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Good News for Low-Income Americans: In the Battle of Credit Unions Against Banks, Credit Unions Score a Point

Mike Adams

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2021; B.S. and M.S. Pure Mathematics, University of California, Irvine, 1994. I would like to thank the world's best study group. We've been working together since our very first semester, and we have always pushed each other to be our best. I don't think I would be succeeding so well at Law School without your help and support. I know for certain that it would not be anywhere near as much fun! I also thank Professor Malloy for his advice and guidance through the complex world of bank and credit union law. Finally, I would like to thank the amazing law review staff for their patient reminders of deadlines and productive feedback on drafts. Your job is onerous, but you do it with grace and we all appreciate it.

"A bank is a place that will lend you money if you can prove that you don't need it."-Bob Hope[1]

I. INTRODUCTION

In the modern world of giant financial corporations that are "too big to fail"[2] and with the increasing power of the administrative branch of government, the recent case of *American Bankers Ass'n v. National Credit Union Administration*[3] is emblematic of the battle between these leviathans.[4] On the surface, the D.C. Circuit supported the expansion of community credit unions over the objections of traditional banks, bringing added competition to an industry that has seen precious little of it in recent years.[5]

But a more thorough reading shows that the D.C. Circuit also signaled to the federal administrative agency that approves and supervises credit unions, the National Credit Union Administration ("NCUA"), that it might be nearing the end of its reach.[6] The court found the specter of redlining—a discredited and illegal bank practice of refusing financial services to minority neighborhoods—was an all-too-real possibility under the new policies.[7] This Comment explores the implications of the decision for the future of credit unions and suggests ways that the NCUA can assure the legality of the policies that narrowly survived judicial review—this time.[8]

A credit union is "a cooperative association created to promote thrift among its members[,] . . . limited to individuals who have a preexisting common bond of association, occupation, or residence in a well-defined group or geographical area."[9] Credit unions provide financial services to people who live in disadvantaged areas and whose income is too high to qualify for government

1. *More Quotes by Bob Hope*, FORBES.COM, https://www.forbes.com/quotes/author/bob-hope/ (last visited Nov. 11, 2020).

2. State National Bank of Big Spring v. Lew, 795 F.3d 48, 52 (D.C. Cir. 2015) (describing a category of financial companies as "too big to fail").

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

4. Wendy Cassity, Note, *The Case for a Credit Union Community Reinvestment Act*, 100 COLUM. L. REV. 331, 354 (2000) (describing how credit unions "can aggressively compete, on an unequal regulatory basis, with banks for customers and profits").

5. ABA v. NCUA, 934 F.3d at 674; Martin Schmalz, *One Big Reason There's So Little Competition Among U.S. Banks*, HARV. BUS. REV. (June 13, 2016), *available at* https://hbr.org/2016/06/one-big-reason-theres-so-little-competition-among-u-s-banks (on file with the *University of the Pacific Law Review*) (explaining one reason for the lack of competition in the banking industry).

6. ABA v. NCUA, 934 F.3d at 674–75 (supporting many recent rule changes for credit union but also requiring the agency to provide more explanation of one rule).

7. *Id.* at 668 ("[W]e see merit in the Association's redlining argument and thus hold the definitional change to be arbitrary and capricious.").

8. *Infra* Parts III–IV.

9. 1 MICHAEL P. MALLOY, BANKING LAW AND REGULATION § 1A.02[E] (2d ed. 2011 & Cum. Supp.).

assistance, yet too low to take advantage of traditional banking.[10] While the NCUA enforces restrictions on credit union membership to meet the statutory common bond requirement,[11] the NCUA also promotes the formation of credit unions.[12] The Federal Credit Union Act sets general terms for the membership limitation and explicitly delegates to the NCUA the power to define those terms.[13]

In early 2017, the NCUA amended its approval standards to increase the size and flexibility of the geographic areas that credit unions can choose to serve.[14] A private association that represents the interests of banks, the American Bankers Association ("ABA"), filed suit against the NCUA to block those changes.[15] Under the Administrative Procedure Act, a court can only overturn the NCUA's expressly delegated power to define terms if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[16] Under that standard, the D.C. District Court in 2018 vacated some of the NCUA's changes to the credit union approval standards.[17] On appeal in 2019, the D.C. Circuit saw the situation differently and came to very different results.[18]

If the NCUA carefully navigates the implications of *ABA v. NCUA*, credit unions can continue to be a force for good for the foreseeable future.[19] But, if the NCUA is not careful, credit unions might begin employing a modern version of redlining, and the D.C. Circuit's opinion makes it clear the law will not permit that.[20]

After providing background for these complex issues in Part II,[21] Part III of this Comment analyzes the issue that the D.C. Circuit explicitly required the

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10. Robert W. Shields, Note, *Community Development Financial Institutions and the Community Development Institutions Act of 1994: Good Ideas in Need of Some Attention*, 17 ANN. REV. BANKING L. 637, 650 (1998) (describing how credit unions can provide financial services to otherwise unserved areas, serve borrows whose incomes are in a gap between those who receive government support and those who can afford traditional loans, and promote neighborhood development through community development loans).

11. MICHAEL P. MALLOY, PRINCIPLES OF BANK REGULATION 40 (3d ed. 2011) (explaining the duties of the NCUA).

12. 12 C.F.R. pt. 701, app. B, ch. 1 § I (describing the goals of the NCUA chartering policy and including "[t]o encourage the formation of credit unions" and "[t]o make quality credit union service available to all eligible persons" among those goals).

13. 12 U.S.C. § 1759(g)(1) ("The Board shall prescribe, by regulation, a definition for the term 'well-defined local community, neighborhood, or rural district.'").

14. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (explaining several rule changes that would take effect Feb. 6, 2017).

15. ABA v. NCUA, 934 F.3d 649, 656 (D.C. Cir. 2019).

16. 5 U.S.C. § 706(2)(A) (1966).

17. ABA v. NCUA, 306 F. Supp. 3d 44, 70 (D. D.C. 2018) (granting in part and denying in part the cross-motions for summary judgment).

18. ABA v. NCUA, 934 F.3d at 674–75 (reversing the challenged parts of the District Court's result).

19. *Infra* Parts III–IV.

20. *Infra* Section III.B; *see* ABA v. NCUA, 934 F.3d 649, 670 (D.C. Cir. 2019) ("But a community credit union can engage in more unconventional redlining practices: gerrymander[ing] to create its own community of exclusively higher-income members.") (internal quotation mark omitted).

21. *Infra* Part II.

NCUA to address: redlining.[22] Once the NCUA addresses redlining, there are other issues that may lead to future lawsuits, and Part IV of this Comment suggests ways the NCUA can continue to vigorously promote credit unions within the confines of the law.[23]

II. BACKGROUND

This Part provides the foundational ideas to support the analysis, starting with Section A explaining the similarities and differences between credit unions and banks.[24] Section B describes the relevant portions of the Administrative Procedure Act, which controls how courts review the NCUA's actions.[25] Section C details the new NCUA rules that the ABA challenged in its lawsuit.[26] Section D explains the way as-applied legal challenges and facial challenges relate to *ABA v. NCUA* and how they might relate to future cases.[27] Section E presents the history of redlining, the most significant problem identified by the D.C. Circuit.[28]

A. Credit Unions Compared to Banks

Congress originally formed credit unions in 1934 because banks were not serving the lower economic rungs of society.[29] The concept was to have people who already shared some kind of bond—geographic or occupational—band together to lend and borrow to and from each other.[30] Since the members knew each other, they were more likely to trust and respect each other and actually repay their loans.[31] Accordingly, Congress created rules that approve only credit unions that serve members with a common occupation or that live in a specified geographic area.[32] Banks have an advantage because they have no such

22. *Infra* Part III.

23. *Infra* Part IV.

24. *Infra* Section II.A.

25. *Infra* Section II.B.

26. *Infra* Section II.C.

27. *Infra* Section II.D.

28. *Infra* Section II.E.

29. Mehrsa Baradaran, *How the Poor Got Cut out of Banking*, 62 EMORY L.J. 483, 501, 503 (2013) (describing how "banks had made their services available mostly to corporations and wealthy individuals, disregarding lower income individuals" and so "Congress passed the Federal Credit Union Act (FCUA) in 1934").

30. *Id.* at 502 ("There was a requirement that there be a 'common bond' among credit union members, which was aimed at reducing the cost of credit and the chance of delinquency because members knew each other.").

31. *Id.* at 503 ("Congress intended the common bond among the members of a credit union to create a cohesive association in which the members are known by the officers and by each other . . . [so that] borrowers would be more reluctant to default.") (internal quotation marks omitted).

32. 12 U.S.C. § 1759(b) (2006) (limiting membership to a group that shares a common bond of occupation or association, multiple such common bonds, or that are within a well-defined local community, neighborhood, or rural district); MALLOY, *supra* note 11, at 53 (explaining the status and history of the multiple common-bond rule for credit unions).

requirement for a "common bond" and can accept any customers they choose.[33] On the other hand, the law exempts credit unions from almost all the taxes banks pay.[34] Congress treats credit unions as a public good and exempts them from state and federal income taxes because of the service they provide to members.[35]

In the early 1980s, credit unions began to struggle.[36] At the time, the majority of credit unions used a common occupational bond among the members.[37] The overall economic downturn of that decade killed off many businesses, which in turn deprived occupational-bond credit unions of their membership base.[38] The very existence of the national credit union system was in crisis.[39]

In 1982, the NCUA responded by changing its approval standards to allow occupational-bond credit unions to be significantly larger than before by permitting multiple occupational-bond groups to band together, even if the occupational groups were unrelated.[40] Banks at the time objected to the increased competition from these upstarts, suing the NCUA in an attempt to block this change in *NCUA v. First National Bank & Trust Co*.[41] The lawsuit lasted many years, but the Supreme Court eventually agreed with the banks in 1998, rejecting the NCUA's expansion of occupational-bond credit unions as contrary to the limitations in the Federal Credit Union Act.[42]

In the nearly twenty years between the implementation of the NCUA rule change and the Court's decision, the new, larger credit unions prospered.[43] As a result of the Court's decision, more than twenty million credit union customers could have seen their credit unions eliminated.[44] But Congress intervened to save

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33. *See generally* MALLOY, *supra* note 11, at 43 (explaining a great many rules that banks must abide by, none of which is analogous to the common-bond requirement for credit unions).

34. JAMES M. BICKLEY, SHOULD CREDIT UNIONS BE TAXED? 3–4 (2005) ("Federally chartered credit unions are exempt from all taxes (including income taxes) imposed by any state, territorial, or local taxing authority, except for local real or personal property taxes.").

35. *Id.* at 3 ("In 1937, Congress amended the act to exempt federal credit unions from both federal and state income taxes because of their service to members.").

36. Cassity, *supra* note 4, at 338–39 ("[I]n the early 1980s . . . many federal credit unions were liquidating.").

37. *Id.* at 338 ("at the time more than eighty percent of credit unions were occupation-based.").

38. *Id.* at 338–39 (explaining that the cause of the crisis for federal credit unions was the reliance on occupational bonds and the loss of businesses due to the severe economic downturn of the early 1980s).

39. *Id.* (describing the crisis as "threatening the safety and soundness of the federal credit union system").

40. *Id.* at 338 (describing how in 1982 the NCUA broadened the rule for occupational-bond credit unions to allow multiple occupational-bond groups to form a credit union together, even if the groups shared no common bond with each other).

41. 522 U.S. 479 (1998). *See also* Cassity, *supra* note 4, at 340 ("Banks began to view these new credit unions as a competitive threat.").

42. NCUA v. First Nat. Bank & Trust Co., 522 U.S. 479, 503 (1998) (holding that the NCUA's multiple common bond rule was "contrary to the unambiguously expressed intent of Congress"); *see also* MALLOY, *supra* note , at § 2.04[A] (2d ed. 2011 & Cum. Supp.) (analyzing *First Nat. Bank & Trust Co.* and its implications).

43. Cassity, *supra* note 4, at 339 ("The credit union industry, and multiple-group credit unions in particular, began to experience sustained and significant growth in membership and assets.").

44. *Id.* at 344 ("[A]t least twenty million of them joined as members of select employee groups, and their membership was placed in jeopardy by the Supreme Court decision.").

the larger credit unions, overruling *NCUA v. First National Bank & Trust Co.* by statute and legalizing multiple-group common bonds.[45]

Today, credit unions serve more than 110 million members.[46] But, the larger credit unions get, the less they look like a group of friends pooling their money to make large purchases and the more they look like traditional banks.[47]

B. The Administrative Procedure Act

Courts review the NCUA's actions under the Administrative Procedure Act.[48] New rules the NCUA promulgates go through the usual notice-and-comment rulemaking.[49] When the NCUA interprets the statute that sets the boundaries of its discretion, courts apply the *Chevron* framework to review that interpretation.[50] The courts must determine whether the interpretation the NCUA offers is reasonable and whether it contradicts the intent of Congress.[51] If a court determines that the NCUA has acted contrary to the parameters given by Congress, then the court can vacate the agency's action.[52]

The Administrative Procedure Act also imposes an additional requirement for standing beyond the Article III requirements under the U.S. Constitution.[53] Plaintiffs must demonstrate they are within the "zone of interests" of the statute the agency is interpreting.[54] Courts have repeatedly held that competitors—like the ABA—have standing to challenge an agency action that relaxes restrictions on competing financial institutions.[55]

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45. Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913 (1998); *see* Cassity, *supra* note 4, at 344–45 (describing the rapid response from Congress to "rescue the multiple-group common bond").

46. John Reosti, *Credit Unions vs. Banks: How We Got Here*, AMERICAN BANKER (April 24, 2018), https://www.americanbanker.com/news/credit-unions-vs-banks-how-we-got-here (on file with the *University of the Pacific Law Review*) ("Today, credit unions count more than 110 million people as members and hold deposits totaling $1.1 trillion.").

47. Cassity, *supra* note 4, at 340 ("Credit unions were given the power to offer services almost identical to those that banks were able to offer.").

48. 5 U.S.C. § 706 (1966) ("[T]he reviewing court shall decide all relevant questions of law" and "interpret . . . statutory provisions"); ABA v. NCUA, 934 F.3d 649, 662 (D.C. Cir. 2019) ("The APA governs this suit.").

49. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("[T]he public should have notice and an opportunity to address such recommendations, as the Administrative Procedure Act requires.").

50. NCUA v. First Nat. Bank & Trust Co., 522 U.S. 479, 499 (1998) (referring explicitly to "the analysis set forth in *Chevron* . . ." when reviewing the NCUA's interpretation of its organic statute).

51. *Id.* at 500 ("[W]e then inquire whether the agency's interpretation is reasonable.").

52. *Id.* at 503 ("[T]he NCUA's current interpretation of § 109 is contrary to the unambiguously expressed intent of Congress and is thus impermissible under the first step of *Chevron*.").

53. *Id.* at 488 ("For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.") (internal quotation marks omitted).

54. *Id.*

55. *See, e.g.*, NCUA v. First Nat. Bank & Trust Co., 522 U.S. 479, 488 (1998) ("[C]ompetitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions."); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403 (1987) (holding that competitors of new "discount

C. The Challenged Rules

The NCUA made three rule changes that relaxed restrictions on the geographic areas credit unions can serve.[56] Subsection 1 describes the NCUA's increase to the allowable size of a "local community."[57] Subsection 2 explains a rule change that allows credit unions more flexibility to serve only a portion of a geographic area.[58] Subsection 3 addresses the increase to the population maximum for a "rural district."[59]

1. Larger Areas for a "Local Community"

The NCUA uses terminology from the United States Census Bureau and the Office of Management and Budget ("OMB") to specify what geographic areas qualify as "local communities."[60] Prior to the changes the banks are challenging, the NCUA already used a type of area called a Core Based Statistical Area ("CBSA").[61] A CBSA consists of an urban core and adjacent communities that have ties to the core.[62]

Under one of the NCUA's new rules, a proposed credit union can go beyond a single CBSA and serve a larger area, so long as the proposed service area fits within a different and potentially larger OMB-defined geographic grouping.[63] Called a Combined Statistical Area ("CSA"), this OMB definition groups together underlying CBSAs that have a significant number of people who live in one CBSA but commute to work in another.[64] It might seem that—because CSAs are created

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brokerage services" had standing to challenge a ruling from the Comptroller that the offices offering these services were not "branches" of the banks, and were therefore permissible); Inv. Co. Inst. v. Camp, 401 U.S. 617, 620–21 (1971) (holding that competitors had standing to challenge a change to the rules that allowed banks to offer stock funds); Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970) (holding that competitors had standing to challenge a rule change that allowed banks to offer travel services); Ass'n of Data Processing Servs. Org., Inc. v. Camp, 397 U.S. 150, 158 (1970) (holding that competitors had standing to challenge a rule change that allowed banks to offer data processing services).

56. ABA v. NCUA, 934 F.3d 649, 659 (D.C. Cir. 2019) (mentioning that there were two changes to the definition of "local community" and one change to the definition of "rural district").

57. *Infra* Subsection II.C.1.

58. *Infra* Subsection II.C.2.

59. *Infra* Subsection II.C.3.

60. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,412–14 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (using the definition of "Core Based Statistical Areas" from the United States Census Bureau and "Combined Statistical Areas" from the Office of Management and Budget).

61. *Id.* at 88,412–13 (explaining the existing rules regarding Core Based Statistical Areas).

62. *Glossary*, U.S. CENSUS BUREAU, GEOGRAPHY PROGRAM, https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_7 (last visited Oct. 27, 2019) (on file with the *University of the Pacific Law Review*) (describing a Core Based Statistical Area has having an urban core of at least 10,000 population and adjacent counties with a "high degree of social and economic integration" with the core).

63. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,414 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("The proposed rule added a third 'presumptive community': A Combined Statistical Area as designated by OMB, subject to the same population limit.").

64. *Glossary*, U.S. CENSUS BUREAU, GEOGRAPHY PROGRAM, https://www.census.gov/programs-

by combining CBSAs—CSAs would be geographically much larger than CBSAs, but the reality is more complicated.[65] The average CSAs that fall under the "local community" population cap of 2.5 million are similar in size to CBSAs the NCUA has already approved.[66] Under this rule change, credit unions can now choose to serve an area that goes beyond a single CBSA so long as the area fits in a single CSA.[67]

2. The Core-Omission Rule

Another new rule from the NCUA changed how a credit union could define its membership area to cover only part of a CSA or CBSA.[68] Since 2010, the NCUA required credit unions to include the urban core in any membership area based on a CBSA.[69] But, under the new rule, the NCUA allows a membership area to omit the core.[70] So, not only can credit unions serve a larger geographical area under the rule change described above, but the area no longer needs to anchor itself to an urban core.[71] The D.C. Circuit found this seemingly simple rule change arbitrary and capricious.[72]

3. Increasing the "Rural District" Population Cap

In addition to the rule changes regarding urban service areas, the NCUA also changed the rules for credit unions that serve rural districts.[73] The Census Bureau has no definition of a "rural" area aside from anything that is not urban.[74]

surveys/geography/about/glossary.html#par_textimage_7 (last visited Oct. 27, 2019) (on file with the *University of the Pacific Law Review*) ("Combined Statistical Areas (CSAs) consist of two or more adjacent CBSAs that have substantial employment interchange.").

65. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,414–15 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (comparing the sizes of CSAs and CBSAs).

66. *Id.* (finding the average qualifying CSA was 4553 square miles and the average approved CBSA was 4572 square miles).

67. *Id.* at 88,414 ("The proposed rule added a third 'presumptive community': A Combined Statistical Area as designated by OMB, subject to the same population limit").

68. ABA v. NCUA, 934 F.3d 649, 660 (D.C. Cir. 2019) ("The new rule no longer requires that the core be included in the local community that a credit union proposes to serve.").

69. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("Since 2010, the Board has required a community consisting of a portion of a CBSA to include the CBSA's core area.") (internal quotation marks omitted).

70. *Id.* ("The proposed rule [repeals] the core area service requirement.") (internal quotation marks omitted).

71. *Id.* at 88,413–14 (allowing multiple CBSAs to be combined into a larger Combined Statistical Area and eliminating the rule that required a credit union service area to contain the urban core).

72. ABA v. NCUA, 934 F.3d at 669 ("[T]he eliminated core requirement is arbitrary and capricious.").

73. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("The amendments will implement changes in policy affecting: The definition of a local community, *a rural district*, and an underserved area.") (emphasis added).

74. *Glossary*, U.S. CENSUS BUREAU, GEOGRAPHY PROGRAM, https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_7 (last visited Oct. 27, 2019) (on file with the *University*

Therefore, the NCUA cannot borrow a well-defined Census Bureau "rural district," but instead must devise its own definition.[75]

There are two parts to the NCUA's definition of a rural district.[76] First, the overall population density must be less than 100 people per square mile, or at least half of the population must live outside areas the Census Bureau designates as "urban."[77] Second, the total population in the service area cannot exceed a specified maximum.[78] The NCUA changed that maximum, quadrupling it from 250,000 to 1 million.[79]

D. As-Applied Challenges Compared to Facial Challenges

When challenging a law, regulation, or rule, there are two types of challenges that a party can bring.[80] The first type is a *facial challenge* because it alleges the law, regulation, or rule is illegal "on its face."[81] The second type is an *as-applied challenge* because it alleges that the law, regulation, or rule is illegal as applied in a particular instance.[82]

It is more difficult to succeed with facial challenges because they require the plaintiff to show that the law, regulation, or rule is fundamentally flawed and cannot be implemented in a legal way.[83] It is easier to succeed with as-applied challenges because a law, regulation, or rule that is predominantly legal might still be applied in illegal ways in specific cases.[84]

The ABA filed an action to block the changes to the definitions on the same day the NCUA published the new rules.[85] Even though the NCUA had yet to approve any credit union under the new rules, the law allows the banks to bring a

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of the Pacific Law Review) ("Rural consists of all territory, population, and housing units located outside [Urban Areas] and [Urban Clusters].").

75. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,416 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("[A]t least 50 percent of the proposed Rural District's population must reside in geographic units the Census designates as 'rural,' or the proposed Rural District's population density cannot exceed 100 persons per square mile.").

76. *Id.* (defining "Rural District" in section II.B).

77. *Id.*

78. *Id.*

79. *Id.* (increasing the population limit from 250,000 to 1 million).

80. *See* EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 523–24 (2014) (explaining the differences between an as-applied challenge and a facial challenge and the heightened standard for the latter).

81. *See id.* at 524 (citing an earlier case's rejection of a "facial challenge" as support for rejecting the EPA's rule "on its face").

82. *See id.* at 523–24 (describing an as-applied challenge as being particularized to a specific application of the general rule).

83. *See id.* at 524 (holding that a rule was not invalid "on its face," even if it might have some uncommon invalid specific applications).

84. *See id.* ("The possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety.").

85. ABA v. NCUA, 934 F.3d 649, 660 (D.C. Cir. 2019) ("On the day the NCUA published the rule, the Association filed this injunctive and declaratory action in the District Court.").

facial challenge.[86] "Ripeness" is not an issue for a facial challenge.[87]

Although the current lawsuit does not attack any specific credit union, it is reasonable to anticipate that banks are ready to bring new legal challenges as soon as the NCUA approves credit unions that the old rules prevented.[88] For example, imagine a credit union the NCUA approves to serve an affluent and profitable suburb but not the impoverished downtown.[89] The D.C. Circuit opinion gives banks a roadmap for how to bring an as-applied challenge against the approval of such a credit union.[90] The banks could argue that the omission of the urban core is the equivalent of the discredited practice of redlining, and the D.C. Circuit indicated that it would view favorably such an argument.[91]

E. The History of Redlining

It was not so long ago that banks took maps of cities and drew red lines around minority neighborhoods.[92] Their purpose in "redlining" these neighborhoods was to identify certain areas where banks would not give loans.[93] The excuse was that these neighborhoods were bad risks for loans, but the real motivation was simply racism.[94]

While racial bias in lending is probably as old as lending itself, the modern version gained a veneer of legitimacy in the 1930s.[95] The Home Owners Loan Corporation ("HOLC") created a color-coded rating system to indicate the mortgage-worthiness of neighborhoods.[96] HOLC explicitly used racial terms to describe the lowest rated, red areas as having "little or no value today, having suffered a tremendous decline in values due to the colored element now controlling

86. *Id.* at 656 (describing the banks' lawsuit as a "facial challenge").

87. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997) (describing how a facial challenge becomes ripe "the moment the challenged regulation or ordinance is passed"); ABA v. NCUA, 934 F.3d 649, 662 (D.C. Cir. 2019) (determining "We see no jurisdictional issues with the rest of the appeal" which implies ripeness was not a problem).

88. *See* ABA v. NCUA, 934 F.3d at 668–69 (describing circumstances where the court seems to be favorable towards an as-applied challenge).

89. *Id.* at 669 ("[C]ommunity 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.") (internal quotation marks omitted).

90. *See id.* at 670–71 (describing a variety of problems with gerrymandered credit union service areas that amount to discriminatory redlining and considering the results to be illegal).

91. *See id.*

92. MANUEL B. AALBERS, PLACE, EXCLUSION, AND MORTGAGE MARKETS 85 (2011) (describing a system used in the 1930s that color-coded neighborhoods into four levels of creditworthiness of which the lowest category was red).

93. *Id.* at 87 (explaining that redlined areas were "identified as areas that should not receive or be recommended for mortgage loans or insurance").

94. *See id.* at 88 ("Redlining [became] heavily associated with racial discrimination.").

95. *Id.* at 83–84 (describing how during the 1930s the Hoover and Roosevelt administrations created national organizations to improve the home mortgage market).

96. *Id.* at 84–85 (using green, blue, yellow, and red to categorize neighborhoods in descending order of creditworthiness).

the district."[97] In 1968, the Fair Housing Act officially ended discrimination in housing based on race, but community-based organizations and researchers still found vestiges of explicit redlining well into the 1970s.[98] Even today, less obvious kinds of redlining exist.[99]

The NCUA's core-omission rule raises the possibility of something similar to redlining, and the D.C. Circuit noticed.[100] By allowing a credit union to serve only a portion of a CSA but omit the central urban core, a credit union could choose to serve affluent suburbs and "redline" around an impoverished urban area.[101]

As the D.C. Circuit noted, this is not traditional redlining where an institution discriminates against customers within the institution's service area.[102] The NCUA rules—which prevent redlining neighborhoods within an existing service area[103]—do nothing to prevent a credit union from gerrymandering its service area in the first place.[104] So far as the D.C. Circuit was able to discern on the record before it, the NCUA had no systems in place to prevent this alternative form of redlining.[105] The D.C. Circuit remanded the core-omission rule—without vacating—for the agency to explain itself better.[106]

III. FIXING THE POSSIBILITY OF REDLINING

The D.C. Circuit approved most of the NCUA's rule changes with one exception.[107] The opinion declared the new rule that allows a credit union to serve

97. *Id.* at 85.

98. AALBERS, *supra* note 92, at 89 ("Despite these acts and the related move of FHA to the inner city, research from the mid- and late 1970s clearly shows the existence of redlining, mostly in inner-city areas.").

99. Aaron Glantz, *We Exposed Modern-Day Redlining in 61 Cities. Find Out What's Happened Since*, REVEAL (Oct. 25, 2018), https://www.revealnews.org/blog/we-exposed-modern-day-redlining-in-61-cities-find-out-whats-happened-since/ (on file with the *University of the Pacific Law Review*).

100. ABA v. NCUA, 934 F.3d 649, 668–71 (D.C. Cir. 2019) (engaging in an extended consideration of the possibility for the core-omission rule to permit an unconventional form of redlining).

101. *Id.* at 669 ("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.") (internal quotation marks omitted).

102. *Id.* ("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.").

103. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,414 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (describing the NCUA's mandate to consider complaints of discrimination and redlining that come from a credit union's members).

104. ABA v. NCUA, 934 F.3d at 670 ("But we do not see how [the NCUA rules fix] gerrymandering or the potential discriminatory economic impact on urban residents.").

105. *Id.* at 671 ("But current reviewing guidelines do not indicate that the agency looks for such discrimination.").

106. *Id.* at 674 (explaining that although the normal remedy is vacatur, the possibility of the NCUA providing a satisfactory explanation, combined with the substantial likelihood of vacatur producing a disruptive effect, justified the unusual remedy of remanding the rule without vacating it).

107. *Id.* at 674–75 (holding summary judgement in favor of the NCUA on all issues aside from the core-omission rule).

a portion of a CSA without including the urban core to be arbitrary and capricious.[108] The D.C. Circuit determined the NCUA failed to adequately articulate how it would prevent the possibility of redlining.[109] Section A describes how the NCUA should respond to meet the expectations of the D.C. Circuit's opinion.[110] Section B warns the NCUA against responses that could lead to future problems.[111]

A. How the NCUA Can Get It Right

The D.C. Circuit remanded the core-omission rule to the NCUA without vacating the rule.[112] This Section presents two ways the NCUA can successfully respond to the D.C. Circuit's holding.[113] Subsection 1 discusses how the NCUA can fix the core-omission rule.[114] Subsection 2 argues the NCUA can simply retract the core-omission rule.[115]

1. Fix the Core-Omission Rule

The NCUA made the case that when a service area must include an urban core, it can only reach a limited distance into the suburbs, leaving some customers without coverage.[116] The D.C. Circuit found that explanation inadequate in the face of the much more serious danger of redlining by gerrymandering a credit union's service area.[117] If the NCUA has a more significant reason why it created the core-omission rule, it should make that reason clear.[118] If the NCUA provides a sufficiently weighty justification—perhaps involving examples of underserved suburban populations that cannot be served without omitting the urban core—the

108. *Id.* at 668 ("[W]e see merit in the Association's redlining argument and thus hold the definitional change to be arbitrary and capricious.").

109. *Id.* at 664 ("[W]e hold that it is rationally related to the Act's text and purposes, but that it is insufficiently explained.").

110. *Infra* Section III.A.

111. *Infra* Section III.B.

112. ABA v. NCUA, 934 F.3d at 674–75 ("[We] remand, without vacating, the relevant portion of the 2016 rule for further explanation.").

113. *Infra* Subsections III.A.1–2.

114. *Infra* Subsection III.A.1.

115. *Infra* Subsection III.A.2.

116. ABA v. NCUA, 934 F.3d at 670 ("[I]t caused community credit unions to sacrifice service to other areas within the Core Based Statistical Area.") (internal quotation marks omitted); Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("[C]ausing an FCU [Federal Credit Union] to sacrifice service to other areas within the chosen portion of a CBSA.").

117. *See* ABA v. NCUA, 934 F.3d at 670 (referencing the explanation of serving otherwise unserved customers, but still concluding that the possibility of redlining invalidated the rule, suggesting that the explanation was not strong enough).

118. *Id.* at 674 ("We conclude that the NCUA might be able to offer a satisfactory reason on remand.").

D.C. Circuit appears poised to accept the core-omission rule.[119]

Alternatively, the NCUA could establish a system for evaluating proposed areas that omit the core from a CSA.[120] One possible system would be to evaluate proposed service areas for discriminatory impact on any adjacent, poorly served urban core.[121] It appears that this would require an expansion of the existing vetting process for credit union service areas.[122] But the NCUA contends that credit unions already serve most urban cores.[123] If this is true, then it would be rare to have an adjacent poorly-served area, and the resulting administrative burden would be slight.[124]

The NCUA could also change its complaint process to allow grievances from certain non-members of a credit union.[125] The NCUA could allow residents of areas adjacent to a credit union's service area to complain that the service area should include them.[126] This would allow residents discriminated against by a gerrymandering credit union—or more likely their attorneys—to bring the issue to the attention of the NCUA.[127]

2. Retract the Core-Omission Rule

Perhaps the simplest solution would be to retract the core-omission rule.[128] As discussed above, with the other changes the NCUA made,[129] keeping this part of the system unchanged is a wise choice.[130]

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119. *Id.*

120. *Id.* at 671 ("But current reviewing guidelines do not indicate that the agency looks for such discrimination.").

121. *Id.* ("the government counsel suggested that the agency may reject proposed local communities if it suspects they discriminate against residents in the urban core.").

122. ABA v. NCUA, 934 F.3d at 671 (quoting oral argument where the NCUA agreed "the agency has no authority to reject that application, as long as the credit union can demonstrate that they can serve the area"); 12 C.F.R. pt. 701, app. B, ch. 1, § VII.A (2020) (describing the approval process for a credit union charter application and indicating that the NCUA only considers "adequate service to all segments of the field of membership" without considering discriminatory effects on adjacent areas).

123. ABA v. NCUA, 934 F.3d at 671 ("The government counsel also suggested that community credit unions already cover the vast majority of urban cores.").

124. *Cf.* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979) (reasoning that efforts to combat discrimination must not create an undue administrative burden).

125. *Cf.* ABA v. NCUA, 934 F.3d at 670 ("As the preamble points out, complaints are raised by the membership, which would not include the affected urban residents.").

126. *Cf. id.* ("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.").

127. *Cf. id.*

128. *See* Atl. States Legal Found. v. E.P.A., 325 F.3d 281, 283 (D.C. Cir. 2003) (stating as self-evident that an agency can respond to the notice-and-comment part of rulemaking by choosing to not implement the new rule or rule change).

129. *See supra* Sections II.C.1, 3 (discussing the rule changes that allow a credit union to serve areas that extend beyond a single CSA and that increase the population cap for rural areas).

130. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,412 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (summarizing six significant changes made all at once to a variety of credit union rules).

The D.C. Circuit considered the possibility that some customers would benefit from the core-omission rule.[131] But the D.C. Circuit identified no evidence of actual unserved customers—it was merely a possibility.[132] During the comment process that preceded the NCUA's adoption of the core-omission rule, no commenters expressed any such need for service.[133] The relevant comments merely speculated that requiring a credit union area to include the urban core might cause the credit union to sacrifice service to another needy area or discourage the credit union from forming in the first place.[134] If there is no pressing need for this new core-omission rule, reverting to the previous rule might be an easy way for the NCUA to comply with the D.C. Circuit's decision.[135]

B. How the NCUA Can Get It Wrong

This Section argues there are two ways the NCUA could fail to respond adequately to the D.C. Circuit's opinion.[136] Subsection 1 describes the obvious danger that the explanation the NCUA provides might be inadequate.[137] Subsection 2 explains the less obvious danger that the NCUA could fail to address other problems the D.C. Circuit highlighted in its opinion.[138]

1. Provide a Weak Explanation

The D.C. Circuit's holding directs the NCUA to provide a better explanation of the core-omission rule.[139] Specifically, the NCUA must explain how it will prevent the unconventional form of redlining the core-omission rule allows.[140]

The commenters' unsupported speculation that the core-omission rule would allow credit unions to reach needy customers outside the core did not convince the

131. ABA v. NCUA, 934 F.3d at 674 ("[W]e 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.").

132. *See generally id.* (reaching its conclusion without referring to any evidence of actual customers denied service).

133. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (summarizing the comments received during the notice-and-comment process and mentioning no examples of actual needy unserved customers).

134. *Id.* (describing the comments about the core-omission rule allowing service to needy customers as speculation).

135. *See* ABA v. NCUA, 934 F.3d at 673 (indicating that the usual practice is to invalidate rules that a court decides are arbitrary and capricious, which implies that eliminating the rule would also have been a solution to the issues the court identified).

136. *Infra* Subsections III.B.1–2.

137. *Infra* Subsection III.B.1.

138. *Infra* Subsection III.B.2.

139. ABA v. NCUA, 934 F.3d at 669 ("[T]he NCUA has not adequately explained [the core-omission rule].").

140. *Id.* ("[T]he response fails to consider an important aspect of the redlining issue or is otherwise so implausible as to be unreasonable.") (internal quotation marks omitted).

D.C. Circuit.[141] Furthermore, the D.C. Circuit discounted the NCUA's argument that its annual review and complaint processes would be adequate to combat redlining.[142] The NCUA will need to present something more.[143]

If the NCUA provides an explanation that the core-omission rule makes credit unions stronger by avoiding bad debts, the NCUA would be repeating the historical justifications given for redlining.[144] The D.C. Circuit may look at the statutory efforts to eliminate redlining as an indication that Congress does not intend to allow the old explanations to work once more.[145] Similar gerrymandering practices by banks led to enforcement actions by the Consumer Financial Protection Bureau.[146] Focusing purely on the rule's ability to increase credit union profitability would not adequately address the D.C. Circuit's concerns.[147]

2. Only Fix the Remanded Issue

The D.C. Circuit gave the NCUA a significant "win" and only remanded one rule change.[148] The court did not vacate that change; so, if the NCUA produces an acceptable justification for the core-omission rule or otherwise adequately responds to the court's redlining criticisms, it might appear the NCUA has done everything it needs to do.[149]

But that is not what the opinion actually indicates.[150] There are several places where the D.C. Circuit presents very strong hints that the NCUA needs to address

141. *See id.* at 670 (referencing the explanation of serving otherwise unserved customers, but still concluding that the possibility of redlining invalidated the rule, suggesting that the explanation was not convincing).

142. *Id.* ("Both aspects of the NCUA's supervisory process fail to address the redlining issue raised by the Association.").

143. *Id.* at 674–75 (requiring the NCUA to provide "further explanation" beyond what it has already given).

144. AALBERS, *supra* note 92, at 88 ("Banks may assume that members of certain racial groups are, on average, less able to fulfill their financial commitments and are therefore more likely to default than are white applicants with the same observed credit characteristics[.] This assumption may provide lenders with an economic incentive to discriminate against minority applicants.") (internal quotation marks omitted).

145. 42 U.S.C. §§ 3604–05 (2018) (making it illegal to discriminate in renting, selling, lending, or in any other way engage in a real estate transaction); Alex Gano, Note, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1124–25 n.73 (indicating that 42 U.S.C. §§ 3604–05 prevent redlining).

146. *See* Gano, *supra* note 145, at 1138 (describing a case where a bank chose to include six counties and exclude four counties, thereby excluding most of the area's minority-majority counties, leading the Consumer Financial Protection Bureau to file a complaint).

147. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (including "enhance [the credit union's] viability" and "additional cost and resources of serving a core area" among the justifications the D.C. Circuit held were inadequate) (internal quotation marks omitted).

148. ABA v. NCUA, 934 F.3d at 674–75 (remanding only the core-omission rule and granting summary judgement to the NCUA on every other issue).

149. *Id.* (making the unusual decision to remand without vacating the core-omission rule).

150. *See id.* at 667–69, 673 (describing several hypotheticals as insufficient to support a facial challenge but suggesting they might support future as-applied challenges).

other issues to prevent future as-applied challenges.[151] The NCUA should capitalize on this rare opportunity to anticipate how courts may rule in future cases.[152] Failure to address these other issues could bring the NCUA back to court and lead to a less favorable outcome.[153]

IV. POTENTIAL AS-APPLIED CHALLENGES

In the opinion, the D.C. Circuit reiterated the point that rare hypothetical problems are insufficient to support a facial challenge such as the one this lawsuit presents.[154] Instead, the D.C. Circuit repeatedly mentioned the possibility of future as-applied challenges if the NCUA approves certain kinds of credit union service areas.[155] This Part discusses several of those potential as-applied challenges, how dangerous each one might be for the NCUA, and ways the NCUA might avoid negative outcomes.[156]

A credit union that serves non-contiguous areas was unpalatable to the D.C. Circuit, but Section A discusses how the NCUA might already have positioned itself to prevent the possibility of non-contiguous areas.[157] Section B examines the more serious problem of what the D.C. Circuit refers to as a "daisy chain" service area: a string of areas each connected to the next, but where the ends of the chain have no significant connections with each other.[158] The D.C. Circuit also warned of purported "rural districts" with mostly urban populations, but Section C explains this danger may be unrelated to the rule changes this lawsuit attacks.[159] Section D describes how the biggest potential problem for the NCUA is a credit union that gerrymanders its service area in a discriminatory, "redlining" fashion.[160]

A. Non-Contiguous Areas

In challenging the new rule that expanded membership areas to include multiple CBSAs, the ABA argued the rule would permit a credit union to serve a collection of disconnected geographical areas.[161] The ABA based the argument on the absence of the word "contiguous" from the part of the rule that expanded

151. *See id.*

152. *See* United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

153. ABA v. NCUA, 934 F.3d at 668 ("The [ABA] has succeeded in such challenges in the past.").

154. *Id.* at 667–69, 673 (describing several hypotheticals as insufficient to support a facial challenge but suggesting they might support future as-applied challenges).

155. *Id.*

156. *Infra* Sections IV.A–D.

157. *Infra* Section IV.A.

158. *Infra* Section IV.B.

159. *Infra* Section IV.C.

160. *Infra* Section IV.D.

161. ABA v. NCUA, 934 F.3d 649, 667 (D.C. Cir. 2019) ("The Association also suggests that the rule might permit local communities comprising non-contiguous portions of a Combined Statistical Area.").

geographical areas out to CSAs.[162] The ABA argued the presence of "contiguous" in the other NCUA rules, and its absence from the Combined Statistical Areas rule, indicated that the NCUA would approve a credit union membership area with non-contiguous borders.[163]

The D.C. Circuit did not consider that argument strong enough to support a facial challenge.[164] It looked to the Supreme Court's repeated holding that the potential for invalid application does not render a rule itself invalid.[165] Accordingly, the D.C. Circuit decided the hypothetical presented by the ABA was too conjectural in the context of a facial challenge.[166] But the court went further and hinted that such a proposed credit union—if approved by the NCUA—could serve as the basis for an as-applied challenge.[167]

The NCUA argues it would never approve a non-contiguous area.[168] To the extent the NCUA could alter that policy, the D.C. Circuit's opinion suggests it would be unwise to do so.[169] The ABA argues the NCUA has already opened the door for such a change by removing the word "contiguous" from the relevant rule.[170] The NCUA may not have intended to suggest that it might allow non-contiguous areas.[171] The best solution would be to remove all confusion and explicitly include the word "contiguous" in the rule.[172]

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162. Corrected Principle and Response Brief for Appellee-Cross-Appellant at 39, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("The Rule provides that a rural district must have contiguous geographic boundaries, but omits this requirement for Combined Statistical Areas.") (internal quotation marks omitted).

163. *Id.* ("When language is included in one section of a statute or rule, but omitted in another, it is generally presumed that [the drafter] act[ed] intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

164. ABA v. NCUA, 934 F.3d at 667 ("[T]he Association would need much more to mount its facial pre-enforcement challenge in this case.").

165. *Id.* at 667–68 (citing EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 524 (2014), Barnhart v. Thomas, 540 U.S. 20, 20 (2003), Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 619 (1991), and INS v. Nat'l Ctr. for Immigrants' Rights, Inc. 502 U.S. 183, 188 (1991), all of which conclude that uncommon possibilities for violative applications do not invalidate a general rule).

166. *Id.* at 668 ("[T]he Association's complaint and the District Court's accompanying worry strike us as too conjectural.").

167. *Id.* at 667–68 ("We might well agree with the District Court that the approval of such a geographical area would contravene the act. . . . if the agency were to receive and approve such an application, a petitioner can make an as-applied challenge.").

168. Corrected Response and Reply Brief for Appellant at § I.A n.6, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) (arguing that ". . . the agency's longstanding policy to limit the community to a *single*, geographically well-defined area" prevents the approval of noncontiguous areas).

169. ABA v. NCUA, 934 F.3d at 667 (including non-contiguous areas in a collection of examples of unreasonable areas); Corrected Principle and Response Brief for Appellee-Cross-Appellant at 40, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("the agency remains free to change [its policy] at any time without notice or an opportunity for comment").

170. Corrected Principle and Response Brief for Appellee-Cross-Appellant at 39, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) (describing how the rule changed the word "contiguous" to "individual" in one place, and in another neither word appears).

171. Organization and Operations of Federal Credit Unions, 71 Fed. Reg. 71,998, 72,012 (Dec. 30, 1998) ("The entire area must be a single well-defined location. Two, noncontiguous, well-defined areas cannot be the basis for a community charter.").

172. *See* ABA v. NCUA, 934 F.3d at 667–68 (including non-contiguous areas in a collection of examples

B. Daisy-Chains with No Overall Commonality

Under the new NCUA rule allowing credit union service areas that go beyond a single CBSA, a credit union could propose a service area involving multiple CBSAs and therefore—according to the ABA—potentially unrelated communities.[173] Of course, it is true the rule requires the proposed area to fall within a single CSA.[174] Because CSAs are created by joining together adjacent CBSAs linked by commuting patterns, those CBSAs will have "substantial employment interchange."[175]

But since each CSA can consist of several individual CBSAs, some sprawling CSAs can chain together communities that individually have no ties to each other.[176] CBSAs *X* and *Y* can have sufficient ties to each other, and *Y* can have sufficient ties to a third CBSA *Z*.[177] Yet *X* and *Z*, even if physically adjacent, may have no direct connections to each other.[178] The new NCUA rule does not require a credit union to serve the entire CSA, so a credit union could choose to serve an area consisting of just *X* and *Z*.[179]

This is more than just a hypothetical possibility.[180] The ABA identified the example of the Washington-Baltimore, MD-Arlington, VA CSA.[181] Although the eight constituent CBSAs are each sufficiently connected to at least one other

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that the court suggested could serve as the basis for meritorious as-applied challenges); Corrected Principle and Response Brief for Appellee-Cross-Appellant at 40, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("the agency remains free to change it at any time without notice or an opportunity for comment").

173. Corrected Principle and Response Brief for Appellee-Cross-Appellant at 36, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("As the district court noted, a Combined Statistical Area may be a daisy chain of metropolitan areas that are linked to their neighbors but have nothing to do with those at the other end of the chain.") (internal quotation marks omitted).

174. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,414 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("The proposed rule added a third 'presumptive community': A Combined Statistical Area as designated by OMB, subject to the same population limit.").

175. *Glossary*, U.S. CENSUS BUREAU, GEOGRAPHY PROGRAM, https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_7 (last visited Oct. 27, 2019) (on file with the *University of the Pacific Law Review*) ("Combined Statistical Areas (CSAs) consist of two or more adjacent CBSAs that have *substantial employment interchange*.") (emphasis added).

176. *See* Corrected Principle and Response Brief for Appellee-Cross-Appellant at 37, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) (providing data on the Washington–Baltimore–Arlington, DC–MD–VA–WV–PA Combined Statistical Area, which includes some CBSAs that have no direct commuting ties with each other).

177. *See id.* (describing CBSAs that are sufficiently connected, such as the Chambersburg-Waynesboro, PA CBSA and the Hagerstown-Martinsburg, MD-WV CBSA).

178. *See id.* (describing CBSAs that are in the same CSA but have no commuting ties to each other, such as the Chambersburg-Waynesboro, PA CBSA and the Cambridge, MD CBSA).

179. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,440 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("The well-defined local community requirement is met if . . . [t]he area is a designated Combined Statistical Area *or a portion thereof*.") (emphasis added).

180. Corrected Principle and Response Brief for Appellee-Cross-Appellant at 37, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) (using actual data from the Census to create an example to illustrate the potential problem).

181. *Id.*

CBSA to satisfy the Census Bureau definition of a CSA, some of the individual constituent CBSAs have no direct commuting ties to each other.[182]

The ABA found particularly illustrative the geographically adjacent Cambridge, MD CBSA and California-Lexington Park, MD CBSA.[183] Physically separated by the Chesapeake Bay, not a single worker commutes from the Cambridge, MD CBSA to the California-Lexington Park, MD CBSA, yet they are both in the same CSA.[184] A credit union proposing to serve these two communities would satisfy the new NCUA rule and consist of a compact and contiguous geographic area.[185]

While the D.C. Circuit did not address the issue of proximal but unrelated CBSAs, it did speak to the issue of geographically extensive strips of land that bring together far-flung unrelated communities.[186] The Court did not issue an advisory opinion, but it did strongly hint that an as-applied challenge against such a credit union service area would be successful.[187]

The NCUA requires applicants to establish that the area they intend to serve has the necessary common connection.[188] The NCUA should be vigilant in applying this policy and skeptical of any applicant that offers the sort of "daisy-chained" service area the D.C. Circuit disfavored.[189] In the past, the NCUA has not always been as vigilant as it should be and has approved unreasonable service areas.[190] Instead of waiting to be overturned in court, the NCUA can take this opportunity to prevent a problem before it occurs.[191]

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182. *Id.*

183. *See id.* (choosing these two CBSAs to illustrate the potential problem).

184. *Id.*

185. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,440 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) ("The well-defined local community requirement is met if . . . [t]he area is a designated Combined Statistical Area *or a portion thereof* . . .") (emphasis added).

186. ABA v. NCUA, 934 F.3d 649, 667 (D.C. Cir. 2019) (considering an example area that would bring together Doylesburg, Pa. and Partlow, Va., which are 200 miles apart).

187. *Id.* ("We might well agree with the District Court that the approval of such a geographical area would contravene the Act.").

188. Organization and Operations of Federal Credit Unions, 71 Fed. Reg. 71,998, 72,037 (Dec. 30, 1998) ("The charter applicant must establish that the area is a well-defined local, community, neighborhood, or rural district.") (internal quotation marks omitted).

189. *See* ABA v. NCUA, 934 F.3d at 667 ("We might well agree with the District Court that the approval of such a geographical area would contravene the Act.").

190. ABA v. NCUA, No. 1:05-CV-2247, 2008 WL 2857678, at *14 (M.D. Pa. July 21, 2008) (holding—in an earlier case involving the same two parties this Comment discusses—that the NCUA's decision to approve a service area that covered six counties, over 3000 square miles, and more than 1.2 million people was arbitrary and capricious).

191. *See* ABA v. NCUA, 934 F.3d at 668 ("[I]f the agency were to receive and approve such an application, a petitioner can make an as-applied challenge."); Organization and Operations of Federal Credit Unions, 71 Fed. Reg. 71,998, 72,037 (Dec. 30, 1998) (indicating that the NCUA policy requires any proposed "local community" must show that the residents "have common interests or interact").

C. "Rural" Districts with Urban Cores

Another possible future as-applied challenge might involve a "rural district" service area.[192] The ABA objected to the NCUA's change that increased the population cap for such districts from 250,000 to 1 million.[193] A key part of the NCUA's argument involved the possibility for the population of these larger purported "rural" areas to predominantly live in large cities.[194]

The ABA illustrated this possibility with an area stretching from Salt Lake City, Utah, to Denver, Colorado.[195] The overall population of this area is less than the one million maximum, and the overall population density of the area is below the 100 person per square mile requirement.[196] Yet 89% of the population of this "rural" district resides in the two urban cities.[197]

Although the Court described examples like this—that stretch the definition of "rural"—as "troubling," it is difficult to see how this is a problem created by increasing the population maximum.[198] Even with the previous 250,000 population cap, it was possible to create areas with an overall population density below the 100 person per square mile requirement yet have a large percentage of the population living in an urban area.[199]

In fact, trimming down the ABA's example to involve just Salt Lake City, Summit County, and Daggett County produces a population density of less than 100 persons per square mile and a total population of less than the old 250,000 limit.[200] More than 80% of the people in that area live in Salt Lake City.[201] If there is a problem with the NCUA's definition of "rural," the problem is not with the new rule but with the old rule.[202]

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192. *See* ABA v. NCUA, 934 F.3d at 673 ("Again, such implausible outliers do not impugn the rule's general reasonableness.").

193. *Id.* at 660 ("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.").

194. Corrected Principle and Response Brief for Appellee-Cross-Appellant at 55, ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("By greatly expanding the population limit, NCUA has allowed large cities to be included in rural districts.") (internal quotation marks omitted).

195. *Id.* at 57 (providing a map showing a long, narrow area highlighted over a map of the United States).

196. *Id.* at 56 (calculating the total population to be 885,216 and the population density to be 72.7 per square mile).

197. *Id.* (reporting that Denver has a population of 600,158 and Salt Lake City has a population of 186,440).

198. ABA v. NCUA, 934 F.3d at 673 ("[T]roubling hypothetical examples of rural districts with unruly shapes and those with dense urban areas such as Denver, Colorado.").

199. *See Quickfacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ (enter Salt Lake City, then Summit County, UT, and then Daggett County in the search box) (last visited Jan. 9, 2020) (on file with the *University of the Pacific Law Review*) (combining Salt Lake City, Summit County, and Daggett County).

200. *Id.* (on file with the *University of the Pacific Law Review*) (calculating a total population of 243,504, which when divided by the total area of 2679.8 square miles, gives a population density of about 90.8 per square mile).

201. *Id.* (on file with the *University of the Pacific Law Review*) (providing the population of Salt Lake City—200,591—which when divided by the overall total population of 243,504, gives a percentage of about 82.4% of the population living in the urban area).

202. *See* Corrected Principle and Response Brief for Appellee-Cross-Appellant at 62, ABA v. NCUA, 934

D. Gerrymandering Around Poor Neighborhoods

The biggest potential problem for the NCUA is redlining.[203] If the NCUA retains the core-omission rule, a future credit union might propose a service area based on that rule.[204] Such a credit union might deliberately exclude an impoverished urban core to more profitably serve affluent suburbs.[205] Under the approval process as the NCUA explained it to the D.C. District Court, the NCUA cannot reject such a credit union's proposal.[206]

This is the circumstance that caused the D.C. Circuit to rule against the NCUA, even when presented as a mere hypothetical.[207] The D.C. Circuit believed such gerrymandering around impoverished areas would create a discriminatory impact on the residents of the neglected urban core.[208] And the potential for such discriminatory impact generated multiple paragraphs of negative analysis from the D.C. Circuit.[209] If this circumstance were to actually occur, and the banks were to challenge the resulting application of the NCUA rule, it seems likely that such a challenge would succeed.[210] The NCUA would be wise to speedily implement whatever policy changes are necessary to prevent the possibility of gerrymandering-style redlining.[211] As discussed above, the simplest solution is to retract the core-omission rule.[212]

V. CONCLUSION

Credit unions are an affordable way disadvantaged customers can receive financial services that might otherwise be unavailable to them.[213] But credit unions

F.3d 649 (D.C. Cir. 2019) (No. 18-5154) ("NCUA's prior rule, which was never subjected to judicial review, may itself have been unreasonable").

203. *See generally* ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (upholding the majority of the NCUA's rule changes with one exception based on the possibility of redlining).

204. *See id.* at 669–70 (considering ways that service areas might have a discriminatory impact).

205. *See* Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (reporting a comment that supported the approval of the core-omission rule because serving an urban core requires additional cost and resources).

206. ABA v. NCUA, 934 F.3d at 671 ("[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.").

207. *Id.* at 668 ("[W]e see merit in the Association's redlining argument").

208. *Id.* at 670 ("[G]errymandering or the potential discriminatory economic impact on urban residents").

209. *Id.* at 669–71 (discussing the possibility of redlining over seven paragraphs).

210. *See id.* at 669 (describing the possibility of redlining as an important issue and the failure to address it grounds to declare the rule "arbitrary and capricious").

211. ABA v. NCUA, 934 F.3d at 671 (citing a portion of the oral argument before the District Court where the NCUA stated that it could not deny a credit union's gerrymandered service area).

212. *See supra* Section III.A.2 (discussing how the NCUA presented no evidence of actual need for the core-omission rule and why it might be wise to simply retract the rule change).

213. Baradaran, *supra* note 29, at 501 ("[B]anks had made their services available mostly to corporations and wealthy individuals, disregarding lower income individuals.").

also compete with American businesses—banks—without having to pay the same taxes banks have to pay.[214] Banks understandably see credit unions as a threat with an unfair advantage.[215] Over time, credit unions have gotten larger and larger.[216] In 2017, the government agency that oversees credit unions, the NCUA, made rule changes to let credit unions get even larger.[217] The banks fought back and sued.[218] In that case—*ABA v. NCUA*—the D.C. Circuit sent two messages.[219] First, credit unions can indeed get even larger.[220] But second, the D.C. Circuit indicated the NCUA's expansion of credit union areas is nearing the edge of what the law will allow.[221]

One rule change might have allowed credit unions to engage in an unconventional version of the discredited practice of "redlining."[222] It was possible that credit unions—to serve their own financial success—could avoid serving needy customers by carefully configuring their service area.[223] The D.C. Circuit held that the NCUA must come up with a better explanation of how it will prevent this possibility.[224] The D.C. Circuit also sent signals that there are other potential problems lurking in the NCUA's approval process.[225]

ABA v. NCUA packs a lot of guidance into a single case.[226] The course charted by the D.C. Circuit leads to larger credit unions.[227] "Local community" credit

214. BICKLEY, *supra* note 34, at 3–4 ("Federally chartered credit unions are exempt from all taxes (including income taxes) imposed by any state, territorial, or local taxing authority, except for local real or personal property taxes.").

215. Lalita Clozel, *Credit Unions Go on Bank Buying Spree*, THE WALL STREET JOURNAL (Sep. 3, 2019), https://www.wsj.com/articles/credit-unions-go-on-bank-buying-spree-11567515601 (on file with the *University of the Pacific Law Review*) ("'When an entity is in business doing the same thing and gets a free ride, that's bad public policy,' she said. 'And it's bad for communities.'").

216. Reosti, *supra* note 46 ("Today, credit unions count more than 110 million people as members and hold deposits totaling $1.1 trillion.").

217. *See* ABA v. NCUA, 934 F.3d 649, 659 (D.C. Cir. 2019) ("On December 7, 2016, the NCUA amended its membership field rules for community credit unions.").

218. *Id.* at 660 ("On the day the NCUA published the rule, the Association filed this injunctive and declaratory action in the District Court.").

219. *Id.* at 674–75 (supporting most of the NCUA's rule changes but remanding as arbitrary and capricious one rule change that could hypothetically allow a return of redlining).

220. *Id.* at 674 (holding that allowing service areas that extend beyond a single CBSA and increasing the population cap for rural districts from 250,000 to one million was reasonable).

221. *Id.* at 667–68, 673 (describing several hypothetical credit union service areas as problematical and suggesting that such instances could serve as the basis for as-applied challenges).

222. ABA v. NCUA, 934 F.3d at 668 ("[W]e see merit in the Association's redlining argument.").

223. Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,413 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (reporting a comment that supported the approval of the core-omission rule because serving an urban core requires additional cost and resources).

224. ABA v. NCUA, 934 F.3d at 670, 674–75 (concluding that the current NCUA procedures do not prevent the possibility of redlining and remanding for the agency to provide a better explanation).

225. *See generally id.* (describing a variety of possible as-applied challenges that could be brought in certain specific circumstances).

226. *See generally id.* (containing an in-depth unpacking of the possibility of redlining, support for the ability of credit unions to compete with banks, and several roadmaps for how to avoid future legal issues).

227. *Id.* at 656 ("[T]he NCUA has promulgated a final rule that makes it easier for community credit unions

unions will be able to serve areas that push beyond the boundaries that currently limit their size.[228] The membership of "rural district" credit unions will grow up to four times as large as they are at present.[229] Banks will face increased competition from these larger credit unions, and more underserved customers will receive affordable financial services.[230]

But the D.C. Circuit's opinion also suggests certain things will not happen in the future.[231] Credit unions will not serve disconnected non-contiguous areas or long "daisy-chain" areas with unrelated ends.[232] No credit unions will serve adjacent but unrelated areas.[233] The NCUA will not approve nominally "rural" service areas that are in fact predominantly urban.[234] And most importantly, one specific new form of redlining—gerrymandering credit unions around disfavored areas—is now much less likely.[235]

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to expand their geographical coverage and thus to reach more potential members.").

228. *Id.* at 666 (stating that the NCUA's new CSA rule "allows for larger community credit unions").

229. ABA v. NCUA, 934 F.3d at 673 (supporting the NCUA's increase to the population limit for rural districts); Chartering and Field of Membership Manual, 81 Fed. Reg. 88,412, 88,416 (Dec. 7, 2016) (to be codified at 12 C.F.R. pt. 701, app. B) (increasing the rural district population limit from 250,000 to 1 million).

230. ABA v. NCUA, 934 F.3d at 674 (refusing to vacate the NCUA's core-omission rule out of concern for needy customers who would otherwise be unserved); Cassity, *supra* note 4, at 340 ("Banks began to view these new credit unions as a competitive threat.").

231. *See generally* ABA v. NCUA, 934 F.3d 649 (D.C. Cir. 2019) (describing a variety of possible as-applied challenges that could be brought in certain specific circumstances).

232. *See id.* at 668 ("[I]f the agency were to receive and approve such an application, a petitioner can make an as-applied challenge.").

233. *See id.* at 667 ("We might well agree with the District Court that the approval of such a geographical area would contravene the Act.").

234. *See id.* at 673 (describing as "troubling" certain "hypothetical examples of rural districts with unruly shapes and those with dense urban areas such as Denver, Colorado").

235. *See id.* at 668 ("[W]e see merit in the Association's redlining argument and thus hold the definitional change to be arbitrary and capricious.").

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