APPENDIX A

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)

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 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.

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 reinstitutes 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 Cmtys. 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 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.

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.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,

Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

Civil Action No. 16-2394 (DLF)

MEMORANDUM OPINION

The Federal Credit Union Act limits membership in certain credit unions to persons or organizations within a "well-defined local community, neighborhood, or rural district" and requires the National Credit Union Administration (NCUA) to define that phrase by regulation. 12 U.S.C. § 1759(b)(3), (g)(1). At issue is an NCUA rule (the Rule) that broadens the agency's definitions of *local community* and *rural district*. 81 Fed. Reg. 88,412, 88,440 (Dec. 7, 2016).

Before the Court are cross-motions for summary judgment filed by the American Bankers Association (ABA) and the NCUA. Dkt. 14; Dkt. 19. The ABA challenges four definitional decisions made by the NCUA in the Rule. The Court concludes that two of those definitional decisions violate the Administrative Procedure Act by exceeding the agency's statutory authority. Accordingly, the Court will grant in part and deny in part the ABA's motion for summary judgment,

and will grant in part and deny in part the NCUA's cross-motion for summary judgment.

I. BACKGROUND

Federal credit unions are mutually-owned financial institutions chartered and regulated by the NCUA. They offer many of the consumer products and services offered by other depository institutions, such as the banks represented by the ABA. U.S. Dep't of the Treasury, *Comparing Credit Unions with Other Institutions* 19 (Jan. 2001). Federal credit unions and banks differ, however, in a few ways. Federal credit unions enjoy the advantage of exemption from federal, state, and local taxes, with few exceptions. 12 U.S.C. § 1768. But they face limitations on their commercial lending and securities activities, the terms of their interest rates, and—central to this case—the areas and categories of persons that they can serve. *Id.* § 1759; *see* U.S. Dep't of the Treasury, *Comparing Credit Unions with Other Institutions* 19.

This case concerns community credit unions, which are federal credit unions limited to serving "persons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). In undertaking the cartographic challenge of defining the *local community* term, the NCUA has relied on statistical measures established by the Office of Management and Budget (OMB). Several geographic measures are relevant to this suit:

- *Core-Based Statistical Area* is a category composed of the country's Metropolitan Statistical Areas and Micropolitan Statistical Areas.

- *Metropolitan Statistical Areas* are defined by the OMB as having "at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties." Office of Mgmt. & Budget, Bulletin No. 15-01 (July 15, 2015) [hereinafter OMB Bulletin No. 15-01]. They are "delineated in terms of whole counties (or equivalent entities)." *Id.* A surrounding county may be part of a Metropolitan Statistical Area only if at least 25 percent of its workers commute into the central county, or if at least 25 percent of the central county's workers commute to the surrounding county. 75 Fed. Reg. 37,246, 37,250 (June 28, 2010). The OMB cautions that Metropolitan Statistical Area delineations "should not serve as a general-purpose framework for nonstatistical activities." OMB Bulletin No. 15-01.
- *Micropolitan Statistical Areas* are identical to Metropolitan Statistical Areas except that their urbanized areas are smaller. In a Micropolitan Statistical Area, the urbanized area (also known as the *core*), contains at least 10,000 but fewer than 50,000 people. *Id.*
- A *Metropolitan Division* is a subdivision of a large Metropolitan Statistical

Area. Specifically, a Metropolitan Division is "a county or group of counties within a Metropolitan Statistical Area that has a population core of at least 2.5 million." *Id.*

- *Combined Statistical Areas* are composed of adjacent Core-Based Statistical Areas that share what the OMB calls "substantial employment interchange." U.S. Census Bureau, *Geographic Terms and Concepts*, https://www.census.gov/geo/reference/ gtc/ gtc_cbsa.html. Two Core-Based Statistical Areas have the requisite interchange if their "employment interchange measure" is at least 15. The employment interchange measure is easiest understood with an example: if 8 percent of County A commutes to County B, and 7 percent of County B commutes to County A, the employment interchange is 15 (the sum of the decimals multiplied by 100). 75 Fed. Reg. at 37,248. The OMB characterizes Combined Statistical Areas as "representing larger regions that reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreation activities, and are likely to be of considerable interest to regional authorities and the private sector." OMB Bulletin No. 15-01.
- A *Single Political Jurisdiction* is a city, county, or the political equivalent. 81 Fed. Reg. at 88,440. While the other terms originated with the OMB, this one appears to be the NCUA's own.

The Rule, promulgated in 2016, defines "local community, neighborhood, or rural district" in four ways challenged here. First, the Rule automatically characterizes as part of a local community any portion of any Core-Based Statistical Area (or of a Metropolitan Division instead when there is one) as long as the portion contains no more than 2.5 million people. 81 Fed. Reg. at 88,440. The NCUA interpreted its previous iteration of the regulation as categorizing a portion of a Core-Based Statistical Area as belonging to a local community only if the core was itself included, but the 2016 Rule does not include that requirement. *Id.* at 88,413–14. Now, a credit union can serve areas within a Core-Based Statistical Area that do not include the core.

Second, the Rule automatically characterizes any individual portion of a Combined Statistical Area as belonging to a local community as long as the portion contains no more than 2.5 million people. *Id.* at 88,440. An example of a Combined Statistical Area is the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Combined Statistical Area, which includes eight Core-Based Statistical Areas from the District of Columbia, Virginia, Maryland, West Virginia, and Pennsylvania.

Third, the Rule allows a credit union serving a portion of a Single Political Jurisdiction, Core-Based Statistical Area, or Combined Statistical Area to add an adjacent area if the credit union can demonstrate that the adjacent area is part of the same local community based on various factors that indicate common interests or interaction. *Id.*

Fourth, the Rule increases the population limit for *rural districts* to one million people. *Id.* A proposed service area within the population limit automatically qualifies as a part of a *rural district* if either (1) most of the area's population resides in Census Bureau-designated rural units or (2) the area's population density does not exceed 100 persons per square mile. *Id.* An area covering the state of Wyoming and portions of six surrounding states, for example, is considered a rural district under the Rule.

The ABA challenges the Rule under the Administrative Procedure Act, arguing that the NCUA exceeded its statutory authority and that the Rule is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C). Both parties moved for summary judgment, and the case was reassigned to the undersigned judge on December 4, 2017.

A. Statutory History

The Federal Credit Union Act (the Act) has its roots in the Great Depression. In the years following the stock market crash of 1929, many Americans lost access to credit at reasonable interest rates. *First Nat'l Bank & Tr. Co. v. NCUA*, 988 F.2d 1272, 1274 (D.C. Cir. 1993). Because they lacked the security required for bank loans, "working Americans turned to loan sharks who typically charged usurious interest rates, which was thought to reduce the overall purchasing power of American consumers." *Id.* (citing 78 Cong. Rec. 12,223 (1934)). Congress sought to solve this problem with the Act. *See* Pub. L. No. 73-467, 48 Stat. 1216 (1934) (codified at 12 U.S.C. § 1751 *et seq.*).

Signed in 1934, the Act was designed to establish a stable federal system of cooperative credit,

strengthen the country's securities market, and "make more available to people of small means credit for provident purposes." *Id.* pmbl. To ensure that federal credit unions met their members' borrowing needs, the Act established the basic features of credit unions that persist today. The Act required credit unions to be owned and controlled by members and empowered credit unions to make loans only to members.[1] *Id.* §§ 103, 107, 109, 111. "Congress expected that such measures guaranteeing democratic self-government would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." *First Nat'l Bank*, 988 F.2d at 1274.

The Act also provided for two basic types of credit unions: common-bond credit unions (those whose membership shares an occupational or associational bond) and community credit unions (those whose membership shares geographic and communal ties). Pub. L. No. 73-467, § 109. The Act accordingly restricted the eligible fields of credit-union membership to "groups having a common bond of occupation, or association" or "groups within a well-defined neighborhood, community, or rural district." *Id.* This requirement was "the cement that united credit union members in a cooperative venture." *First Nat'l Bank & Tr. Co. v. NCUA*, 90 F.3d 525, 526, 529–30 (D.C. Cir. 1996), *aff'd*, 522 U.S. 479 (1998). "The Congress intended that each [federal credit union] be a cohesive association in which the members are known by the officers and by each other in order to 'ensure both that

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[1] A later amendment allowed credit unions to make loans to other credit unions as well. *See* 12 U.S.C. § 1757(5).

those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.'" *Id.* (quoting *First Nat'l Bank*, 988 F.2d at 1276).

The NCUA and its predecessors initially interpreted the Act to require that every member of a common-bond credit union—the type not at issue here—share the same occupational bond. *First Nat'l Bank*, 522 U.S. at 484. But in 1982, the NCUA "reversed its longstanding policy in order to permit [common-bond] credit unions to be composed of *multiple* unrelated employer groups." *Id.* (emphasis added). In 1998, however, the United States Supreme Court rejected the NCUA's new interpretation as "simply not what the statute provides" and "contrary to the unambiguously expressed intent of Congress." *First Nat'l Bank*, 522 U.S. at 501, 503.

Within months of the Supreme Court's decision, Congress amended the Act via the Credit Union Membership Access Act (the 1998 Act). *See* Pub. L. No. 105-219, 112 Stat. 913 (1998). In the preface to the 1998 Act, Congress reiterated its longstanding support for credit unions, finding that they "have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means." *Id.* § 2. Congress also 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 or identity is essential to the fulfillment of the public mission of credit unions." *Id.* Most relevant here, the 1998 Act modified the categories of service areas for community credit unions: whereas service

areas were previously limited to a "well-defined neighborhood, community, or rural district," Pub. L. No. 73-467, § 109, the 1998 Act changed that phrase to "well-defined *local* community, neighborhood, or rural district," Pub. L. No. 105-219, § 101 (codified at 12 U.S.C. § 1759(b)(3)) (emphasis added). The 1998 Act required the NCUA to prescribe a definition of the phrase by regulation. *Id.* § 103 (codified at 12 U.S.C. § 1759(g)(1)).

B. The NCUA's Interpretations

Under this express delegation of definitional authority, the NCUA has promulgated multiple rules addressing the permissible service areas for community credit unions.

1. *The 1998 Rule*

Four months after the passage of the 1998 Act, the NCUA promulgated a rule defining the geographic scope of community credit unions. 63 Fed. Reg. 71,998 (Dec. 30, 1998). The NCUA stated that 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. The rule thus "recognize[d] 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." *Id.* Notably, the NCUA responded to Congress's decision to replace the term *community* with *local community*:

> [T]he [NCUA] 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.

Id. at 72,012.

The rule established three requirements for community credit union applications: (1) the proposed area must have clearly defined geographic boundaries; (2) the applicant must demonstrate that the proposed area falls within a well-defined local community, neighborhood, or rural district; and (3) the residents of the area must have common interests or interact. *Id.* at 72,037. The rule identified factors that the agency would consider in assessing the third requirement (which informed the second, *id.* at 72,012), including (i) the presence or absence of a single major trade area, shared governmental or civil facilities, or area newspaper; and (ii) the population and geographic size of the proposed area. *Id.* at 72,037. The NCUA noted that states and congressional districts did not meet the requirement that a service area be a local community, neighborhood, or rural district. *Id.*

The rule also illustrated its requirements with examples of acceptable, unacceptable, and insufficiently defined fields of membership for community credit unions. Acceptable fields included people who live or work in the same county, the same school district, or the same university. *Id.* at 72,038. Unacceptable fields included "persons who live or work in the Greater Boston Metropolitan Area" or "the State of California."

Id. at 72,039. And insufficiently defined fields included "persons who live or work within and businesses located within a ten- mile radius of Washington, DC" or "persons who live or work in the industrial section of New York." *Id.*

2. *The 2003 Rule*

In 2003, the NCUA promulgated a rule that broadened the *local community* requirement. 68 Fed. Reg. 18,334 (Apr. 15, 2003). First, the rule established that any Single Political Jurisdiction (or any contiguous portion of one) automatically qualified as a local community. *Id.* at 18,357. The NCUA clarified that this was an "irrebuttable presumption, regardless of population size," and that "no documentation demonstrating that the political jurisdiction is a community would be required." *Id.* at 18,337. Second, the rule provided that the statutory requirements might be met if "the area to be served is in multiple contiguous political jurisdictions" as long as the area's population does not exceed 500,000. *Id.* at 18,357. And third, the rule provided that the requirements might be met by an area with a population of up to one million people if the area is a Metropolitan Statistical Area or an equivalent area. *Id.* For any area not within a Single Political Jurisdiction, the rule required credit union applicants to submit a narrative letter describing how the proposed area meets the standards for community interaction or common interests. *Id.* at 18,337, 18,357.

3. *The 2010 Rule*

The NCUA further expanded the permissible service areas in a 2010 rule. While the NCUA

acknowledged that "the statutory language 'local community' does imply some limit" and reiterated that states and congressional districts do not qualify as local communities or rural districts, the agency abandoned its narrative-based approach. 75 Fed. Reg. 36,257, 36,258, 36,264 (June 25, 2010). The NCUA stated that the local community requirement is met if the proposed service area is (1) a Single Political Jurisdiction or any contiguous portion thereof; or (2) a Core-Based Statistical Area or Metropolitan Division with a population not exceeding 2.5 million people, or portion thereof. *Id.* at 36,264; *see also id.* at 36,257. In the rule's preamble, the NCUA noted that "any portion of a [Core-Based Statistical Area] chosen as the geographic area of the community must . . . contain the core." *Id.* at 36,260.

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.

4. *The 2013 Rule*

In 2013, the NCUA increased the population limit for rural districts to the greater of 250,000 people or 3 percent of the state in which most of the district is located. 78 Fed. Reg. 13,460, 13,463 (Feb. 28, 2013).

C. The 2016 Rule

In a final rule promulgated in December 2016, the NCUA adopted the four changes that the ABA now challenges. First, the Rule modifies the requirements

for Core-Based Statistical Areas. The Rule now automatically qualifies as part of a local community any contiguous portion of a Core-Based Statistical Area (or of a Metropolitan Division when there is one) of more than 2.5 million people as long as the portion's population does not exceed 2.5 million people. 81 Fed. Reg. at 88,440. In the Rule's preamble, the NCUA observed that it was eliminating the requirement that a portion of a Core-Based Statistical Area belongs to a local community only if it includes the core. *Id.* at 88,413–14. The NCUA reasoned that credit unions were fulfilling the underlying purpose of the core requirement—to ensure adequate service to low-income communities—without regard to location. *Id.* Bank-affiliated commenters expressed concern that eliminating the core requirement would allow credit unions to redline out low-income communities; the NCUA responded by asserting that its supervisory process would prevent discrimination. *Id.*

Second, the Rule adds Combined Statistical Areas to the list of categories that automatically qualify as belonging to a local community, subject to a 2.5 million population limit. *Id.* at 88,440. In response to commenters who argued that a Combined Statistical Area is too expansive to be considered a local community, the NCUA emphasized the population limit and observed that the average Combined Statistical Area was smaller than the average Core-Based Statistical Area that the NCUA had approved since 2010. *Id.* at 88,414–15.

Third, the Rule allows credit unions to apply to add areas adjacent to a portion of a Single Political Jurisdiction, Core-Based Statistical Area, or Combined Statistical Area that they already serve, subject

to the same population limit. *Id.* at 88,440. To expand a service area, applicants must establish that the adjacent area is part of the same local community as the already-served statistical area with "objective documentation" showing common interests or interaction among residents on both sides of the statistical area's perimeter. *Id.* at 88,415.

Fourth, the Rule increases the population limit for rural districts to one million people and eliminates the alternative population limit of 3 percent of the state in which most of the district is located. *Id.* at 88,440. The NCUA defended the increased population limit on the ground that it would allow greater and more efficient service to rural areas. *Id.* at 88,417. As before, an area qualifies as a rural district only if it meets the population limit and either (1) more than 50 percent of the area's population resides in rural areas (as defined by government agencies) or (2) the area's population density does not exceed 100 persons per square mile. *Id.* at 88,440. The Rule also introduces a requirement that a rural district cannot exceed the boundaries of the states bordering the state in which the credit union is headquartered. *Id.*

II. LEGAL STANDARDS

A court grants summary judgment if the moving party "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); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A "material" fact is one with potential to change the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine"

if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

Here the plaintiff seeks review of an agency's final rule, invoking the Administrative Procedure Act's requirement that a court "hold unlawful and set aside" any aspect of the rule that is "arbitrary [and] capricious" or "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C). In an Administrative Procedure Act case, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). In other words, "the entire case . . . is a question of law" and the district court "sits as an appellate tribunal." *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (quotation marks and footnote omitted).

Review of an agency's interpretation of a statute it administers is governed by the two- step *Chevron* doctrine. At Step One, a court must determine "whether Congress has directly spoken to the precise question at issue" or instead has delegated to an agency the legislative authority to "elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843–44 (1984). If the latter, a court must reach Step Two, which asks whether the agency action "is based on a permissible construction of the statute" or instead is "manifestly contrary to the statute." *Id.* at 843, 844.

A statute's grant of definitional authority to an agency decides Step One in the agency's favor because the definitional provision "confirms that the Congress has not directly spoken" to the interpretive question. *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016) (internal quotation marks and emphasis omitted); *see also Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 1000–01 (D.C. Cir. 1989) (concluding that when a statute gives an agency definitional authority, "there is no need to rely on the presumptive delegation to agencies of authority to define ambiguous or imprecise terms we apply under the *Chevron* doctrine, for the delegation of interpretative authority is express" (citation omitted)). The grant of definitional authority also "necessarily suggests that Congress did not intend the [terms] to be applied in [their] plain meaning sense," *Women Involved*, 876 F.2d at 1000 (emphasis omitted), and "manifests that the Congress intended the [agency] to enjoy broad discretion to decide" what the statute means by the terms to be defined, *Lindeen*, 825 F.3d at 653.

But that broad discretion is not unlimited. Even a statute that gives an agency definitional authority does not leave the agency "free to write its own law." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985) (quotation marks omitted). Instead, the statute carries the implicit premise that the agency's definitions must be reasonable. *See Lindeen*, 825 F.3d at 656 (sustaining an agency's exercise of express definitional authority because the agency "acted reasonably" in making its definitional decision); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 717 (D.C. Cir. 2016) (sustaining an agency's exercise of express definitional authority because the agency's interpretation

of the statute was "reasoned and reasonable"); *Women Involved*, 876 F.2d at 1003 (suggesting that when an agency acts under express definitional authority, the ultimate question is whether the agency's definition is "a reasonable interpretation of the statute"). In other words, the agency's exercise of definitional authority must survive *Chevron* Step Two—it cannot be "manifestly contrary to the statute." *Lindeen*, 825 F.3d at 656 (quotation marks omitted); *see also* NCUA Suppl. Mem. at 1, Dkt. 31 (acknowledging the same).

Arbitrary and capricious review is "fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (quotation marks and alteration omitted). A court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Even so, the standard is not entirely toothless: the agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Id.* When reviewing the agency's explanation, a court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quotation marks omitted). A court defers to the agency "as long as the action is supported by 'reasoned decisionmaking.'" *Bean v. Perdue*, No. 17-cv-0140, 2017 WL 4005603, at *5 (D.D.C. Sept. 11, 2017) (quoting *Fox*, 684 F.3d at 75). Finally, the party challenging an agency's action as arbitrary and capricious bears the burden of proof. *Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015).

III. ANALYSIS

The ABA has Article III and prudential standing to bring this suit because its members compete with the credit unions that benefit from the NCUA's broadened definitions. *See First Nat'l Bank*, 522 U.S. at 488. The ABA challenges the Rule under the Administrative Procedure Act, which requires a court to "hold unlawful and set aside" agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C). The Court concludes that the Rule's approaches to Combined Statistical Areas and rural districts are manifestly contrary to the Act and thus violate Section 706(2)(C). On the other hand, the Rule's approaches to Core-Based Statistical Areas and adjacent areas are neither in excess of the agency's statutory authority nor arbitrary and capricious, though the approach to Core-Based Statistical Areas pushes against the outer limits of reasonableness.

The interpretive question presented is whether the terms *local community* and *rural district* can reasonably be thought to encompass the scope that the NCUA has given them. Discerning the boundaries of vague terms—permissible boundaries, in this case—is notoriously challenging, but that is the task at hand. Several principles guide the inquiry.

First, it is the meaning of a statutory term at the time it became law that controls. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (stating

that a statute is interpreted according to its contemporaneous meaning); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (examining the ordinary meaning of the relevant term "as understood when the [statute] was enacted"). To discern contemporaneous meaning, courts look first to contemporaneous dictionaries. *See PHH Corp. v. CFPB*, 881 F.3d 75, 130 (D.C. Cir. 2018) (Griffith, J., concurring in the judgment) (collecting cases for the observation that the Supreme Court "generally begins [an interpretive task] with dictionaries"); *Kellogg Brown & Root Servs. v. U.S., ex rel. Carter*, 135 S. Ct. 1970, 1976 (2015) (citing dictionaries from the period surrounding the date of enactment).

But exclusive reliance on dictionaries would be misguided. For one, a dictionary "cannot delineate the periphery" of vague terms (those that blur around the edges) like *local community* and *rural district*. Antonin Scalia & Bryan A. Garner, *Reading Law* 418 (2012); *see also* William N. Eskridge Jr., *Interpreting Law* 58 (2016) (same). More significantly, contemporaneous dictionaries do not provide American definitions of *local community* or *rural district*. The terms' individual words are defined, of course, and definitions of component words often shed light on a term's meaning, but a term does not necessarily mean the sum of its parts. *See FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation."); *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014) (observing that the term *domestic violence* encompasses "acts that one might not characterize as 'violent' in a nondomestic context"). For these reasons, it is important to consult the interpretive canons and

common usage of the terms *local community* and *rural district* at the time of their enactment.

A. The NCUA's Definition of *Local Community*

The ABA challenges three aspects of the Rule that expand the NCUA's definition of *local community*: the addition of Combined Statistical Areas to the list of automatic qualifiers, the absence of a core requirement for Core-Based Statistical Areas, and the potential inclusion in a service map of areas adjacent to statistical areas that are categorically defined as local communities.

1. Meaning of *Local Community*

The question whether the NCUA's definitions of *local community* are manifestly contrary to the statute requires comparisons to the term's 1998 meaning. The term *community* was included in the 1934 Act, but because that term was replaced in 1998 by the distinct term *local community*, the latter year is most relevant.

a. Definitions

In 1998, the word *community*, on its own, could refer to a group as small as a few people (*e.g.*, a church *community* group) or one including most of the world (the international *community*). That said, several dictionaries define *community* as a body of people who live "in the same locality" or in "one place." Chambers Dictionary (1993); Oxford Dictionary of Current English (3d ed. 2001). And one of Black's definitions for *community* is a "neighborhood, vicinity, or locality." Black's Law Dictionary (7th ed. 1999). Geographic

proximity aside, the defining characteristic of a community was a common bond. *See, e.g.*, Chambers Dictionary (1993) (defining *community* as "a group of people who have common interests, characteristics or culture").

Many 1998-era dictionaries make clear that *local* meant geographically limited. *See, e.g.*, 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 provides more precise definitions: "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)." Webster's Third New International Dictionary (3d ed. 1993); *see also id.* (defining *local* as "a newspaper story or item of interest mainly to readers who live in the town or city where the paper is published"). These definitions—which cite towns, counties, and other "minor" political subdivisions as examples of local areas—suggest that a *local* community generally extended no farther than countywide.

While 1998-era dictionaries do not define the term *local community*, several state statutory provisions in effect around that time did. One state defined the term broadly, but numerous others defined it narrowly. Kentucky defined *local community crisis response team* as "a team formed to provide crisis response services in a county, district, or region." Ky. Rev. Stat. Ann. § 36.250(5) (2017) (relevant language effective 1998). Against that broad definition, however, Rhode Island defined *local communities* as "any cities and towns of Rhode Island." R.I. Gen. Laws § 23-

7.1-3 (2017) (relevant language effective 1968). Mississippi defined *local community* in an early-intervention statute as "a county either jointly, severally, or a portion thereof, participating in the provision of early intervention services." Miss. Code. § 41-87-5(f) (2017) (relevant language effective 1990). In a statute concerning the conversion of single-unit home communities to multi-unit condominiums or co-operatives, Delaware defined *affected local community* as "the municipality or county in which the largest portion of the real property which has been proposed as a conversion project is situated." Del. Code Ann. tit. 25, § 7102(1) (2018) (relevant language enacted 1983). Alaska defined *local community entity* as "a city or borough or other political subdivision of the state, a nonprofit organization, or a combination of these." Alaska Stat. § 18.66.990(7) (2017) (relevant language effective 1996). Iowa defined *local community* as "a county conservation board, a city, or a nongovernmental organization operating on a non-profit basis." Iowa Code Ann. § 461.36 (West) (2018) (relevant language enacted 2010). Oklahoma defined the term to mean a "town or city and [] county . . . ; provided, a city or town and a county may jointly constitute the 'local community.'" Okla. Stat. Ann. tit. 68, § 4203 (West) (2018) (relevant language enacted 2006). In a statute addressing violent video games, Michigan defined *local community* as "the county in which the video game was disseminated." Mich. Comp. Laws Ann. § 722.686 (West) (2018) (relevant language effective 2005). Also relevant is a California definitional provision: "'Community,' 'locality,' 'local government,' or 'jurisdiction' means a city, city and county, or county." Cal. Gov't Code § 65582(a) (West 2018) (relevant language enacted 1980). On the whole,

these definitions suggest that *local community* was understood in 1998 as generally encompassing an area no larger than a county.

b. Textual Context and Statutory History

A circumscribed understanding of *local community* also follows from the term's surrounding text and statutory history. First, the term is embedded in a statutory provision that contains other geographically limited terms: "local community, *neighborhood*, or *rural district*." 12 U.S.C. § 1759(b)(3) (emphases added). These terms 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." *United States v. Williams*, 553 U.S. 285, 294 (2008). By applying the *noscitur* canon, courts "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).

Both early- and late-twentieth century dictionaries define *neighborhood* as a relatively small area: the term referred to a "section or district" lived in by people "forming a loosely cohesive community within a larger unit (as a city, town) . . . ." Webster's Third New International Dictionary (3d ed. 1993); *see also* 6 The Century Dictionary and Cyclopedia (1911) (defining *neighborhood* as "[t]hose living in the vicinity or adjoining locality; neighbors collectively"). Similarly, *rural district* generally referred to areas no larger than a county. *See infra* Section III.B. The geographic scope of the "company [the term *local community*]

keeps," *Yates*, 135 U.S. at 1085, suggests that the term describes areas similar in size to a neighborhood or county.

The Act's statutory history also "sheds . . . light on the text." *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014); *see also Kellogg Brown*, 135 S. Ct. at 1977–78 (suggesting that in some cases the statutory history is "the strongest support" for a court's interpretation). The 1998 Congress did not spin the phrase *local community* from whole cloth— the word *community* had been in the Act since its enactment in 1934. *See* Pub. L. No. 73-467, § 109 (limiting membership to "groups within a well-defined neighborhood, community, or rural district."). As the NCUA has long conceded, the change from *community* to *local community* shrunk the phrase's geographic scope. *See* 63 Fed. Reg. at 72,012; Hr'g Tr. at 44, Dkt. 33. That means the preexisting understanding of *community* is relevant as an outer bound for the meaning of *local community*.

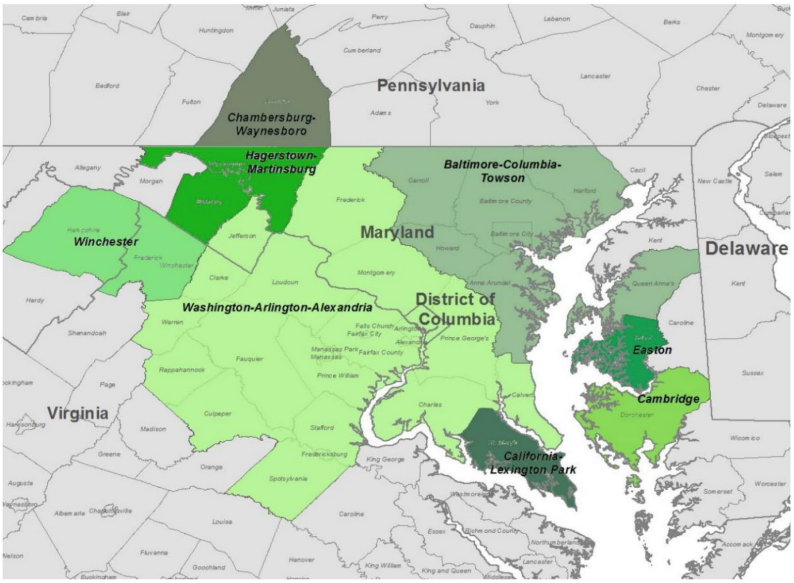
In 1934, *community* meant "a body of people having common organization or interests, or living in the same place under the same laws and regulations." Webster's New International Dictionary (2d ed. 1934); *see also* 2 The Century Dictionary and Cyclopedia (1911) (defining *community* as a "number of people associated together by the fact of residence in the same locality, . . . ; a village, township, or municipality"); *see also Lukens Steel Co. v. Perkins*, 107 F.2d 627, 631 (D.C. Cir. 1939), *rev'd on other grounds*, 310 U.S. 113 (1940) (observing that *community* connotes not "large geographical areas, with widely diverse interests" but rather "congeries of common interests arising from associations—social, business, religious, governmental, scholastic, recreational—involving considerations of

public health, fire protection, water, sewage, transportation, and other services"). This informs the 1998 meaning of *local community* and provides further support for a narrow reading of the term.

2. Combined Statistical Areas

The Rule automatically qualifies any contiguous portion of a Combined Statistical Area as part of a single local community, as long as the portion's population does not exceed 2.5 million.[2] A Combined Statistical Area consists of adjacent Core-Based Statistical Areas that, according to the OMB, have substantial employment interchange. 75 Fed. Reg. at 37,248. The Combined Statistical Area that includes Washington D.C., for example, is composed of the entirety of the colored area in this map:

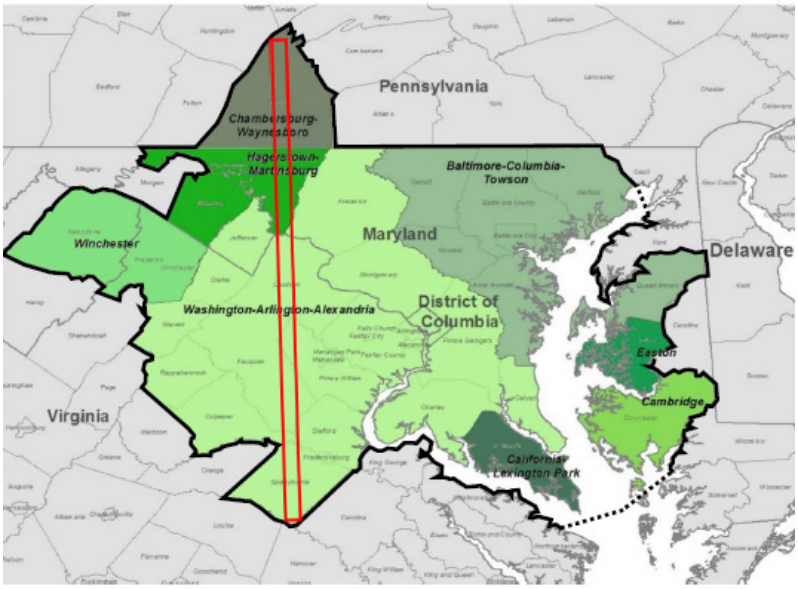
[2] The ABA claims that the Rule also allows noncontiguous areas to qualify, but in its briefing the NCUA assures that the Rule requires contiguous areas. *See* ABA Br. at 25, Dkt. 14; NCUA Br. at 27–28, Dkt. 19-1. An agency's interpretation of its regulation advanced in a legal brief is entitled to deference unless it is "plainly erroneous or inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). The Rule qualifies as part of a *local community* "a portion" of the relevant areas, 81 Fed. Reg. at 88,440, and that can reasonably be interpreted as requiring contiguity, so the NCUA's reading merits deference.



The varying shades of green represent each of the eight Core-Based Statistical Areas that form the Combined Statistical Area. The OMB claims that Combined Statistical Areas "reflect broader social and economic interactions" like "wholesaling, commodity distribution, and weekend recreation activities." OMB Bulletin No. 15-01. The record, however, does not provide support for that conclusion. While Chambersburg-Waynesboro, for example, must have an employment interchange of at least 15 with Hagerstown-Martinsburg (its adjacent Core-Based Statistical Area), Chambersburg-Waynesboro does not necessarily have any interchange at all with any of the other Core-Based Statistical Areas. In other words, 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.

The NCUA argues that the population cap of 2.5 million people and the contiguity requirement together prevent distant and unconnected areas from being considered a local community. Those limits, however, do not solve the problem. Here's an extreme example:



According to the Rule, everyone living within the red rectangle, which is contiguous and contains fewer than 2.5 million people, is part of the same local community. *See* Hr'g Tr. at 42 (NCUA acknowledging that the Rule defines thin strips like the above as part of a single *local community*). That is true even though residents of Doylesburg, Pennsylvania (at the northern edge of the red rectangle) and residents of Partlow, Virginia (at the southern edge of the red rectangle)

live about 200 miles from each other—around a 3.5-hour drive. What is more, unlike some residents from even the perimeter of the D.C. Core-Based Statistical Area, residents of Doylesburg and Partlow do not necessarily share any commuting relationship to D.C. They might not share any commonality whatsoever beyond that they live in the Mid-Atlantic region of the United States within a certain radius of D.C.

The Doylesburg-Partlow example is extreme, but it is not hypothetical: the Rule *defines* the red rectangle as belonging to a single local community. If a credit union seeks to serve such an area, the NCUA has no discretion to reject the credit union's application on the ground that the area is not a local community. 81 Fed. Reg. at 88,440; *see also* Hr'g Tr. at 42. Because any portion of a Combined Statistical Area automatically qualifies, 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.

A definition that calls Doylesburg, Pennsylvania and Partlow, Virginia residents part of the same local community is not anywhere near the term's standard meaning. As noted, at the time of enactment, numerous states defined the term as constituting a geographic scope no larger than a county. And definitions of the individual words *local* and *community* also suggest that a *local community* was understood as a group sharing a common bond and living in a geographically small area such as a county or municipality. Combined Statistical Areas do not necessarily have either of those characteristics: they 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. Any number of less extreme examples make the same point: the 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.

The NCUA's responses are unpersuasive. First, the NCUA asserts that the term *local community* does not "connote any fixed restrictions" at all because the statute does not explicitly address the question how broad is too broad. NCUA Br. at 26, Dkt. 19-1. But while *local community* is vague, it is not devoid of meaning. Acceptance of the NCUA's argument would allow an agency to rewrite a statute whenever it is given the authority to define a vague term. Second, to suggest that it retains some discretion over areas like the red rectangle, the NCUA invokes a requirement that a credit union applicant must establish that it has the ability to serve its proposed service area. Hr'g Tr. at 36; *see also* 81 Fed. Reg. at 88,414. But that requirement is an additional one imposed on top of the *local community* requirement; it does not factor into the NCUA's definition of *local community*. *See* 75 Fed. Reg. at 36,261 ("[A]fter establishing the existence of a [well-defined local community]," a credit union must "demonstrate it is able to serve the [well-defined local community]."). Because the Rule automatically qualifies any area of 2.5 million or fewer people from any Combined Statistical Area as part of a local community—despite its potential geographic breadth and

lack of commonality—this definition is manifestly contrary to the statute.

3. Core-Based Statistical Areas

Next, the Rule deems any individual portion of any Core-Based Statistical Area (or Metropolitan Division instead when there is one) a local community as long as the portion's population does not exceed 2.5 million. 81 Fed. Reg. at 88,440. A Core-Based Statistical Area consists of an urban core, its county, and any surrounding counties that are, according to OMB, highly socially and economically integrated with the core. 75 Fed. Reg. at 37,249; *see also* U.S. Census Bureau, *Geographic Terms and Concepts*. The OMB defines social and economic integration with commuting ties: a surrounding county may be part of a Core-Based Statistical Area only if at least 25 percent of its workers commute into the central county or vice versa. 75 Fed. Reg. at 37,250.

The Rule eliminates two requirements that prevented certain areas within Core-Based Statistical Areas from being considered part of a single local community. First, while the NCUA interpreted the 2010 rule to define a portion of a Core-Based Statistical Area as part of a local community only if it included the core, the new Rule contains no such requirement, and the NCUA notes in the Rule's preamble that the core requirement is eliminated. 81 Fed. Reg. at 88,414, 88,440. Second, the Rule also eliminates the requirement from the 2010 rule that a Core-Based Statistical Area can form the basis for a local community only if the Core-Based Statistical Area as a whole contains no more than 2.5 million people. *Id*. Now, the *portion* of the Core-Based Statistical Area can contain

no more than 2.5 million people, but the Core-Based Statistical Area itself can be any size. According to the NCUA, the 2010 rule inadvertently misstated the appropriate population limit and thus the population-limit increase in the Rule is merely a "technical remedy" to correct that mistake. *Id.* at 88,414; Hr'g Tr. at 39.

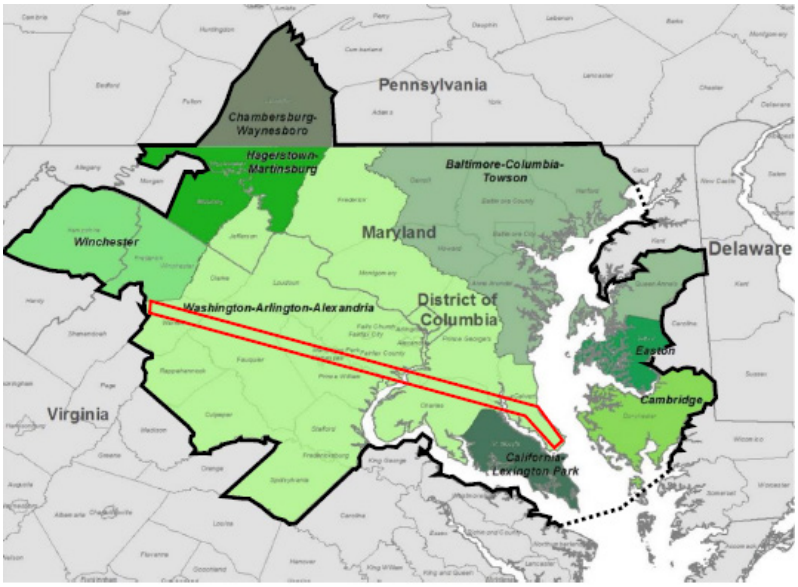
The Court's review of the Rule's definitional decisions regarding Core-Based Statistical Areas is limited to the absence of a core requirement. The complaint referred to the population- limit increase, Compl. ¶ 53, but to the extent that the ABA challenges the Rule on that basis, the claim is waived because the issue was not raised during the notice-and-comment rulemaking process. *See Koretoff v. Vilsack*, 707 F.3d 394, 397 (D.C. Cir. 2013) ("A party will normally forfeit an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration." (quotation marks omitted)); 81 Fed. Reg. at 88,414 (noting that no commenter opposed the population-limit increase). It is worth noting, however, that because of the population-limit increase, the Rule now automatically qualifies portions of ten of the largest Core-Based Statistical Areas (those with more than 2.5 million people and with no Metropolitan Division) as belonging to a single *local community*. And in conjunction with the elimination of the core requirement, the population-limit increase qualifies even portions drawn exclusively from the perimeter of those large Core-Based Statistical Areas.

On the absence of a core requirement, the ABA argues that the core is what united the Core-Based

Statistical Area to begin with, so a Core-Based Statistical Area without a core cannot belong to a *local community*. *See* ABA Br. at 33–34, Dkt. 14-1. This argument is unconvincing. The Act contains nothing to suggest that a service area encompassing only part of a local community is off limits. Removing the core, moreover, actually *decreases* the geographic size of a service area based on a Core-Based Statistical Area—after all, the area of a circle becomes smaller when a donut hole is carved out. And the absence of the core does not alter the other residents' common bond. If residents of Arlington, Virginia and Bethesda, Maryland are part of the same local community, that is so because of commonalities based on their shared vicinity to Washington, D.C. These commonalities are unaffected by the absence of the D.C. core from a credit union's service map. In other words, Arlington and Bethesda residents share the common bond of residing in suburban D.C. regardless of whether D.C. residents are part of their credit union's service area.

The absence of the core requirement is nonetheless troubling, however, because it allows for geographically larger *local communities*. If the core requirement were in place, a credit union seeking to serve the Chicago Core-Based Statistical Area, for example, would not be able to reach past the core itself because the core's population is above the 2.5 million-person limit. But without the core requirement and with the removal of the population limitation for Core-Based Statistical Areas or their Metropolitan Divisions, a credit union can now reach the outer boundaries of the largest Core-Based Statistical Areas or their Metropolitan Divisions, as long as the credit

union serves no more than 2.5 million people. For example, the Rule describes residents of Reliance, Virginia (at the western edge of the red area) and residents of Lusby, Maryland (at the southeastern edge of the red area) as part of a single local community even though they live about 140 miles from each other—a drive of more than two hours:



Similarly, the Rule defines Shelby, Texas and Anahuac, Texas as part of a single local community although parts of those towns are 160 miles and more than 2.5 hours from each other; both towns are within the Houston Core-Based Statistical Area and are connected by a contiguous area with a population below 2.5 million. As with Combined Statistical Areas, any such portion of a Core-Based Statistical Area or one of its Metropolitan Divisions automatically qualifies as part of a single local community under the Rule. As a result, the NCUA cannot prevent a gerrymandering

credit union from serving the far-flung perimeter of the largest Core- Based Statistical Areas or their Metropolitan Divisions.

Such a capacious definition of *local community* is jarring, to say the least. Although 25 percent of the workers in each constituent county commute to the core, the corollary is that up to 75 percent of each county's workers do *not* make that commute and may have no ties to the core (much less to a remote town on the opposite side of the core) beyond regional proximity. Also, unlike distant commuters, people who live in the same city or county—the areas normally associated with the term *local community*—often share other communal ties. They are likely to vote in the same mayoral race, frequent the same parks, suffer the same potholes, or enroll their children in a common school district or sports league. Finally, even if it is granted that residents of Reliance and Lusby share community because a quarter of both of their counties work in the same core, they do not necessarily share a *local* community. It is possible, that is, to leave one's local community to commute to work.

Nonetheless, the towns in these examples can reasonably be thought to contain at least some traces of the social, economic, and geographic commonalities of a local community. At least 25 percent of the workers in Reliance's and Lusby's counties share the commonality of commuting to the D.C. core. 75 Fed. Reg. at 37,250. As even the ABA acknowledges, that is "pretty substantial commuting activity." Hr'g Tr. at 7. The commuting metric ensures that a service area's constituent counties are all within a feasible commuting radius of the core, which means that the service area

shares at least some geographic ties and cannot expand without limit. Also, the OMB uses shared commuting activity as a proxy for extensive social and economic commonalities, an inference that the NCUA has adopted. *See* 75 Fed. Reg. at 37,249; 81 Fed. Reg. at 88,450; NCUA Reply Br. at 16–17, Dkt. 25.

While these inferred social, economic, and geographic ties may be less robust than those of a prototypical local community, they provide at least some reasonable basis for the NCUA to define *local community* as including areas on the perimeter of a Core-Based Statistical Area. And a barely reasonable interpretation is enough to satisfy *Chevron* Step Two. The Act gives the NCUA "broad discretion" to define *local community*, *Lindeen*, 825 F.3d at 653, and that discretion includes the ability to make definitional decisions that do not derive from the term's "most natural reading," *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991). Given the reasonable basis put forth by the NCUA and the deference owed to the NCUA's definition, the absence of a core requirement is not manifestly contrary to the statute.

Neither is the elimination of the core requirement arbitrary and capricious. Apart from the requirement that the NCUA cannot imbue *local community* with an unreasonable meaning, the Act provides the NCUA with little guidance regarding what factors to consider in defining the term. Acting under its broad delegation of definitional authority, the NCUA adequately articulated reasons for eliminating the core requirement.

First, the NCUA explained that the Act does not mandate a core requirement, and that the majority of

commenters favored repeal of the requirement because it "unnecessarily impose[d] an additional constraint on who credit unions can serve." 81 Fed. Reg. at 88,413. Second, the NCUA determined that the core requirement had led to negative consequences. It had limited the flexibility needed by a credit union to establish a "marketplace footprint;" it had deterred credit unions from serving Core-Based Statistical Areas with populated urban areas; and it had required credit unions to sacrifice service to non-core portions of Core-Based Statistical Areas. *Id.* By removing the core requirement, the NCUA reasonably sought to alleviate these adverse results.

Finally, the NCUA responded to concerns that repeal "would effectively permit 'redlining' through formation of a community primarily consisting of wealthier areas within a [Core-Based Statistical Area], while excluding areas where low-income and minority populations are concentrated." *Id.* The NCUA explained that it "has in place a supervisory process to assess [a credit union's] efforts to offer service to the entire community [the credit union] seeks to serve." *Id.* The NCUA represented that it would "hold[] credit union management accountable for the results of an annual evaluation [occurring during the first three years of a credit union's charter or expansion and overseen by the Office of Consumer Protection] that encompasses a community [credit union's] implementation of its business and marketing plans." *Id.* The NCUA also cited 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.* at 88,414.

Based on this supervisory process, especially the evaluations by the Office of Consumer Protection, the NCUA decided to repeal the core requirement "in view of credit unions' success in 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.'" *Id*.

Notwithstanding this explanation, the ABA maintains that the NCUA's reasons were 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." ABA Reply Br. at 25, Dkt. 23. As evidence of that intent, the ABA emphasizes that in the 1998 Act, Congress found that the credit unions' mission of meeting consumer savings and credit needs extends "especially [to] persons of modest means." Pub. L. No. 105-219, § 2; *see also* Pub. L. No. 73-467, pmbl. (stating that a purpose of the statute was to "make more available to people of small means credit for provident purposes").

As laudable and important as this congressional policy may be, it is thin evidence that the NCUA failed to consider relevant factors and failed to adequately explain its decision. *Cf. H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989) (refusing an invitation to invoke a statute's preamble and legislative history to give broad statutory language a specific reading). Moreover, the NCUA did consider the policy and concluded—based on its experience reviewing business and marketing plans since 2010—that credit unions were adequately serving low-income areas and would continue to do so without the core requirement, perhaps even "more effectively." *See* Fed. Reg. at 88,413–14. The NCUA explained that the Rule did not disturb

the agency's mandate to consider complaints alleging discriminatory practices affecting underserved populations and to correct any discriminatory practices shown to exist. *Id.* at 88,414. In light of this reasonable explanation, the NCUA's decision to eliminate the core requirement was not arbitrary and capricious.

4. Adjacent Areas

Next, the Rule allows a credit union serving a Single Political Jurisdiction, Core-Based Statistical Area, or Combined Statistical Area to add an adjacent area if the credit union can demonstrate that a "sufficient level of interaction" exists between the adjacent area and the already-served area such that the proposed service area "meets the requirements for being a local community." *Id.* at 88,440. The ABA's challenge to this aspect of the Rule fails.

Unlike the Rule's provisions that automatically qualify certain areas as belonging to a *local community* or *rural district*, the adjacent-area provision has no definitional import. Instead it allows credit unions to submit documentation in support of a proposed service area, and the NCUA then decides on a case-by-case basis whether the proposed area belongs to a single local community. It is only after the NCUA evaluates an application that a definitional decision is made. While these individual decisions can be challenged, the ABA's current facial attack loses because individual applications might propose service areas well within a reasonable definition of *local community*. For example, a credit union serving Bethesda might apply to add neighboring Chevy Chase, and the NCUA's approval of that application would be unlikely to contradict the Act. If a credit union serving a

local community does not initially serve the entire community, that is, the Act does not prohibit expansion into a greater portion of the community.

Neither is the adjacent-area provision arbitrary and capricious. The NCUA considered the relevant factors and articulated an adequate explanation for its decision. *See Fox*, 684 F.3d at 75. The NCUA explained that "[t]here is no statutory requirement or economic rationale that compels the Board to charter only the smallest [local community service map] in a particular area." 81 Fed. Reg. at 88,412 (quotation marks omitted).

The NCUA also chose reasonable factors for evaluating whether adjacent areas are part of the same local community. The Rule establishes that when evaluating a proposed adjacent area, the NCUA will consider whether the quintessential characteristics of a local community are present, including economic interdependence, related industries, intertwined traffic flows, shared governmental or quasi-governmental agencies, common educational institutions, and shared public services such as common police or fire protection. *Id.* at 88,415 & n.33; *see also* 80 Fed. Reg. 76,748, 76,772 (Dec. 10, 2015). This permits the NCUA to bring its reason and experience to bear. The NCUA's ability to accept or reject credit-union proposals on a case-by-case basis allows it to make reasonable decisions about whether a proposed area is part of a single local community.

B. The NCUA's Definition of *Rural District*

Finally, the Rule increases the population limit for rural districts from 250,000 (or 3 percent of the relevant state) to one million. 81 Fed. Reg. at 88,440. The Rule also maintains a rurality requirement that either (1) most of the area's population resides in rural areas (as defined by government agencies) or (2) the area's population density does not exceed 100 persons per square mile. *Id.*

The original meaning of *rural district* dates to 1934. While the provision concerning community credit unions has been amended elsewhere since then, *rural district*—which has appeared unaltered in the statute since its incipiency—maintains its 1934 meaning. The NCUA argues that the modern meaning of *rural district* controls instead because in 1998 Congress gave the NCUA authority to define the term. Hr'g Tr. at 28–29. But because the statute allows the NCUA to define the term only within the bounds of reason, the interpretive question still requires reference to the standard meaning of *rural district* as used in the statute.[3] That meaning was not altered by the grant of definitional authority.

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[3] This point is perhaps easiest illustrated with an example. The Constitution requires the federal government to protect a state from "domestic violence" upon the state's request. U.S. Const. art. IV, § 4. Scholars agree that this use of *domestic violence* refers to rioting or insurrection from within a state. Now, however, the term is commonly used to refer to abuse inside the home, as opposed to civil unrest. An inquiry into the reasonableness of a definition for *domestic violence* as used in the Constitution would require a comparison to the term's original meaning, not its modern meaning.

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. *See, e.g.*, Webster's New International Dictionary (2d ed. 1934); Concise Oxford Dictionary of Current English, New Edition (1929). Their dispute is over how large a *district* can be when *rural* modifies it, and whether a district can be considered rural if most of the district's residents live in urban areas.

Dictionaries from around 1934 indicate that some areas described as *districts* were geographically expansive. They cite as examples the *District of Kentucky*, *District of Alaska*, and *District of Maine* (as those areas were known when not yet states). *See* 3 The Oxford English Dictionary (1933); 2 Dictionary of American English (1940). One dictionary defines *district* as a "region or territory whose limits and dimensions are approximately those of a state," or alternatively as an "extensive area, tract, or region having limits only vaguely defined." 2 Dictionary of American English (1940). Another dictionary defines *district* as "[a]ny portion of territory of undefined extent; region." Webster's Collegiate Dictionary (4th ed. 1931). Some definitions provide examples of much smaller districts, but others are quite large.[4]

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[4] For more examples of definitions suggesting a potentially expansive geographic scope, see Webster's New International Dictionary (2d ed. 1934) (defining *district* as "[a] division of territory; a defined portion of a state, county, country, town, or city, etc., made for administrative, electoral, or other purposes . . . ."); American College Dictionary (1949) ("[A] region or locality."); 2 Dictionary of American English (1940) ("Any one of the various areas, differing greatly in size, regarded as an election or administrative unit . . . ."); *id.* (citing Illinois and Ohio as examples of

But geographically broad definitions of *district* do not necessarily mean that a *rural district* could be broad. It would be a mistake to conclude from these broad definitions that a *school district*, for example, could cover an entire state. And while few 1934-era dictionaries define the *rural district* term, those that do suggest that rural districts were smaller than a county. Webster's Second provides this definition of *rural district*: "In England, Wales, and Northern Ireland, a subdivision of an administrative county embracing usually several country parishes." Webster's New International Dictionary (2d ed. 1934); *see also* Funk & Wagnell's New Standard Dictionary of the English Language (1913) (similar). This definition has limited probative value because it reports non-American usage, but its presence in American dictionaries suggests some degree of American familiarity.

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the "extensive area[s]" regarded as districts for Methodist religious work).

For examples of definitions suggesting a narrower geographic scope, see 3 The Oxford English Dictionary (1933) ("In U.S. used in various specific and local senses . . . . In some States the chief subdivision of a county (*civil*, *magisterial*, *militia*, *justice's district*), called in other states *townships* or *towns*. Formerly, in South Carolina = county; elsewhere, a division of a state containing several counties."); 2 Dictionary of American English (1940) ("A county or similar subdivision of a state."); *id.* ("The neighborhood or community in which the one speaking resides."); *id.* ("A subdivision of a city serving as a unit for policing, fire prevention, political representation, etc.").

For (British) dictionaries that define *district* with reference to rural areas, see 3 The Oxford English Dictionary (1933) (defining *district* as "[o]ne of the urban or rural subdivisions of a county"); Concise Oxford Dictionary of Current English, New Edition (1929) (same).

Relying on the fact that no dictionary definition for American usage of *rural district* exists, the NCUA argues that in America the phrase meant no more than the sum of its component words. Hr'g Tr. at 30. According to the NCUA, in other words, if an area was both *rural* and a *district*, it could fairly be considered a *rural district*. The Supreme Court has addressed precisely this question—whether a multi-word phrase carries distinct meaning—by "survey[ing] modern press usage" with a search of "computerized newspaper databases—both the New York Times database in Lexis/Nexis, and the US News database in Westlaw." *Muscarello v. United States*, 524 U.S. 125, 129 (1998). Those databases contain virtually no record of 1934-era language usage, but a more robust database indicates that the phrase *rural district* was used with some frequency in the first half of the twentieth century before mostly falling out of usage in the second half.[5] This suggests that even if *rural district* does not carry meaning distinct from its individual words today, it did in 1934.

Usage of *rural district* in 1934-era judicial opinions also suggests that the term carried distinct meaning—and that it referred to areas much smaller than a state. A Westlaw search for *rural district* in opinions published from 1920 through 1940 returns 293 cases. *See* ABA Suppl. Mem. App. 6, Dkt. 32-6. Of

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[5] The database, called the Corpus of Historical American English, is a giant repository of text that houses more than 400 million words collected from fiction, non-fiction, magazines, and newspapers published from 1810 to 2017. A search at corpus.byu.edu/coha for "rural district*" shows a dramatic decline in usage beginning around 1950.

those, 144 provide clues to the term's geographic scope.[6] Many of those (68) use *rural district* to refer to a rural school district. The others also plainly refer to areas much smaller than a state. For example, one opinion refers to a rural district "about five miles square." *Robb v. Stone*, 146 A. 91, 91 (Pa. 1929). Another mentions a utility company serving "a rural district adjoining the village [of Tupper Lake]." *Vill. of Tupper Lake v. Maltbie*, 15 N.Y.S.2d 491, 493 (N.Y. App. Div. 1939). A third opinion reports that a newspaper salesman sought to distribute papers "in a certain designated territory consisting of small villages and rural districts." *Brechbiel v. Hentgen*, 8 N.E.2d 1007, 1007 (Ind. Ct. App. 1937). Many opinions (23) refer to rural districts within a named city or county. *See, e.g.*, *Blake v. Bd. of Educ. of City of Parsons*, 210 P. 351, 351 (Kan. 1922) (referring to a "rural district of Labette county"). Against the dozens of similar examples, not one opinion appears to envision a rural district approaching the size of a state.

Finally, the *noscitur* canon also indicates that *rural districts* were geographically small. As noted, the term *neighborhood* referred to an area smaller than a city. *See supra* Section III.A.1. And the term *community* referred to areas under "the same local laws" and not to "large geographical areas" with "widely diverse interests." *Id.*; *Lukens Steel*, 107 F.2d at 631; 2 The Century Dictionary and Cyclopedia (1911).

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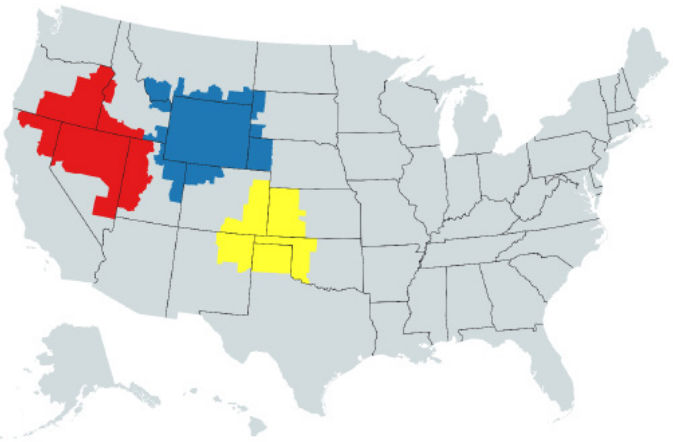
[6] The phrase *the rural districts* was often used simply to distinguish from urban areas. *See, e.g.*, *Widmer v. State*, 142 N.E. 145, 145 (Ohio Ct. App. 1924) ("[T]he people from the rural districts, joining with the people of the towns and villages, would gather . . . and have their contests."). Opinions like *Widmer*, however, do not shed light on the size of any individual *rural district*.

Yet the Rule defines certain areas significantly larger than most states as belonging to a single *rural district*. Here are three examples, shaded in red, blue, and yellow, of areas that qualify under the Rule:



See State Associations Amicus Br. at 22–24, 34–41, Dkt. 18. The red area includes most of Nevada along with portions of four adjoining states; the blue area includes Wyoming and portions of six adjoining states; and the yellow area includes portions of Texas, Oklahoma, Kansas, Colorado, and New Mexico. Each area has a population density well under 100 persons per square mile. *Id.*

Not only are these areas geographically expansive, they also capture numerous urban centers. The yellow area, for example, includes the Amarillo, Texas Metropolitan Statistical Area, which has a population of more than 250,000 people. The Rule's rurality requirement originated in a previous iteration of the regulation and is not challenged here, but its low threshold exacerbates the deficiencies of the Rule's population-limit increase. It is the combination of the

rurality requirement and the population-limit increase that qualifies Amarillo as part of a rural district. Similarly, because of the population-limit increase, the state of Wyoming now qualifies as belonging to a rural district even though 57 percent of the state's residents live in urban areas. *See* ABA Br. at 39.

As with other challenged provisions of the Rule, the NCUA left itself no escape hatch for fielding *rural district* applications. As long as a credit union's proposed service area meets the Rule's population and rurality requirements, the Rule automatically characterizes the area as a *rural district*—no matter its geographic size or the number or size of metropolitan areas falling within its proposed boundaries. And a definition of *rural district* that includes the expansive areas illustrated above is not even in the ballpark of the term's standard meaning. Because the Rule automatically qualifies areas larger than states as *rural districts* even though the term commonly referred to areas smaller than a county, the NCUA's definitional decision is unreasonable and manifestly contrary to the statute.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the ABA's motion for summary judgment, Dkt. 14, and the Court grants in part and denies in part the NCUA's cross-motion for summary judgment, Dkt. 19. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Friedrich .
DABNEY L. FRIEDRICH
United States District Judge

Date: March 29, 2018

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5154
September Term, 2019
1:16-cv-02394-DLF
Filed On: December 12, 2019

AMERICAN BANKERS ASSOCIATION,

Appellee,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Appellant.

Consolidated with 18-5181

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of appellee/cross-appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

RELEVANT STATUTORY PROVISIONS

12 U.S.C. § 1751 note

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(b)

(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.

12 U.S.C. § 1759(g)(1)

(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.