, without adequate explanation, NCUA’s prior determinations that specific fields of membership do not constitute “well-defined local communities.” For instance, NCUA previously rejected a community charter for a four-county area north of New York City. See *In re Hudson Valley Federal Credit Union*, 1999 WL 35787082 (July 22, 1999).⁵³ In denying the charter, NCUA explained that the proposed area—stretching from dense New York suburbs, through agricultural areas, to the Catskill Mountains—did not “show adequate interaction

⁵³ The counties included in the area were Dutchess, Orange, Putnam, and Ulster. 1999 WL 35787082, at *1.

among its residents to meet the community chartering standards.” *Id.* at *3. The agency also emphasized the “multiplicity of services” across the region and the “lack of an urban center which draws together residents of the entire area.” *Id.* Under the Final Rule, however, this area is deemed “a well-defined local community,” because, though it combines portions of both the Kingston, NY CBSA and the New York-Newark-Jersey City, NY-NJ-PA CBSA, the whole area is contained within the New York-Newark, NY-NJ-CT-PA CSA.⁵⁴ Moreover, because the area has fewer than one million people, another 1.5 million-person portion of the CSA could be combined with this area and *still* be deemed “a well-defined local community.”⁵⁵ NCUA did not explain why it has changed its view that such an area does not have adequate interaction or a sufficient urban center to constitute “a well-defined local community.”

As another example, NCUA previously rejected a six-county field of membership in Colorado, which constitutes a portion of the Denver-Aurora, CO CSA, including portions of both the Denver-Aurora-Lakewood and Boulder CBSAs. *See In re Bellco First Federal Credit Union*, 1999 WL 34801880 (May 19, 1999).⁵⁶ NCUA recognized that this proposed field of membership lacked evidence of “common characteristics and background of area residents and . . . characteristics that distinguish the area and its residents from surrounding areas and residents.” *Id.* at *3. The agency also emphasized that “[t]he multiplicity of services” in the area “indicates

⁵⁴ *See* OMB Bull. No. 15-01, at 37, 43, 109.

⁵⁵ *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST040216/36071,36111,36079,36027,00>.

⁵⁶ *See also* OMB Bull. No. 15-01, at 26, 31, 101. The counties were Adams, Arapahoe, Boulder, Denver, Douglas and Jefferson. *See In re Bellco First Federal Credit Union*, 1999 WL 34801880, at *1 n.1.

insufficient interaction.” *Id.* Yet, under the Final Rule, this field of membership would have been approved as a portion of the Denver-Aurora CSA.⁵⁷

The arbitrariness of the CSA rule is further underscored by NCUA’s own criteria for determining whether an area is a well-defined local community. In the Final Rule, NCUA identifies seven factors the agency will consider in deciding whether an adjacent area may be added as an extension of a “well-defined local community.” 81 Fed. Reg. at 88,440. These criteria demonstrate the inappropriateness of deeming CSAs to be “well-defined local communities”—because *not one of them* applies to a typical CSA.

The criteria are:

1. *Economic Hub.* CSAs by definition have more than one economic hub, because they contain multiple urban cores for each of their component CBSAs.
2. *Population Center.* CSAs by definition have multiple population centers, because they contain multiple core areas for each of their component CBSAs.
3. *Isolated Areas.* CSAs often contain areas that are geographically isolated, like the areas across at least “two major mountain ranges” in the Salt Lake City-Provo-Orem CSA. *See Am. Bankers Ass’n*, 347 F. Supp. 2d at 1070.
4. *Quasi-Governmental Agencies.* CSAs typically contain more than a single economic development commission, regional planning board, and labor and transportation district.
5. *Government Designations.* CSAs typically contain more than a single regional transportation district, water district, or tourism district.
6. *Shared Public Services and Facilities.* CSAs typically contain multiple separate service zones for police, fire protection, parks, public transportation, etc.
7. *Colleges and Universities.* CSAs typically contain a number of colleges and universities serving distinct portions of the larger CSA region.

⁵⁷ See *Colorado Population Change, by County, 2010 U.S. Census*, Denver Post (Feb. 23, 2011), <http://www.denverpost.com/2011/02/23/colorado-population-change-by-county-2010-u-s-census/> (total population of six-county area in 2000 was approximately 2.4 million).

In the Final Rule, NCUA put forward no evidence that CSAs typically satisfy *any* of these criteria, let alone all or most of them. *See* 81 Fed. Reg. at 88,414–15. The Final Rule is thus arbitrary and capricious for this reason as well.

For these reasons NCUA’s determination that every CSA is “a well-defined local community” violates the FCUA and the APA.

C. A Core-Based Statistical Area Without Its Core Is Not “A Well-Defined Local Community.”

Prior to the Final Rule, a community credit union with a field of membership based on a core-based statistical area was required to serve the core of the community, i.e., the most populated county or city in the CBSA. *See* 81 Fed. Reg. at 88,413. In the Final Rule, however, NCUA deemed that a community credit union may serve any portion of a CBSA with up to 2.5 million people—even if the credit union does not serve the “core” area at all. *See id.* at 88,440. This change again departs from the reasonable meaning of “a well-defined local community.”

By eliminating the need for a community credit union to serve the core of a CBSA, the Final Rule eliminated the basis for deeming a CBSA to be “a well-defined local community.” As NCUA has acknowledged, the core of a CBSA is the “focal point for common interests and interaction among [CBSA] residents.” 80 Fed. Reg. at 76,749.⁵⁸ CBSAs are defined by reference to commuting ties *with the core*, not with other portions of the CBSA. *See* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82,228, 82,238 (Dec. 27, 2000). OMB, which created CBSAs and is statutorily responsible for delineating them, has explained that “[t]he general concept” of a CBSA “is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration *with that nucleus*”—but not

⁵⁸ *See* OMB Bull. No. 15-01, at 1.

necessarily with other portions of the CBSA. *Id.* at 82,228 (emphasis added). Indeed, OMB has noted that CBSAs may contain communities separated “by large distances or difficult terrain,” including “isolated rural communities.” *Id.* at 82,229. These communities are tied together only by their common association with the core, and may have little or no association with each other.

For example, the Washington-Arlington-Alexandria CBSA stretches across wide areas of Maryland and Northern Virginia and includes a county in West Virginia as well as the District of Columbia core (as pictured above on page 23). The only factor that unites these far-flung communities is their commuting relationship with the District of Columbia. Once the District is eliminated from the service area, the credit union no longer serves “a well-defined local community.” This is especially so because there is no requirement that the portions of a CBSA served by a community-based credit union must be contiguous. *See* 81 Fed. Reg. at 88,440. Under the Final Rule, a field of membership could include isolated communities on opposite sides of a sprawling CBSA. For instance, in the Washington-Arlington-Alexandria CBSA, a credit union could make its field of membership Frederick, Maryland and Fredericksburg, Virginia, even though Frederick and Fredericksburg have little, if anything, in common beyond the similarity of their names.

Examples from other CBSAs are just as striking. The only linkage between the Hamptons on Long Island and Pike County, Pennsylvania, nearly 200 miles away in the foothills of the Poconos is a (distant) tie to New York City. But the Final Rule deems these two isolated communities a single “well-defined local community”—without New York City—merely because they both are part of the New York-Newark-Jersey City CBSA.

Eliminating NCUA’s core area requirement also permits credit unions to serve only wealthier suburban areas, while excluding low-income and minority communities in the urban

core. This is contrary to Congress’s intention that credit unions should serve communities of “modest means.” *See supra* at 2–4. Federal credit unions, unlike the financial institutions that belong to the ABA, are not required to comply with the Community Reinvestment Act, 12 U.S.C. § 2901 *et seq.*, which was enacted to ensure that financial institutions help meet the needs of borrowers in all segments of their communities, including low- and moderate-income neighborhoods. *See id.* § 2902(2). Even before NCUA promulgated the Final Rule, credit unions had drifted from their basic purpose and were serving substantially fewer low-income individuals, and substantially more high-income individuals, than other financial institutions. *See* U.S. Gov’t Accountability Office, GAO-07-29, 26–27 (estimating that approximately 31% of credit unions members are of “modest means,” as compared to 41% of bank customers, and 49% of credit union members are upper-income, as compared to 41% of bank customers). The Final Rule will increase these disparities, by permitting credit unions to engage in precisely the kind of “redlining” that is prohibited for banks. A service area of a CBSA without the urban core would be an obvious target for a fair lending enforcement action against a bank. Yet the Final Rule permits credit unions to serve such areas—making an uneven playing field more uneven, and failing to serve the very people credit unions were intended to serve.⁵⁹

The Final Rule deeming a CBSA to be “a well-defined local community” without its core area is therefore contrary to the statutory text and purpose.

⁵⁹ For example, the Department of Justice filed a fair lending lawsuit against a Chevy Chase bank and its subsidiary for selectively marketing their services in a manner that “amount[ed] to a redlining of African American residential neighborhoods of the Washington, D.C., metropolitan area as off-limits.” *United States v. Chevy Chase Federal Savings Bank*, No. 1:94-cv-01829, ¶ 31 (D.D.C. August 22, 1994), available at <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-68>.

D. An Adjacent Area Is, by Definition, Not Part of “A Well-Defined Local Community.”

The Final Rule also allows a community credit union to expand outside the boundaries of a CSA, a CBSA, or a political jurisdiction (i.e., a city or a county), to any area “immediately adjacent” to these geographic units. *See* 81 Fed. Reg. at 88,440. This change again conflicts with the meaning of a single “well-defined local community.” By definition, an area adjacent to “a well-defined local community” is not part of that “well-defined local community.” Congress has not authorized a community credit union to serve “a well-defined local community” plus areas adjacent to that community.

NCUA appears to recognize that it cannot permit community credit unions to expand into adjacent areas simply because they are adjacent. The Final Rule requires submission of some (anecdotal) evidence of “common interests or interaction among residents on both sides” of the community boundary line. *See* 81 Fed. Reg. at 88,415, 88,440. But the Final Rule does not require any showing that the adjacent area shares the attributes that led to the original determination of “a well-defined local community.” *See id.* at 88,440.

The Final Rule’s approach is inconsistent with the statutory language. There is likely to be some interaction between individuals on either side of almost any geographic boundary line. But that peripheral interaction is not enough to establish that an area adjacent to “a well-defined local community” is a part of that community. The fact that people who live near the edge of a town have some interaction with people who live just outside the town limits does not demonstrate that the residents outside town are part of the town community. If it did, the concept of a well-defined local community would be essentially meaningless and community credit unions could expand limitlessly, in any direction, simply by showing—as they inevitably could—that there is some interaction between individuals close to their current boundary line and individuals just

across that line. As was the case when the Supreme Court rejected NCUA's earlier field-of-membership overstep, the NCUA has ignored the statutory "require[ment] that membership in federal credit unions 'shall be limited,'" and replaced the statute's "*limitation* on credit union membership," with an essentially "*limitless*" rule. *NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. at 502 (emphasis in original).

Once again, the Washington-Baltimore-Arlington CSA is illustrative. The eastern boundary of the CSA abuts two of Delaware's three counties (as pictured above on page 23). Thus, under the Final Rule, a community credit union already serving an enormous number of people in the Washington-Baltimore-Arlington CSA (which includes parts of four states as well as the District of Columbia), could seek to expand into a fifth state, Delaware. The credit union likely could show *some* evidence of interaction between communities in Delaware and adjacent Maryland Eastern Shore communities on the periphery of the CSA. This would allow the credit union to serve these Delaware communities—even though they may share no meaningful community ties with Washington or Baltimore. Moreover, the rural Delaware communities added to the CSA field of membership likely could show interaction with other areas in Delaware, such that, once the first adjacent areas were added to the field of membership, others even farther from Washington and Baltimore could follow—ad infinitum.

At best, NCUA's adjacent area rule is a rule for linking adjacent communities together. Individuals served by a community credit union must share a common bond, such as residence in the same political jurisdiction or ties to a CBSA core. Individuals in an adjacent area do not share that common bond. There might be some *other* community bond those in the adjacent area share with neighbors at the edge of the field of membership by virtue of being neighbors. But the statute requires that the field of membership be limited to "a" single "well-defined local community," not

multiple communities. As the Supreme Court explained in reference to the same statutory provision (before the addition of the word “local”), permitting a community credit union field of membership based on multiple communities “would render the geographical limitation meaningless.” *Id.* at 502.

This Court should reject NCUA’s attempt to overstep the “well-defined local community” lines Congress required through the adjacent area rule.

II. A Single “Rural District” May Not Include an Entire State, a Million People, or a Predominantly Urban Population.

The FCUA permits a community credit union to serve a field of membership consisting of “a well-defined local community, neighborhood, or *rural district*.” 12 U.S.C. § 1759(b)(3) (emphasis added). A “rural district” is “a subdivision of an administrative county that usually embraces several country parishes and is governed by a council,”⁶⁰ or “a rural division of a county.”⁶¹ A rural district is thus both (1) rural and (2) relatively small. Under the Final Rule, however, “rural districts” need not be either.

Prior to the Final Rule, NCUA’s regulations provided that the total population of a “rural district”-based credit union could not exceed 250,000 (or three percent of the state’s population, whichever was larger). 78 Fed. Reg. at 13,461. These limitations reflected NCUA’s view that a rural district should have a “relatively small” population. 80 Fed. Reg. at 76,751.

⁶⁰ Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/rural%20district>; *see also* Oxford English Dictionary Online (“rural district” means “[a] group of country parishes governed by an elected council”), https://en.oxforddictionaries.com/definition/rural_district.

⁶¹ Collins Dictionary Online. “Rural districts” were rural divisions of counties in England and Wales from 1888 to 1974 and in Northern Ireland from 1898 to 1973. *See id.*; *see also Fin. Pac. Ins. Co. v. Silva*, No. C043832, 2004 WL 882101, at *7 (Cal. Ct. App. Apr. 26, 2004) (“California courts used the term [rural district] to refer to land outside an incorporated city or other urbanized area where farming and grazing were the primary uses.”).

The Final Rule dramatically expands the limits of a “rural district” by quadrupling the numeric limit to a population of one million and eliminating the percentage limit. *See* 81 Fed. Reg. at 88,440. Moreover, the Final Rule defines a rural district to include any one million person area in which (1) at least half the population resides in federally-designated rural areas, or (2) the area’s population density does not exceed 100 persons per square mile. *Id.*

NCUA’s Final Rule pushes the definition of a “rural district” well beyond its reasonable limit. Under the NCUA’s new approach, five entire states—Alaska, North Dakota, South Dakota, Vermont, and Wyoming—are defined as single rural districts.⁶² Each of these states has a population under one million and a population density under 100 persons per square mile.⁶³ Moreover, the Final Rule allows rural districts to cross into a second state. *Id.* So, for example, NCUA now considers an enormous area covering all of Wyoming and most of Montana to be a single rural district.

To make matters worse, the populations in these “rural districts” may be predominantly *urban* rather than rural. In four of the five states that now qualify as single rural districts (all except Vermont), more than half the population lives in an urban area. (In Alaska, 66% of the population is urban; in North Dakota, South Dakota, and Wyoming, the proportions range from 57% to 65%.⁶⁴) Under the Final Rule, “rural districts” can include individual cities larger than the prior 250,000 cap on rural districts’ total population. Anchorage, for example, has a population of nearly

⁶² *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/02,38,46,50,56,00>.

⁶³ *See* U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/02,38,46,50,56,00>.

⁶⁴ U.S. Census, *Percent Urban and Rural in 2010 by State*, <https://www.census.gov/geo/reference/ua/urban-rural-2010.html>.

300,000.⁶⁵ Finally, the Final Rule does not even require that the credit union serve the rural portions of the field of membership. *See* 81 Fed. Reg. at 88,440. So a “rural district”-based credit union could serve Anchorage and Fairbanks, while ignoring the vast rural stretches in between. Incredibly, such a credit union would be approved without serving any rural community—thereby reading the word “rural” out of the statute—while combining two urban communities that could never qualify as a “well-defined local community.” The NCUA’s approach cannot be squared with the statutory text.

NCUA’s dramatic expansion of the definition of “rural district” is a sharp reversal of its prior interpretation of the statutory language. In its 1999 rules, NCUA identified “[p]ersons who live or work in a state” as a paradigmatic example of an “unacceptable” field of membership that does not “meet the definition of a local community, neighborhood, or rural district.” 63 Fed. Reg. at 72,039; *accord id.* at 72,037 (“Although . . . state boundaries are well-defined areas, they do not meet the second requirement that the proposed area be a local community, neighborhood, or rural district.”). NCUA also previously rejected an application for a community credit union covering a whole state, Delaware, despite its small size. *In re Delaware Federal Credit Union*, 2000 WL 36716365 (Sept. 7, 2000).⁶⁶ Given the diversity of population and geography across the state, including the urban-rural divide between the northern part of the state and the rural remainder, NCUA determined that “the evidence does not support a local community.” *Id.* at *2. NCUA has not explained why the statutory language permits entire states to serve as fields of membership, thus demonstrating that the change is not only contrary to the statute’s language, but also arbitrary

⁶⁵ U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/0203000,00>.

⁶⁶ Delaware is the second smallest state in area and has fewer than one million people. *See* U.S. Census, *State Area Measurements & Internal Point Coordinates*, *supra* at n.44; U.S. Census, *QuickFacts*, <https://www.census.gov/quickfacts/table/PST045216/10,00>.

and capricious. *See, e.g., Encino Motorcars*, 136 S. Ct. at 2126; *Motor Vehicles Ass'n*, 463 U.S. at 42.⁶⁷

Accordingly, the Final Rule's dramatic expansion of rural districts violates the FCUA and the APA.

CONCLUSION

The Court should enter summary judgment for Plaintiff, declare that the Final Rule is in excess of NCUA's statutory authority and is arbitrary and capricious, vacate the portions of the Final Rule challenged in this lawsuit, and enjoin NCUA from approving expansion of any community credit union's field of membership pursuant to the Final Rule.

⁶⁷ Although NCUA pointed to certain economies of scale that may be associated with permitting larger fields of membership, *see* 81 Fed. Reg. at 88,417, Congress authorized community credit unions to operate only in "a well-defined local community, neighborhood, or rural district." The statutory language contains no exception allowing credit unions to operate more broadly if doing so would be more efficient. And it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014).

Dated: May 26, 2017

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