IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress directed NCUA[1] to "prescribe, by regulation, a definition for the term 'well-defined local community, neighborhood, or rural district.'" 12 U.S.C. § 1759(g)(1). Through this language, Congress delegated broad interpretive authority to NCUA. Neither "local community" nor "rural district" has an unambiguous meaning, and Plaintiff does not appear to claim otherwise. In everyday speech, "local" and "community" are both often used to describe areas with large populations, and areas spanning multiple political jurisdictions. And "rural district" does not even have a meaningful or consistent pedigree in American law or language, let alone a clear and certain scope. Plaintiff also does not point to any legislative history delineating the reach of either term, and there is no evidence Congress contemplated any particular limits. Although NCUA may not prescribe regulations that are arbitrary, capricious, or manifestly contrary to the statute, the agency's interpretation is owed substantial deference. Plaintiff does not come close to overcoming that deference here.

First, NCUA's addition of a CSA-based category represented a permissible construction of the statute. NCUA has long permitted charters covering a CBSA, subject to a 2.5 million-person limit, as well as single-political-jurisdiction credit unions regardless of population. NCUA reasonably concluded that a CSA or portion thereof, subject to the same 2.5 million-person limit, could also constitute a local community. Plaintiff's response—which largely consists of cherry-picking the country's most populous CSAs, then conjuring up fanciful hypotheticals that ignore both the 2.5 million-person limit and NCUA's longstanding requirement that communities be geographically contiguous—does not establish that NCUA acted unreasonably. Plaintiff also

[1] Unless otherwise indicated, all abbreviations and terms correspond to those in Defendant's memorandum filed June 21, 2017. *See* ECF Nos. 19-20 ("NCUA Mem.").

continues to rely on dated administrative and federal court cases, but those decisions have nothing to do with any supposed distinction between CSAs and CBSAs and rested on a regulatory approach that NCUA abandoned long before the Final Rule. And Plaintiff's overarching argument that "CBSAs and large single political jurisdictions push[] against the reasonable limits of a single 'well-defined local community'" and that a CSA-based category "is a bridge too far," ECF No. 23 ("ABA Reply") at 15-16, represents precisely the sort of line drawing that Congress entrusted to NCUA.

Second, NCUA permissibly eliminated the requirement that CBSA-based communities include the CBSA's "core area." The statute does not even arguably mandate this requirement, which had generated numerous unintended and negative consequences. The thrust of Plaintiff's contrary argument—that particular areas may constitute a local community when combined with a core area, but a ***smaller*** portion that excludes the core may not—is illogical, and certainly not the sort of obvious inference the statute compels the agency to accept. Plaintiff's arguments about possible redlining are wholly speculative, unrelated to the legal question of what can reasonably be characterized as a local community and, in any event, adequately addressed by NCUA.

Third, Plaintiff's challenge to the adjacent-area addition is unripe and meritless. This issue would be more appropriately resolved in the context of a challenge to a specific charter, and Plaintiff's unfounded speculation about how it might be applied in the future illustrates as much. Plaintiff would also suffer no meaningful hardship from bringing such a challenge, as Plaintiff has done multiple times in the past. But if the Court considers this issue, Plaintiff's challenge should be rejected. NCUA's approval of a community credit union consisting of a single political jurisdiction, CBSA, CSA, or portion thereof, plainly does not preclude the agency from subsequently permitting an applicant to demonstrate that an adjacent area should also be regarded

as part of the same local community.

Fourth, the agency permissibly modified its rural-district definition to impose a uniform one million-person cap. As NCUA explained in its opening brief, the agency had already approved numerous credit unions far exceeding the prior 250,000 numerical limit under the alternative three-percent state population measure. Those credit unions have successfully brought affordable financial services to the areas they serve, and Plaintiff does not argue that credit unions will be unable to serve areas covered by the Final Rule. Contrary to Plaintiff's central argument, there is no statutory basis for its claim that a rural district must be particularly small. NCUA's regulatory definition is consistent with the text and purposes of the FCUA, and is not arbitrary or capricious.

Plaintiff's positions would have sweeping consequences. Plaintiff asserts that NCUA was required to interpret "local community" as analogous to the term "neighborhood" and by reference to a separate provision generally requiring that only groups with fewer than 3,000 members be included within a multiple-common-bond credit union. ABA Reply at 5-6. And Plaintiff insists that "rural district" must mean a "small, rural area[]", citing such examples as a "school territory." *Id.* at 33 & n.6. These radical arguments would call into question not merely the Final Rule, but all of NCUA's post-CUMAA regulations. There is no evidence Congress intended to impose such limits on NCUA's ability to expand access to credit union membership. This Court should reject Plaintiff's arguments and defer to NCUA's reasonable judgment as to how to best exercise its delegated authority.

ARGUMENT

I. CONGRESS GRANTED NCUA BROAD AUTHORITY TO SET COMMUNITY CREDIT UNIONS' FIELD OF MEMBERSHIP

Congress authorized NCUA to "prescribe, by regulation, a definition for the term 'well-defined local community, neighborhood, or rural district'" for purposes of "making any

determination with regard to the field of membership" of a community credit union, and the authority to "establish[] the criteria applicable with respect to any such determination." 12 U.S.C. § 1759(g)(1). "An agency is at the apex of its administrative authority when Congress not only gives the agency general authority to implement a statute but also expressly asks the agency to define a specific phrase." *Henry Ford Health Sys. v. Dep't of Health & Human Servs.*, 654 F.3d 660, 665 (6th Cir. 2011). And as this delegation illustrates, Congress did not believe that the terms "well-defined local community" or "rural district" have a single meaning. The Final Rule must be given "controlling weight unless" Plaintiff can show that it "is arbitrary, capricious, or manifestly contrary to the statute." *Lindeen v. SEC*, 825 F.3d 646, 656 (D.C. Cir. 2016) (citation omitted).[2]

Notwithstanding this express delegation and highly deferential legal standard, Plaintiff insists that the statute "imposes significant limits on community-based credit unions." ABA Reply at 3 (capitalizations omitted). But Plaintiff's arguments on this point are unconvincing. As to "local community," Plaintiff does not contend that this term has an unambiguous meaning and Plaintiff studiously avoids setting forth any particular restrictions it believes the term connotes. Instead, Plaintiff continues to insist that a local community must be "relatively small." *Id.* at 4, 6.

[2] Plaintiff disagrees that, when exercising expressly delegated interpretive authority, an agency should receive greater deference than when the delegation is merely implicit. ABA Reply at 4 & n.1; *but see Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 566 (6th Cir. 2014) (noting that, when delegation is implicit, "the court's review is somewhat less deferential" than when it is explicit). But *Chevron* itself distinguished between the two situations, and the D.C. Circuit has done so as well. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Lindeen*, 825 F.3d at 655-56 (noting that "[t]ypically, at *Chevron* Step 2, we defer to the Commission so long as its definition is 'based on a permissible construction of the statute'" but explaining that "where, as here, 'there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' we give the regulation 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute'") (quoting *Chevron*, 467 U.S. at 843-44) (alteration supplied by *Lindeen*). But even if Plaintiff were correct that, formally speaking, the standards are the same, it is relevant in evaluating Plaintiff's legal challenge that Congress explicitly recognized that the statutory terms at issue have no unambiguous meaning, and specifically directed NCUA to prescribe a regulatory definition.

But Plaintiff does not dispute that the term "community" does not denote any particular size or population limit, and that communities can thus come in all shapes and sizes. NCUA Mem. at 19; ABA Reply at 7. Plaintiff also does not dispute that local can mean "of, relating to, or characteristic of a particular place," or pertaining to "particular places," NCUA Mem. at 20 & nn. 2-3, and does not appear to contend that the Final Rule is inconsistent with these common definitions. Plaintiff insists that this cannot be what the statutory term "local" means because, according to Plaintiff, such a definition would add "nothing to the term 'community,' which already describes individuals living in a particular area or a common location." ABA Reply at 7. But putting aside that the surplusage canon Plaintiff invokes "is not an absolute rule," *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015), the use of "local" in these common senses does meaningful work, both in emphasizing that the community is geographic in nature (e.g., not "the legal community" or "the Polish-American community") and in clarifying more specifically that the statute imposes some geographic limits on community charters, neither of which "community" alone would necessarily make clear. Moreover, the statute refers to a "***well-defined*** local community" and the statutory term "local" clarifies that an applicant must ***identify*** a particular place or places.

By contrast, Plaintiff identifies no support in CUMAA's legislative history for its assertion that Congress intended the term "local" to place "significant limits on community-based credit unions," ABA Reply at 3 (capitalizations omitted), and NCUA is aware of none.[3] Even if Congress did intend the word "local" to place greater limits on NCUA's authority, the bulk of

[3] Plaintiff also contends that the statute "was designed to limit membership to communities that are small enough so that lenders will know loan applicants and borrowers will be more reluctant to default." ABA Reply at 5. But as amici point out, by 1998 credit unions had already moved towards serving larger communities, and it is implausible that Congress intended this concept to apply to modern credit unions. *See* ECF No. 22 at 14.

Plaintiff's additional dictionary definitions—which define "local" as, inter alia, "not general or widespread," "not broad," "restricted," and "narrow"—do not address how broad something must be before it can no longer plausibly be described as local. NCUA Mem. at 20.

Plaintiff also observes that the term "local community" is "commonly used in everyday speech." ABA Reply at 8. But although Plaintiff quibbles with the particular examples in NCUA's opening brief,[4] Plaintiff has no meaningful answer to the basic point that neither "local" nor "local community" must mean a particularly small area. The Washington Metropolitan area illustrates this point. That area has an estimated population of more than 6,000,000 people (nearly two and a half times the limit the Final Rule sets for CBSA and CSA-based credit unions), but it would be wholly unremarkable to refer it as a "local community." The amici supporting NCUA (collectively, "CUNA") offer a number of other instructive examples. *See* ECF No. 22 ("CUNA Mem.") at 12-13 (noting, inter alia, that the U.S. District Court for the District of Alaska covers "an area dozens of times larger than the largest CSA," yet still has "local rules"). In common

[4] The Government previously pointed out that "it is common for newspapers to have a 'local' section that covers the entire metropolitan area, even when that area spans thousands of miles and encompasses millions of people," NCUA Mem. at 20, which is difficult to square with Plaintiff's central argument that "local" necessarily means "relatively small." Addressing only one of the cited examples, Plaintiff notes that the *Washington Post* "offers twelve different zoned local sections." ABA Reply at 9. But the *Post*'s decision to sub-divide its local coverage does not alter the basic point that each of the zoned sections offers news coverage the *Post* reasonably characterizes as "local." Plaintiff also notes that "none of the *Post*'s zoned local sections covers areas on the periphery of the Washington-Baltimore-Arlington" CSA and, addressing another example offered by NCUA, in the majority of this CSA the Washington Wizards are apparently not one of the three most ***popular*** professional basketball teams (which does not mean the Wizards are not the ***local*** team). ABA Reply at 9. But this CSA contains nearly ten million people (four times the Final Rule's limit), so these observations say nothing about whether the Final Rule is a reasonable implementation of the statute. NCUA also pointed to an article highlighting disagreement concerning what qualifies as "locally grown." NCUA Mem. at 20 n.5. In response, ABA disputes that the Pacific Northwest is a single local community (it would not qualify as such under the Final Rule). ABA Reply at 9. But again, Plaintiff has no persuasive response to the points this article underscores, namely, that "local" need not be as limited as Plaintiff believes.

speech, whether a particular area is a "local community" can be based on any number of factors, including but not limited to the population and size of the area, economic ties, social and cultural interaction, shared public services and facilities, and shared governmental and quasi-governmental institutions. Congress recognized as much, and entrusted NCUA with prescribing a regulatory definition based on its experience and expertise supervising credit unions.

Plaintiff's arguments concerning "rural district" are weaker still. Plaintiff contends that a "[d]istrict means a political subdivision, i.e., 'a territorial division (as for administrative or electoral purposes)'" and that "[d]istrict is 'used in various specific and local senses,' such as a school district or a fire district." ABA Reply at 34. At least the first definition is not clearly inconsistent with the Final Rule. And "district" can also mean "[a]n area ***of a country*** or city, especially one characterized by a particular feature or activity,"[5] or "a division of territory, as of ***a country***, state, or county, marked off for administrative, electoral, or ***other purposes***."[6] Nothing in these definitions requires that a "district" be relatively small. Contrary to Plaintiff's argument, *see id.*, a district can encompass an entire state, as evidenced by the U.S. District Court for the District of Alaska, the congressional district that covers Alaska, and the multiple other judicial and congressional districts that cover entire states. And a "rural" district by its very nature generally covers a larger area, ordinarily one "too large to be considered 'local.'" Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,417 (Dec. 7, 2016). There is no linguistic or logical support for a claim that "rural" or "district" connotes an area that must be "relatively small."

That leaves Plaintiff's argument that the combined term "rural district" has an established

[5] Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/district (last visited Aug. 9, 2017) (emphasis added).

[6] Dictionary.com, http://www.dictionary.com/browse/district (last visited Aug. 9, 2017) (emphases added).

and narrow meaning in American language. But Plaintiff does not appear to dispute that the dictionary definitions on which it relies describe a since-superseded type of local Government area used in England, Wales, and Northern Ireland from the late nineteenth century to the early 1970s. *See* NCUA Mem. at 22. Even if it would be possible to apply such definitions to modern American geographic units, it is implausible to contend that Congress (in 1934 or 1998) intended that a definition from the United Kingdom that ceased being used a quarter century before CUMAA's enactment would govern interpretation of this statute. And particularly since Congress does not often borrow obsolete foreign definitions in this way, if Congress had intended such a bizarre result here, one would expect to see some evidence of such intent in the statute's legislative history.

Plaintiff also contends that "the authority cited in ABA's opening brief makes clear that 'rural district' was not a 'foreign' term, but was used in the United States to describe small, rural areas." ABA Reply at 33. But the only authority ABA cited for this proposition in its opening brief is an unpublished intermediate California state appellate decision. ABA Mem. at 38 n.61 (citing *Fin. Pac. Ins. Co. v. Silva*, No. C043832, 2004 WL 882101 (Cal. Ct. App. Apr. 26, 2004)). That decision does not purport to identify any uniform definition of "rural district," but instead analyzed how ***California*** courts had used the term. *Silva*, 2004 WL 882101, at *7. And even as to that narrow topic, the court observed that "the term 'rural districts' is of antiquated usage." *Id.*

Plaintiff's reply further contends that "hundreds of U.S. cases, statutes, and local ordinances have used the term 'rural district' in a similar sense." ABA Reply at 33. But the fact that "rural district" has often been used to refer to particular areas or types of land does not establish that it is a "term[] of art in which [is] accumulated the legal tradition and meaning of centuries of practice." ABA Reply at 33 (quoting *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013)). Plaintiff's examples illustrate this point. Plaintiff cites state cases using the term to mean a "school

territory," "a location for low density single family residential development in conjunction with providing continued farming activities," and an area designated for "[f]arming, truck or nursery gardening" under a particular local zoning ordinance. ABA Reply at 33 & n.36. Such a jumble of disparate uses does not come close to delineating a "***well-settled*** meaning" that Congress can be presumed to have known about and adopted, *Neder v. United States*, 527 U.S. 1, 23 (1999) (emphasis added)—particularly since, again, Plaintiff points to nothing in the legislative record in support of this proposition, and Congress directed ***NCUA*** to prescribe a definition of the term.

Plaintiff also observes that section 1759(d) requires that generally only groups with fewer than 3,000 members be included within a multiple-common-bond credit union, ABA Reply at 5; 12 U.S.C. § 1759(d), but this is not evidence that Congress intended to limit ***community*** credit unions to a particular population. Indeed, if anything, the opposite is true: Congress's decision to impose a numerical limit for multiple-common-bond credit unions but not for community credit unions suggests that Congress did not wish to place rigid population or related limits on NCUA's ability to charter community credit unions. *Cf.* 2B Norman Singer & Shambie Singer, Sutherland Statutory Construction § 51:2 (7th ed. 2007) ("[W]here a legislature inserts a provision in only one of two statutes that deal with a closely related subject, courts construe the omission as deliberate rather than inadvertent.").

Invoking *noscitur a sociis*, Plaintiff reprises its argument that because "Congress used the term 'neighborhood' immediately after 'local community' and immediately before 'rural district,'" "local community" and "rural district" should be given a narrow and restrictive gloss. ABA Reply at 6. This argument fails. Initially, *noscitur a sociis* is "not an invariable rule." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Moreover, the canon is at most a tool for identifying the best possible reading of a statute; at least absent strong evidence of Congressional

intent to preclude a particular agency interpretation, it does not overcome the deference due the agency's reasonable interpretation here. *Cf. Petit v. U.S. Dep't of Educ.*, 578 F. Supp. 2d 145, 158 n.10 (D.D.C. 2008) (making similar point in analyzing a different canon). The three terms "local community," "neighborhood," and "rural district" also are not particularly analogous, and the Supreme Court has rejected reliance on *noscitur a sociis* in a similar context. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 288 (2010) ("A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating."). And as NCUA previously explained, the Supreme Court has rejected the proposition "that pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006). Plaintiff responds that "'local community' and 'rural district' are not 'broad' statutory terms—they connote relatively small communities." ABA Reply at 6. But that assertion is wrong for reasons previously discussed.

Most fundamentally, Plaintiff's challenge raises precisely the sorts of questions Congress surely knew would arise, yet declined to address. Distilled to their essence, Plaintiff's arguments are that the Final Rule permits communities that are too populous and too geographically expansive. From the standpoint of Congress, these would hardly be novel or unexpected claims; they are the sort of core issues any definition of "rural district" or "local community" necessarily must address. If Congress had intended to limit community credit unions to geographic areas of a particular size or with particular population restrictions, it could have said so. *See also* CUNA Mem. at 15. Yet Congress did not include any such limitation. Nor, for that matter, does the legislative record contain any meaningful guidance on these topics. This absence is telling, and likewise illustrates that Congress intended to afford NCUA wide latitude to interpret the statute's terms.

II. THE FINAL RULE PERMISSIBLY INTERPRETS "A WELL-DEFINED LOCAL COMMUNITY, NEIGHBORHOOD, OR RURAL DISTRICT"

A. NCUA Reasonably Interpreted "Well-Defined Local Community" to Include a CSA or Portion of a CSA, Subject to a 2.5 Million-Person Limit

NCUA reasonably concluded that a CSA or portion thereof, subject to the same 2.5 million-person limit that applies to CBSA-based credit unions, qualifies as a WDLC. There are 174 CSAs in the United States and Puerto Rico, and the median population of the CSAs (about 530,000[7]) is a fraction of NCUA's longstanding population limit for CBSA-based credit unions. OMB Bull. No. 15-01 at 2. And although CSAs are on average geographically larger than CBSAs, that is not always the case. Indeed, excluding the 22[8] largest CSAs (which do not qualify as WDLCs under the Rule because each exceeds 2.5 million people), the remaining CSAs are actually slightly smaller on average than the average size of the 243 CBSA-based charters NCUA has approved since 2010. NCUA Mem. at 24-26. OMB's classification of CSAs is based on an objective employment interchange measure, and it has characterized CSAs as "reflect[ing] broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreation activities." OMB Bull. No. 15-01. And with respect to the largest CSAs (the subject of virtually all of Plaintiff's hypotheticals), the 2.5 million-person limit operates to make a community "local" regardless of the size or population of the whole CSA in which the community is located.[9]

1. In its opening brief, NCUA pointed out that, according to OMB, "adjacent CBSAs

[7] This figure was calculated by generating a list of the 174 CSAs ordered by 2016 population from the Census website, *see* https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml, and then averaging the 87th and 88th ranked CSAs by population. Although, as Plaintiff points out, the average CSA population is somewhat greater than the median, it is still significantly less than the 2.5 million limit for CBSA-based credit unions. ABA Reply at 14 n.21.

[8] According to Census data, a 23rd CSA (the Salt Lake City-Provo-Orem, UT CSA) passed 2.5 million between 2015 and 2016. For consistency, NCUA uses the prior figure here.

[9] As to this point, it is worth noting that Plaintiff's argument rests entirely on an assumption that is likely false, namely, that "[a] population limit in and of itself, ***no matter how small***—and 2.5

within a CSA" share ties that, though "less intense than those captured by [CBSAs]," are "still significant." NCUA Br. 24 (quoting 75 Fed. Reg. 37,246, 37,248 (June 28, 2010)). Plaintiff's reply has little to say about these ties that OMB has characterized as "significant," and NCUA reasonably determined that such ties, subject to a 2.5 million-person limit, were sufficient to qualify an area as a WDLC. Plaintiff insists that this analysis "misses the point" because CSAs can also include CBSAs that are not adjacent to each other. ABA Reply at 11-12. But a majority of CSAs (93 out of 174) contain ***only*** two component areas. OMB Bull. No. 15-01 at 98-114. The 22 most populous CSAs, all of which contain more than two CBSAs, exceed 2.5 million people, and credit unions in these areas are subject to the Final Rule's separate population limit. The minority of remaining CSAs that have more than two CBSAs and fewer than 2.5 million people tend, by operation of OMB's definition, to cluster around (and exhibit interaction and common interests through) a dominant CBSA. There is nothing at all unreasonable about NCUA, consistent with its practice of relying on OMB statistics, using such measures to classify CSAs (and geographically contiguous portions thereof) with 2.5 million or fewer people as WDLCs. It is telling that, with one exception,[10] all of the examples Plaintiff hypothesizes on these points involve either the Washington-Baltimore-Arlington CSA or the Boston-Worcester-Providence CSA, as to which the 2.5 million-person limit imposes substantial limitations that Plaintiff largely ignores.

2. Plaintiff continues to insist that, notwithstanding the agency's contrary

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million is not small—cannot create a 'local community.'" ABA Reply at 16 (emphasis added). It is difficult to see why this is necessarily so. Had NCUA decided to use ***population alone*** as a uniform, easily administrable measure—thus permitting any geographically contiguous area with a total population of 2.5 million or less to qualify as a WDLC—such a determination would hardly have been unreasonable. In any event, this Court need not address that broader question here.

[10] The one exception is the Cincinnati-Wilmington-Maysville, OH-KY-IN CSA, as to a portion of which Plaintiff cites a 2007 NCUA administrative decision. ABA Reply at 18. For reasons NCUA has previously discussed and addresses further in this memorandum, such fact-bound decisions under the narrative summary approach have nothing to do with the legal issue presented here.

representation, the Final Rule does not require that CSA-based, CBSA-based, and single political jurisdiction charters be geographically contiguous. ABA Reply at 17-18. Plaintiff does not dispute that the agency announced in its first post-CUMAA rulemaking (in 1998) that "[t]wo, noncontiguous, well-defined areas cannot be the basis for a community charter," and that it has consistently enforced that requirement since. *See* NCUA Mem. at 27 & n.13. Yet according to Plaintiff, NCUA abandoned that requirement without providing any indication that it was doing so in either the Proposed Rule or the Final Rule. This is an implausible claim, which is not supported by the text of the Final Rule. The Final Rule applies to a CBSA, CSA, or "a portion thereof," as well as to a single political jurisdiction "or any individual portion thereof." 81 Fed. Reg. at 88,440. Two non-contiguous segments of one of these geographic units would constitute "***multiple*** portions," not "a portion" or an "individual portion." Indeed, the operative provision of the 1998 rule ***also*** did not use the word "contiguous," but stated that "NCUA policy is to limit the community to a single, geographically well-defined area," Organization and Operations of Federal Credit Unions, 63 Fed. Reg. 71,998, 72,037 (Dec. 30, 1998)—which, as NCUA similarly stated in the explanatory portion of the rule, meant that the proposed area must be contiguous. *Id.* at 72,012.[11] And even if it were ***possible*** to interpret the Final Rule as eliminating NCUA's longstanding contiguity requirement—and doing so *sub silentio*—NCUA has stated that non-contiguous communities are impermissible under the Final Rule, and that interpretation is entitled to deference. Plaintiff may refuse to take yes for an answer, but this Court should not.[12]

[11] Plaintiff notes that the Final Rule substituted "individual" for "contiguous" and argues that "[i]f 'individual' means 'contiguous' there would be no reason for NCUA to have made such a change." ABA Reply at 17. But since the Final Rule included no discussion of this issue, and NCUA has used the concept of singularity to describe a contiguity requirement, the more plausible (and certainly reasonable) inference is that the substitution does not signify any substantive change.

[12] Courts should defer under *Auer v. Robbins*, 519 U.S. 452 (1997), "to an agency's interpretation advanced during litigation regarding the meaning of an ambiguous regulation, if the position is not

3. Plaintiff again claims that two federal court decisions rejecting particular factual showings under NCUA's prior narrative summary system are relevant to the very different legal question presented here: whether the CSA-based category NCUA added is a reasonable implementation of the statute. ABA Reply at 20-21 (discussing *Am. Bankers Ass'n v. NCUA*, 347 F. Supp. 2d 1061, 1067 (D. Utah 2004), and *Am. Bankers Ass'n v. NCUA*, 2008 WL 2857678 (M.D. Pa. July 21, 2008)). NCUA does not merely "dismiss the[se] cases as 'fact-bound.'" ABA Reply at 20. The point is that those courts were evaluating fields of membership under NCUA's then-existing regulatory regime, which was entirely different than the categorical approach the agency has followed since 2010. Plaintiff does not dispute that the Pennsylvania decision evaluated whether the challenged approval "was consistent with [NCUA's] then-prevailing field of membership rules." NCUA Mem. at 30. And although Plaintiff suggests that the Utah decision was a statutory one untethered to NCUA's regulations, this suggestion is implausible. ABA argued there that the expanded charter was "not a 'well-defined local community' as that term is defined in the NCUA's regulations," 347 F. Supp. 2d at 1065, and the Court "remanded for further analysis on the issue of whether the six-county area constitutes a 'local' community within the parameters of the NCUA regulations," *id.* at 1073, which the Court could not have done if it concluded that the ***statute*** prohibited the proposed area. The Court also referred to "[t]he NCUA promulgated rules setting forth the requirements for establishing a 'well-defined local community,'" *id.* at 1064, and repeatedly referred back to the regulatory factors throughout its analysis, *id.* at 1069-1074. These two decisions, moreover, have no particular relevance to the Final Rule: while Plaintiff strains to style the decisions as related to CSAs, neither so much as ***mentioned*** CBSAs or CSAs.

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inconsistent with the agency's prior statements and actions regarding the disputed regulation." *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002). The two cases Plaintiffs cite on this point, *see* ABA Reply at 18—neither of which involved *Auer* deference—are not to the contrary.

4. Plaintiff continues to claim that NCUA's addition of a CSA-based category was "arbitrary and capricious because it reverses prior agency determinations without an adequate explanation." ABA Reply at 21. In its opening brief, Plaintiff faulted NCUA for supposedly failing to explain an alleged departure from the 1998 rule's determination that "it would be difficult for a major metropolitan city or an area covering multiple counties with significant population" to qualify as a WDLC. ABA Mem. at 31 (quotation marks and alteration omitted). As NCUA explained, these determinations were not "reversed" by the Final Rule; they were reversed in previous rulemakings. NCUA Mem. at 31-32. This argument is not, as ABA describes it, "simply that [NCUA's] rules have changed over time." ABA Reply at 21. It is that the agency was not required to address topics that had already been resolved in reasoned decisions years earlier.

Shifting focus somewhat, Plaintiff now faults NCUA for not explaining its supposed reversal of prior administrative decisions that, as Plaintiff frames them, "rejected fields of membership comprising portions of CSAs of 2.5 million people—or substantially fewer people." ABA Reply at 21. But like the two federal court opinions, none of these decisions even ***mentioned*** CSAs; each was based on analysis under the narrative-summary model that NCUA abandoned long ago. In creating a CSA-based category, NCUA was not required to address decisions that did ***not address*** CSAs, and which were grounded in a system the agency jettisoned years earlier.

5. Finally, there is no merit to Plaintiff's argument that the addition of a CSA-based category was arbitrary because, according to Plaintiff, a typical CSA does not display the characteristics NCUA considers for adjacent-area additions. ABA Reply at 22-23; NCUA Mem. at 33. As NCUA previously explained, adjacent areas by definition fall outside the applicable single political jurisdiction, CBSA, or CSA, and the criteria thus reflect an ***alternative*** means of demonstrating that the adjacent area is part of the same community. NCUA Mem. at 33. Plaintiff

asserts that NCUA has used "virtually the same" or "similar" criteria for years. ABA Reply at 22-23. But Plaintiff does not appear to dispute NCUA's observation that several (perhaps even a majority) of the criteria do not clearly apply across a single CBSA either. NCUA Mem. at 33 & n.17. And while Plaintiff cites the ***2010*** rule for the proposition that NCUA never stated that it was creating an alternative means of demonstrating local community status for adjacent areas, the adjacent-area addition is a product of the ***2016*** rule, which on its face does just that.[13]

B. NCUA Permissibly Eliminated the Core Area Service Requirement

The Final Rule eliminated the requirement that, when an applicant seeks to serve a portion of a CBSA, the proposed area must include the "core area." 81 Fed. Reg. at 88,414. The FCUA does not even arguably contain this requirement and Plaintiff does not appear to contend that the statute, considered on its own, mandates it. Instead, Plaintiff argues that, because NCUA's previous rule justified CBSA-based credit unions by reference to ties with the core, non-core portions without the core cannot be deemed a local community. ABA Reply at 23.

This argument is unsound and is certainly not so "unambiguously manifest," *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995), that the agency was required to accept it. As NCUA previously explained, although CBSAs are defined by reference to ties with the core, those ties unite the entire CBSA, core and non-core parts alike. NCUA Mem. at 34-35. To reprise the example from NCUA's opening brief, residents of Arlington and McLean,

[13] Plaintiff also faults NCUA for "never explain[ing] why the 'Greater Boston Metropolitan Area' 'd[id] not meet the definition of local community' in 1998, but it does today." ABA Reply at 21 (quoting 63 Fed. Reg. at 72,039). The Greater Boston Metropolitan Area would not meet the Final Rule's definition because it is not a single political jurisdiction and its population far exceeds 2.5 million people. In any event, this observation was obviously related to NCUA's broader skepticism about larger and more populous areas, including its view that a major metropolitan city or an area covering multiple counties with significant population could not qualify as a WDLC. NCUA indeed explained its departure from those principles long before the Final Rule. NCUA Mem. at 37-38.

Virginia are socially, economically, and culturally linked by virtue of their mutual ties with the District. Most residents of the two cities would probably conclude that they comprise a local community and, in any event, would be baffled by a suggestion that the District, Arlington, and McLean can be a local community but Arlington and McLean alone cannot. *See also* CUNA Mem. at 12 (making similar point about Fairfax County, Virginia and Fairfax City, Virginia).

Plaintiff does not meaningfully address either this point or NCUA's example. Instead, Plaintiff imagines a hypothetical community consisting of Frederick, MD and Fredericksburg, VA, and asserts that "no one would view the[se] peripheral counties of that CBSA, considered by themselves and excluding Washington, DC, as a single local community." ABA Reply at 24. Perhaps not, but any intuition that Frederick and Fredericksburg alone are not a local community stems from the fact that the two areas ***are not contiguous***, as NCUA's regulations require; it has nothing to do with the exclusion of the District. Plaintiff also imagines a hypothetical community consisting of eight counties in the New York-Newark-Jersey City CBSA which again, in its view, no one would consider a local community. *Id.* But this example has no connection to Plaintiff's core area argument and just underscores the illogic of its community-by-addition approach: if Plaintiff does not think these counties can be characterized as a local community, it is hard to see how ***adding*** New York City to the picture—more than quadrupling the population—would improve matters. In any event, this CBSA is the nation's most populous (by a large margin), and the ability of creative counsel to conceive of anomalous hypotheticals is not a justification for imposing a nationwide core service requirement with no basis in the statute.

Plaintiff also again claims that the Court should vacate this aspect of the Final Rule because it authorizes redlining. ABA Reply at 25-27. This argument fails. Most fundamentally, it is simply not related to the legal question of what can reasonably be characterized as a "local community"

for purposes of the statute. *See* 81 Fed. Reg. at 88,414 (core service mandate is "not a requirement mandated by the" FCUA). In any event, the record reflects that the agency took this policy concern seriously and reasonably concluded based on its post-2010 experience that the requirement was unnecessary to prevent such practices. Among other points noted in NCUA's opening brief, the agency concluded that, having reviewed credit unions' business and marketing plans since 2010, it believed that credit unions were adequately serving low-income persons and underserved areas without regard to their location, making additional location-based restrictions unnecessary. Chartering and Field of Membership Manual, 80 Fed. Reg. 76,748, 76,749 (proposed Dec. 10, 2015). In contrast to NCUA's considered and experience-based conclusion, Plaintiff offers nothing more than speculation in support of its claim that elimination of the core service requirement will lead to redlining on a large scale. Indeed, given what Plaintiff describes as the rapid growth of credit unions, *see* ABA Reply at 40, it is implausible to suggest that credit unions will react to the Final Rule by abandoning the nation's population centers as a source for business.

Finally, Plaintiff makes little effort to grapple with the negative consequences of the core area service requirement that NCUA highlighted in the Final Rule and in its opening brief. Continuation of the mandate could lead to some credit unions sacrificing service to non-core portions of a CBSA; indeed, for CBSAs with a total population exceeding 2.5 million people, it would ***require*** such a sacrifice. NCUA Mem. at 36; *cf.* CUNA Mem. at 18 (quoting study which found that "[b]y 2008, suburbs were home to the largest and fastest-growing poor population in the country"). On this point, Plaintiff has no response. The requirement also provides a deterrent to credit unions serving CBSAs at all, particularly where the credit union does not have the ability to serve the entire core. NCUA Mem. at 36. Plaintiff insists that this is not a problem, because such a credit union could just choose to serve an individual county or other single political

jurisdiction within a CBSA. ABA Reply at 26 n.34. But such an all-or-nothing approach is not a solution for credit unions—particularly those within areas that are less densely populated—who wish to expand their membership outside of a small city, town, or county, but lack the resources to serve an entire core. *See* CUNA Mem. at 17-18 (explaining that small credit unions are at significantly higher risk of failure than larger ones, and that allowing them to expand their fields of membership reduces the volatility of their earnings and offers other benefits).

The core service requirement has no basis in the FCUA, and NCUA's elimination of it was neither arbitrary nor capricious. The Court should reject Plaintiff's arguments to the contrary.

C. Plaintiff's Challenge to the Adjacent-Area Addition Is Unripe and Meritless

The adjacent-area addition does not create a presumptive local community category. It just allows an applicant to ***attempt to convince*** NCUA that an area adjacent to a pre-existing WDLC is logically part of the same local community (with any expanded community subject to the same 2.5 million-person limit). NCUA Mem. at 37. The Final Rule goes on to specify seven factors NCUA will consider in determining whether an applicant has demonstrated "Compelling Evidence of Interaction or Common Interests" between an adjacent area and a previously approved WDLC. *Id.* at 40. Plaintiff's challenge thus raises an abstract legal question: whether the statute permits NCUA to allow a community credit union to add any adjacent area applying these criteria. "The ripeness doctrine," however, "favors postponement of review when a court believes that it would be better able to decide the case in the concrete factual context of a specific application of the challenged agency decision." *Consolidation Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 824 F.2d 1071, 1083 (D.C. Cir. 1987). That precisely describes the situation here.

Plaintiff's latest arguments underscore this point. Since Plaintiff challenges the adjacent-area addition wholly in the abstract, its brief is heavily layered with contingent language and

speculation.[14] And Plaintiff continues to misconstrue the Final Rule, asserting that "individuals on either side of almost any geographic boundary line are likely to have some common interests or interaction," ABA Reply at 27, and raising the specter of applicants combining multiple adjacent communities to infinitely expand a WDLC in a single direction, *id.* at 31. As NCUA previously explained, the Final Rule does not authorize an adjacent-area addition based on normal cross-border interactions, and does not permit the bootstrapping Plaintiff describes. NCUA Mem. at 40.

Nor would Plaintiff suffer any legally cognizable hardship if it were required to bring its challenge in a more concrete context. The adjacent-area addition—like the other challenged aspects of the Final Rule—does not regulate Plaintiff's members at all, and does not require them to engage in (or refrain from taking) any action. *See Texas v. United States*, 523 U.S. 296, 301 (1998) (challenge to regulation not ripe if plaintiff is "not required to engage in, or refrain from, any conduct"). Plaintiff claims that requiring it to file later lawsuits "would impose a considerable hardship on ABA," ABA Reply at 29, but a need for future litigation is ***always*** the consequence of finding a premature suit unripe, and the D.C. Circuit has held that "the burden of pursuing future litigation is not enough, by itself, to demonstrate hardship justifying premature judicial decision-making." *Truckers United for Safety v. Mead*, 251 F.3d 183, 192 (D.C. Cir. 2001); *see also Webb v. Dep't of Health & Human Servs.*, 696 F.2d 101, 107 (D.C. Cir. 1982) (the "burden of having to file another suit" is not sufficient to justify review).[15] This Court should evaluate this issue in the

[14] *See, e.g.*, ABA Reply at 31 (asserting that a "field of membership ***could be*** expanded all around the edge of the CBSA or CSA, through numerous adjacent area approvals" (emphasis added)); *id.* ("expanded field of membership could include any number of community bonds based on different interactions on each portion of the periphery of the original community"); *id.* (field of membership in "DC-MD-VA-WV-PA CSA could add adjacent counties linking Culpeper County to Charlottesville" then "add adjacent counties in Pennsylvania, like Gettysburg's Adams County").

[15] Moreover, to the extent Plaintiff asserts that it would need to pursue serial litigation, that concern is speculative and likely exaggerated. If, for example, Plaintiff were to successfully challenge a particular adjacent-area approval as contrary to the statute, there would be strong incentives for

context of a challenge to a specific expanded charter, not on the basis of Plaintiff's abstract, speculative, and largely inaccurate attack.

If the Court considers Plaintiff's challenge now, the challenge should be rejected because it is meritless. It was entirely reasonable for NCUA to conclude that, notwithstanding its use of single political jurisdictions, CBSAs, and CSAs, in at least ***some*** cases "areas adjacent to the perimeter of these objective geographic units may lack a credit union presence and/or lack sufficient access to financial services, even though residents on both sides of the perimeter may routinely interact or share common interests with each other," 80 Fed. Reg. at 76,749-76,750, and that applicants should be permitted to explain why an adjacent area "is logically part of a WDLC that includes [a single political jurisdiction], CBSA, or [CSA] due to common interests or interaction among residents on both sides of the perimeter," 81 Fed. Reg. at 88,415.

In response, Plaintiff advances the radical claim "that consideration of whether there is interaction among residents on both sides of the perimeter, ***no matter how thorough***, is legally insufficient to demonstrate that the adjacent area is part of the original local community as a whole." ABA Reply at 30-31 (emphasis added) (citation omitted). That is so, Plaintiff contends, because NCUA's grounds for granting an adjacent-area addition must mirror its grounds for approving the original community. *Id.* at 30 (contending that if "a field of membership has been deemed 'a well-defined local community' based on common residence in a single political jurisdiction . . . individuals outside the jurisdiction by definition will not share the community bond that is the basis for the original community").

NCUA to adjust its policies and practices to comply with such a holding. And Plaintiff's claim that NCUA does not permit third parties to participate in the relevant agency proceedings, *see* ABA Reply at 29, is irrelevant to the point that a possible need to file lawsuits in the future is not hardship sufficient to justify premature judicial consideration now.

This argument has no basis in either the FCUA or common sense. As NCUA recognized, the relevant inquiry is whether an adjacent area and previously approved WDLC should logically be regarded as part of the same local community, and there is no reason NCUA's analysis of this new question must precisely track its analysis of the original application. To take just one example, consider a scenario involving Minneapolis, Minnesota, and Saint Paul, Minnesota (the Twin Cities). If NCUA previously approved a credit union encompassing Minneapolis on the grounds that Minneapolis is a single political jurisdiction, Plaintiff's position would mean that the statute forbids NCUA from subsequently considering an adjacent-area addition of Saint Paul or a portion thereof—no matter how extensive the cross-border interaction, and even if the overwhelming majority of residents would consider the two areas to be part of the same local community. Even if the straightjacket approach Plaintiff advocates could ***plausibly*** be derived from the statute—which is doubtful—nothing in the FCUA ***unambiguously*** forecloses the agency's reasonable and more flexible approach. The Court should enter judgment for NCUA on this issue.

D. NCUA's Rural-District Definition Is Reasonable

Finally, NCUA reasonably adjusted the numeric rural-district population limit from 250,000 to one million, and eliminated as redundant an alternative three percent state population measure which had ***already*** been used to charter credit unions serving populations far greater than 250,000. Urging otherwise, Plaintiff's primary claim is that a rural district must be relatively small, but that argument has no statutory basis, let alone the sort of clear textual evidence that is required to displace the agency's regulatory definition under *Chevron*. On this point, the extensive discussion above permits a measure of brevity here: (1) the term "district" need not mean a small area and can certainly encompass an entire state; (2) a "rural" district by its very nature generally covers a larger area; and (3) as to the combined term "rural district," there is no evidence that

Congress intended to codify the defunct foreign definitions on which Plaintiff relies, and the term has no established or well-settled meaning in American law or language. *See* pp. 7-9, *supra*.

Based on its broad experience supervising credit unions, NCUA also concluded in the Final Rule that increasing the absolute numeric limit would ensure that it is economically viable to offer services to rural district residents. 81 Fed. Reg. at 88,416. Plaintiff contends that there is "no statutory justification for considering this factor," ABA Reply at 37, but it is sensible for NCUA—construing an ambiguous term Congress has directed it to interpret—to ensure that its definition makes less densely populated areas financially attractive for credit unions to service.

NCUA's adjustment of the numeric limit also has the salutary effect of reducing a disparity between rural and other areas. As the agency previously explained, even the current one million-person limit is still only forty percent of the limit applicable to CBSA and CSA-based credit unions, and only ten percent of the population in the largest single political jurisdiction credit union NCUA has thus far approved. NCUA Mem. at 42. Plaintiff responds that "urban areas, by definition, have a higher population density than rural areas" and it is thus likely that "a given number of individuals concentrated in a relatively small urban area will have more interaction than an equal number of individuals spread out over a much larger rural area." ABA Reply at 37. But as NCUA concluded, there is no requirement that a rural district exhibit the sort of interaction associated with "local" communities. *See* 81 Fed. Reg. at 88,417. And again, NCUA was entitled to adjust the regulatory definition to reduce the population service disparity between rural and other areas, and to make the latter more financially viable for credit unions.

The Final Rule also standardizes what had previously been a patchwork of different population limits. On this point, Plaintiff again overstates the significance of the Final Rule's changes. Plaintiff states that "one million unquestionably is four times . . . 250,000" and "the

entire population of a state is much larger than three percent of its population." ABA Reply at 34. No disagreement there. But under the prior rule, the total population could not exceed the ***greater*** of 250,000 or three percent of the population of the state in which the majority of residents live. *See* NCUA Mem. at 8. As NCUA previously explained, this framework in practice meant that the population limit differed in many states, with a rural district of at least one million people permitted in California, and a rural district of at least 800,000 allowed in Texas. 81 Fed. Reg. at 88,417. And under that framework, NCUA had already approved eight rural districts with an average population of 536,646 under the old rule. NCUA Mem. at 41. Although Plaintiff contends that "in less populous states, the size limit for rural credit unions has been quadrupled," ABA Reply at 35, Plaintiff does not explain how it could possibly be arbitrary or capricious to replace a system of disparate state-dependent population limits with a uniform cap. Nor, for that matter, does Plaintiff dispute NCUA's claim that the eight expanded rural-district credit unions approved prior to the Final Rule have succeeded in bringing affordable financial services to the areas they serve.

Plaintiff also continues to complain that, because NCUA will classify an area as rural if either 50 percent or more of the population resides in designated rural areas or if the population density does not exceed 100 people per square mile, a rural district may predominantly consist of people who do not reside in Census-designated rural areas. ABA Reply at 35-36. As NCUA previously explained, this is not even arguably a feature of the Final Rule, as this alternative rural designation/population density was expressly established by the 2010 rule. *See* NCUA Mem. at 8, 43. Plaintiff has no response. In any event, there is nothing unreasonable about NCUA's longstanding approach. The Census Bureau itself recognizes that there are multiple ways to measure rural communities. NCUA Mem. at 22. And it was sensible for NCUA to determine that an area with a relatively small total population (a fraction of the limit permitted for other

community charters) and light average population density could qualify as a rural district. Indeed, Plaintiff's apparent contrary approach—in which a rural district must both be "relatively small" ***and*** generally exclude areas that the Census Bureau does not designate as rural—would severely handicap NCUA's ability to encourage credit unions to provide services to such underserved areas.

Finally, Plaintiff reprises its claim that a credit union could decline to serve the more rural portions of its field of membership. ABA Reply at 38. As NCUA explained in its opening brief, an applicant for a rural district charter, like all community charter applicants, must "demonstrate an intent and ability to serve the entire area." 81 Fed. Reg. at 88,417. Plaintiff claims that "an 'intent and ability' to serve an entire area at the time of the charter application does not ensure that the entire area will actually be served," ABA Reply at 38, but this hairsplitting goes nowhere. NCUA also requires each credit union applicant to submit a business plan setting forth "the products, programs, and services to be provided to the entire community," 81 Fed. Reg. at 88,441, and it annually reviews a credit union's implementation of this plan for three years after the credit union is chartered, converts or expands, *id.* *See also id.* at 88,413 (noting "that NCUA has in place a supervisory process to assess management's efforts to offer service to the entire community [a Federal Credit Union] seeks to serve"). NCUA is entitled to summary judgment on this issue.[16]

CONCLUSION

This Court should deny Plaintiff's motion for summary judgment, grant Defendant's cross-motion for summary judgment, and enter judgment for Defendant.

[16] Plaintiff also discusses a particular West Texas credit union that Plaintiff apparently believes is not adequately serving its entire field of membership. ABA Reply at 38. If Plaintiff believes that particular credit unions are not satisfying their obligations, Plaintiff is free to raise this issue with NCUA or to encourage members of those credit unions to do so. The Final Rule plainly requires federal credit unions to serve their entire fields of membership, and Plaintiff's fact-bound allegations about a particular credit union's compliance are outside the scope of this lawsuit.

Dated: August 9, 2017

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

/s/ Andrew M. Bernie
ANDREW M. BERNIE (D.C. BAR# 995376)
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 616-8488
Fax: (202) 616-8470
andrew.m.bernie@usdoj.gov
Counsel for Defendant