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

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| DISTRICT OF COLUMBIA, et al.,<br><br>*Plaintiffs,*<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,<br><br>*Defendants.* | ) | C.A. No. 1:20-cv 00119-BAH |
| BREAD FOR THE CITY, et al.,<br><br>*Plaintiffs,*<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE et al.,<br><br>*Defendants.* | ) | C.A. No. 1:20-cv-00127-BAH |

**PRIVATE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED)**

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The hallmark of USDA's Opposition is its failure to respond meaningfully to the Private Plaintiffs' arguments. USDA ignores many, and touches briefly on others, but never persuasively refutes any of them. The Court should enter summary judgment for Plaintiffs and deny USDA's cross-motion for summary judgment.[1]

## ARGUMENT

### I. USDA EXCEEDED ITS STATUTORY AUTHORITY BY PROMULGATING A PROSPECTIVE CATEGORICAL RULE THAT SUBSTANTIALLY DISPLACES THE WAIVER ADJUDICATION PROCESS MANDATED BY STATUTE.

The Court should first conclude that USDA exceeded its statutory authority by promulgating a prospective categorical rule that substantially displaces the waiver adjudication process mandated by statute. The Court should vacate the rule on that ground.

#### A. The Statute's Waiver Provision Did Not Authorize USDA to Displace the Adjudication Process With a Prospective Categorical Rule.

The statute's waiver provision (7 U.S.C. § 2015(o)(4) (2018)) did not authorize USDA to displace the adjudication process with a prospective categorical rule. Plaintiffs' opening brief demonstrated that:

- the plain language of 7 U.S.C. § 2015(o)(4) requires a case-specific, individualized determination of the employment opportunities for particular "individuals" in "the area in which the individuals reside" (Pl. Br. at 10-11);
- these individualized determinations fall easily within the definition of informal "adjudication" (Pl. Br. at 13);
- under the foundational principles of the Administrative Procedure Act, adjudication and rulemaking are mutually exclusive means of regulating (Pl. Br. at 13-14); and
- because section 2015(o)(4) requires adjudication, that provision could not have authorized the prospective categorical rule challenged here. (Pl. Br. at 13-14).

[1] Based on the complexity of the issues presented, Plaintiffs respectfully request the Court to hear oral argument on their motion and Defendants' cross-motion.

USDA completely ignores these arguments. The agency "simply fail[s] to respond to Plaintiff[s'] arguments on these points, and therefore concede[s] their validity." *Hester v. District of Columbia*, 433 F. Supp. 2d 71, 78 (D.D.C. 2006) (abrogated on other grounds).

### B. USDA's General Rulemaking Authority Did Not Empower the Agency to Displace the Adjudication Process with a Prospective Categorical Rule.

Plaintiffs' opening brief also demonstrated that the SNAP statute's general rulemaking provision (7 U.S.C. § 2013(c) (2018)) does not authorize USDA to displace the section 2015(o)(4) adjudicatory process with a prospective categorical rule. Section 2013(c) only empowers the agency to issue a rule "consistent with" the adjudicatory process. Section 2013(c) did not authorize USDA to issue this rule, because it conflicts with, and displaces, the adjudicatory process. Pl. Br. at 16-17 (quoting 7 U.S.C. § 2013(c)). USDA cites to section 2013(c) in its Opposition but again ignores Plaintiffs' argument—the agency does not even discuss how its displacement of the adjudicatory process could possibly satisfy the statutory obligation for a rule to be "consistent with" that process.

Instead of addressing the statutory language, USDA cites boilerplate case law holding that an agency generally has discretion to choose between rulemaking and adjudication. Opp. Br. at 34. But in asserting that generic response, USDA misses the crux of the specific question presented here: has Congress directed which process the agency must follow or instead permitted a discretionary choice? USDA inexplicably ignores binding precedent—cited in Plaintiffs' opening brief—holding that an agency does *not* have discretion to choose between rulemaking and adjudication when Congress specifies which of the two processes to use. Pl. Br. at 15 (citing *Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001)).

The cases that USDA does discuss are fully consistent with the rule that the statutory language determines whether or not the agency has discretion. Those cases rely fundamentally

upon *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 292-93 (1974) (citing *Chenery*); *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 993 n.22 (D.C. Cir. 1978) (citing *Chenery*). The D.C. Circuit has specifically cited to *Chenery* in holding that an agency *lacks* discretion to choose between adjudication and rulemaking when Congress has directed which process the agency must follow. *Michigan*, 268 F.3d at 1087 (discussing *Chenery*). *Cf. NLRB v. Wyman*, 394 U.S. 759, 764 (1969) (opinion of Fortas, J.) ("There is no warrant in law for the Board to replace the statutory scheme"—requiring an "adjudicatory proceeding"—with "a rule-making procedure of its own invention.").

Here USDA had no such discretion, because Congress specified adjudication as the process to use, as Plaintiffs' opening brief explains in detail. Pl. Br. at 10-15. USDA does not proffer any *alternative* construction of the statute to support its contrary assertion (that the agency allegedly can pick and choose between adjudication and rulemaking). Because the presence or absence of discretion turns entirely on statutory language, USDA's failure to proffer a statutory construction is an extraordinarily significant omission. It means that USDA has utterly failed to prove its assertion that it had discretion to displace adjudication with rulemaking. It will be too late for USDA to proffer a statutory construction on this issue for the first time in its reply brief. *See, e.g.*, *Benton v. Laborers' Joint Training Fund*, 121 F. Supp. 3d 41, 51 (D.D.C. 2015); *Performance Contracting, Inc. v. Rapid Response Constr., Inc.*, 267 F.R.D. 422, 425 (D.D.C. 2010).

### C. The Final Rule is Starkly Different Than Permissible Rules That Merely Supplement, Rather Than Displace, an Adjudicatory Process Required by Statute.

Plaintiffs' opening brief discussed why the challenged rule is starkly different than other rules that merely supplement an adjudicative process without displacing it. Such supplemental rules enhance an adjudicative process—by uniformly disposing of certain types of repetitive issues for which the outcome should not vary from case to case, or by limiting adjudication to matters

contested by the parties—instead of displacing an adjudicative process (like the challenged rule). Pl. Br. at 18-21. Plaintiffs cited the primary precedent validating such a supplemental rule (*Heckler v. Campbell*, 461 U.S. 458 (1983)) and explained four grounds for distinguishing that rule from the USDA rule challenged here. Pl. Br. at 18-19.

USDA cites *Heckler* but does not even acknowledge (much less respond to) Plaintiffs' grounds for distinguishing the case. Defs' Br. at 25. USDA cites other similarly distinguishable cases as well, in a boilerplate discussion that does not even mention Plaintiffs' analysis. *Id.* USDA's silence as to these distinctions is quite telling. If USDA could explain why these cases apply here it would have done so.

The following chart provides more detail on this issue, documenting six material distinctions between the rules at issue in USDA's cited cases and the USDA rule challenged here:

| **SUPPLEMENTAL RULES CHALLENGED IN CASES CITED BY USDA** | **USDA RULE CHALLENGED IN THIS CASE** |
|---|---|
| Rule uniformly addresses a general factual issue that does not vary from case to case.[2] | Rule uniformly addresses location-specific factual issues that do vary from case to case.[3] |

[2] *Heckler*, 461 U.S. at 468 (rule itemizing types and numbers of jobs that exist in the national economy addressed a "general factual issue" that "is not unique to each claimant"); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 618 (1991) (collective bargaining rule applying uniformly to acute care hospitals rested on the agency's "considered judgment that 'acute care hospitals do not differ in substantial, significant ways . . . .'") (citation omitted); *id.* at 619 (agency justified uniform treatment of acute care hospitals "by detailing the factors that supported generalizations"); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 193 (1956) (rule limiting the number of broadcasting stations that could be owned by an applicant for a broadcast license rested on general concerns about "overconcentration of broadcasting facilities" that were not specific to particular applicants).

[3] *See, e.g.*, Pl. Br. at 39 n.19 (contrasting unemployment rates in the District's Ward 7, Ward 8, and the interstate LMA that includes the District).

| SUPPLEMENTAL RULES CHALLENGED IN CASES CITED BY USDA | USDA RULE CHALLENGED IN THIS CASE |
|---|---|
| Rule does not determine the end result of the agency's decision-making process. Rule only addresses a single issue, while the agency uses adjudication to address other material issues in making the final decision.[4] | Rule determines the end result of the agency's decision-making process.[5] |
| Rule applies to only a small subset of parties governed by the pertinent statutory provision. The agency regulates the majority of parties through individualized adjudication.[6] | Rule applies to all parties governed by the pertinent statutory provision and forecloses individualized adjudication in all but exceptional circumstances.[7] |
| Rule promotes efficiency without sacrificing fairness, because it addresses an issue that will not vary from case to case. Continuously re-adjudicating the issue would be needless effort that would benefit no one.[8] | Rule uses a uniform standard to address an issue that will vary from case to case. Agency will—and intends to—reach different results under the rule than it would if it adjudicated waiver applications individually.[9] |

[4] *Heckler*, 461 U.S. at 460-61, 467 (agency's disability-benefits determination rested on a two-step decision in which the first step required a "determination of historic facts" through "findings on the basis of evidence adduced at a hearing" and the challenged rule addressed only the second step of the decision); *Am. Hosp. Ass'n*, 499 U.S. at 613 (explaining that the agency must adjudicate "a host of other issues" separate and apart from the specific collective-bargaining issue addressed by the rule).

[5] Pl. Br. at 11-15.

[6] *Am. Hosp. Ass'n*, 499 U.S. at 608 (rule applied only to collective bargaining units for acute care hospitals, whereas the agency otherwise regulated collective bargaining units for all other "line[s] of commerce" through adjudication); *see also id.* at 618 (noting that the rule "does not apply to many facilities, such as nursing homes, blood banks, and outpatient clinics"); *Storer*, 351 U.S. at 193, 202 (rule applied only to broadcast license applicants that had an ownership interest in a specified number of other stations, whereas the agency accorded most applicants a "full hearing" giving "every party . . . the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts").

[7] Pl. Br. at 11-12.

[8] *Heckler*, 461 U.S. at 468 (rule addressed a "general factual issue [that] may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing"); *id.* ("To require the Secretary to relitigate" the general factual issue "at each hearing would hinder needlessly an already overburdened agency"); *Storer*, 351 U.S. at 205 (rule prevented "wast[ing] time on applications that do not state a valid basis for a hearing"); *id.* at 202 (rule was promulgated to facilitate "orderly conduct of [the agency's] business").

[9] Proposed Rule, 84 Fed. Reg. 980, 981 (Feb. 1, 2019) (USDA intends new rule to "ensure that the waivers are applied on a more limited basis"); Final Rule, 84 Fed. Reg. 66,782, 66,807 (Dec. 5,

| SUPPLEMENTAL RULES CHALLENGED IN CASES CITED BY USDA | USDA RULE CHALLENGED IN THIS CASE |
|---|---|
| Rule implements express congressional intent for the agency to use rulemaking to regulate the specific subject matter at issue.[10] | There are no indicia of congressional intent for the agency to use rulemaking to regulate the specific subject matter at issue. |
| Rule gives regulated parties a broad opportunity to obtain an exception to the rule (and have individualized adjudication instead) by demonstrating that the agency should not apply the rule to them.[11] | Rule gives regulated parties a strictly limited opportunity to obtain an exception to the rule (and have individualized adjudication instead) by demonstrating that the agency should not apply the rule to them.[12] |

### D. USDA Tacitly Concedes That the Court Need Not Reach the Question of *Chevron* Deference if the Agency Construed the Statute in the Wrong Procedural Context.

Plaintiffs' opening brief established that because USDA conducted any statutory interpretation in the wrong procedural context—rulemaking not adjudication—the Court need not even reach the question whether it should apply *Chevron* deference to the rule that is the fruit of

2019) (new rule would cause approximately 77 percent of counties to lose waiver, resulting in the loss of benefits by 688,000 individuals).

[10] *Heckler*, 461 U.S. at 466 (rule addressing criteria for proving disability, promulgated under the agency's statutory authority to "'regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same' in disability cases") (citation omitted); *Am. Hosp. Ass'n*, 499 U.S. at 617 (rule addressing acute-care hospitals, promulgated under statute with legislative history stating that if the agency "did not give appropriate consideration" to issues specific to such hospitals "Congress might respond with a legislative remedy"); *see also id*. at 610, 613 (holding that applicable statutory language did not require adjudication of the acute-care hospital issue addressed by the rule); *Storer*, 351 U.S. at 202 & n.11 (stating that broadcast-licensing rule allowed the agency to "deny[ ] a license to operate a station in ways contrary to those that the Congress has determined are in the public interest" and citing other statutory provisions to evidence that congressional determination).

[11] *Heckler*, 461 U.S. at 467 (rule "afford[ed] claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them"); *Storer*, 351 U.S. at 201 & n.10 (regulated party could obtain waiver of, or exception to, rule by "show[ing] the nature of the waiver or exception desired and set forth the reasons in support thereof"); *see also Heckler*, 461 U.S. at 467 n.11 (stating that *Storer* was "careful to note that the statutory scheme at issue allowed an individual applicant to show that the rule promulgated should not be applied to him") (citing *Storer*, 351 U.S. at 205.).

[12] Pl. Br. at 12 n.8.

that (inapplicable) rulemaking process. The *Chevron* deference question would only arise if the agency had conducted any statutory interpretation in an adjudication (which it has not). Pl. Br. at 21. USDA does not even attempt to respond to this argument. Accordingly, USDA has tacitly conceded that *Chevron* deference is not pertinent here if Plaintiffs are correct that the agency had no statutory authority to displace adjudication with rulemaking. It will be too late for USDA to argue otherwise in their reply brief. *See, e.g.*, *Performance Contracting*, 267 F.R.D. at 425.

Given this concession and the other arguments discussed above, the Court should enter judgment for Plaintiffs, and deny summary judgment for Defendants, on the ground that USDA's rule was a final agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

## II. THE USDA RULE IS ARBITRARY AND CAPRICIOUS.

### A. The Rule is Arbitrary and Capricious Because It Relies Solely Upon an Unemployment Rate to Establish Whether ABAWDs Have Sufficient Job Opportunities in the Areas Where They Reside.

USDA's entire rationale for using a general unemployment rate as the sole waiver-approval criterion rests on a faulty premise: USDA entirely fails to recognize that the criterion must assess whether an area *lacked sufficient jobs for ABAWDs*. USDA does not come close to demonstrating that it meets that requirement through its exclusive reliance on a general unemployment rate. USDA uses the general unemployment rate to replace longstanding agency guidance and practice permitting the agency to consider probative evidence of job opportunities for ABAWDs—even though USDA continues to acknowledge that this data can be sufficient proof of the lack of sufficient jobs. Final Rule, 84 Fed. Reg. at 66,799 (citing 7 C.F.R. § 273.24(f)(6)).

**1. Longstanding Agency Practice Does Not Provide a Rationale for Relying Solely on an Unemployment Rate.**

USDA misstates and obscures Plaintiffs' argument by asserting that all previously-granted waivers would be invalid if the statute prohibited USDA from relying on a general unemployment rate. Defs' Br. at 22. While an unemployment rate can be *one* criterion considered in determining job opportunities for ABAWDs, the Final Rule is arbitrary and capricious because it relies *solely* on an unemployment rate to grant or deny waivers. The Final Rule does not adequately address numerous comments highlighting the ways that a general unemployment rate fails to account for ABAWDs' employment challenges, choosing instead to reject provisions in the current regulation that do address them. Pl. Br. at 25-27.

Unlike the Final Rule, the current regulation allows use of an unemployment rate as a basis to grant waivers, not to limit and deny access to waivers. *See* Pl Br. at 19-21. The current regulation uses an unemployment rate to define a category of applications that USDA will automatically grant, because the agency does not contest that the waivers are justified. Put another way, the current rule uses an unemployment rate as a metric to define the point at which the agency agrees there definitely are insufficient jobs for ABAWDs. *Id.* However, the Final Rule is fatally defective, because it also deletes the current rule's entitlement to an individualized adjudication of applications that are not automatically granted based on an unemployment rate. *See Sullivan v. Zebley*, 493 U.S. 521 at 525, 541 (1990). The Final Rule is arbitrary and capricious because of this fatal flaw.

To the extent longstanding practice is relevant, the consistent practice was to accept all manner of evidence proving that an area *lacks sufficient jobs for ABAWDs.* 7 C.F.R. §§ 273.24(f)(2), (f)(2)(ii) (2019)). The Final Rule is arbitrary and capricious, because it does not provide an adequate rationale for departing from that longstanding practice.

### 2. USDA Has Not Provided a Rationale Adequate to Justify the U-3 Unemployment Rate as a "Reasonable Approximation" of ABAWD Job Opportunities Based Upon the "Most Reliable Data Available."

USDA also has not provided a rationale adequate to justify an unemployment-rate criterion as a "reasonable approximation" of ABAWD opportunities. USDA centers its arguments on the wholly unsurprising proposition that an agency is not required to find the one criterion that perfectly measures a characteristic with scientific exactitude. *See* Defs' Br. at 22-24, 45. Plaintiffs do not dispute that the agency is permitted to "make 'reasonable approximations' based on the 'most reliable data available.'" *Baystate Franklin Medical Center v. Azar*, 950 F.3d 84, 92 (D.C. Cir. 2020) (quoting *Methodist Hospital of Sacramento v. Shalala*, 38 F.3d 1225 at 1235 (D.C. Cir. 1994)). However, USDA cites to nothing in the record supporting its assertion that the U-3 unemployment rate (which establishes the Final Rule's waiver criterion) is the "most reliable" available evidence of sufficient job opportunities for ABAWDs. *See* Defs' Br. at 23-24, 42-49. The agency's conclusory assertion renders the Final Rule arbitrary and capricious. *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (agency decision was arbitrary and capricious because it merely "[n]od[ded] to concerns raised by commenters only to dismiss them in a conclusory manner."); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("The Commission's failure to respond meaningfully . . . renders its decision to use the median rate arbitrary and capricious.").

#### a. USDSA Failed to Address Significant Comments Demonstrating That a General Unemployment Rate is Not the "Most Reliable Data" Regarding ABAWD Job Opportunities.

The Final Rule also is arbitrary and capricious, because USDA did not adequately consider major comments demonstrating that the U-3 unemployment rate is in fact *not* the "most reliable

data available to the Secretary." *Methodist Hosp. of Sacramento*, 38 F.3d at 1230.[13] USDA failed to address significant comments outlining the challenges ABAWDs face in obtaining employment, which make the general unemployment rate an *unreliable* criterion. Commenters enumerated numerous factors that make ABAWDs unrepresentative of the general public (whose job opportunities are measured by the U-3 rate). Pl. Br. at 31-32 (citing comments demonstrating how the U-3 unemployment rate systemically undercounts those seeking employment). USDA acknowledges these factors but then ignores them without a supporting rationale. Final Rule, 84 Fed. Reg. at 66,787.

USDA relies on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) to support its position. USDA's reliance is misplaced. In *Vermont Yankee*, the Supreme Court stated, "Not only did the record before the agency give every indication that the project was actually needed, but also there was nothing before the Board to indicate to the contrary." *Id*. at 553. Here USDA is missing half of its support. Nothing in the record supports the use of the U-3 rate as the sole basis (or even an appropriate or reliable basis) for determining that an area lacks sufficient jobs for ABAWDs. Rather the record is replete with evidence to the contrary—demonstrating that

[13] USDA makes more of its cited authority than is warranted. In *Methodist Hosp. of Sacramento*, the parties actually agreed that the Secretary had used the most reliable data available—an agreement that is not present here. 38 F.3d at 1230 ("[t]he parties d[id] not dispute that the wage index . . . made use of the most reliable data available to the Secretary ***at the time of publication***." (emphasis added)). The other cases USDA cites also are distinguishable. In *USW v. Marshall*, the Court based its analysis on explicit statutory language requiring that the agency must use the "best available evidence." 647 F.2d 1189, 1266 (D.C. Cir. 1980) (quoting 29 U.S.C. § 655(b)(5)). Such language does not exist in the statute at issue here. Further, *Indus. Union Dept., AFL-CIO v. Hodgson* states that "[w]here existing methodology or research in ***a new area of regulation*** is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." 499 F.2d 467, 474 n.18 (D.C. Cir. 1974) (emphasis added). SNAP cannot plausibly be called a *new* area of regulation.

the U-3 rate is not a reliable basis for determining that an area lacks sufficient jobs for ABAWDs; evidence that USDA simply ignored. As a result the Final Rule is arbitrary and capricious.

**b. USDA Did Not Establish That the U-3 Rate Was the "Most Reliable Data" Simply by Tying the Rate to LMA Waiver "Areas".**

USDA relies on the Final Rule's definition of LMAs as waiver "areas" to justify use of the U-3 unemployment rate, on the ground that no other yardstick would be available on a "substate" basis. *See* Def's Br. at 43-46. But the "area" chosen has nothing to do with data reliability. And USDA's choice of LMAs as "areas" was itself arbitrary and capricious, as discussed below.

**B. The Rule Arbitrarily and Capriciously Limits the Geographic Scope of Waivers to Labor Management Areas Established by the Labor Department.**

Plaintiffs' opening brief established that USDA acted arbitrarily and capriciously in selecting one BLS designation (LMA) as a waiver "area" and excluding another (LSA). This Court agreed, properly concluding in its Preliminary Injunction opinion that USDA "embraced DOL data inconsistently" and failed to rationally explain that preference. Mem. Op. at 31, n.12. When an agency deviates from prior policy, as USDA did here, "its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alterations in original) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). USDA's opposition falls far short of proving that the agency has met that requirement. USDA mischaracterizes Plaintiffs' arguments as a critique of the agency's end result (i.e., the choice of LMAs) instead of as a critique of the analysis and rationale underlying that end result. Defs' Br. at 58–59. And USDA does not even respond to Plaintiffs' specific arguments about the substantial flaws in the agency's analysis and rationale: (1) exclusively confining waiver areas to LMAs while acknowledging that LMAs are created using outdated commuting data (Pl. Br. at 34-35;

ABAWD00000463-64); (2) inconsistently embracing DOL data (in favor of an outcomes-driven approach) (Pl. Br. at 35-37); and (3) basing employment opportunities in the District of Columbia on job opportunities primarily outside of the District (Pl. Br. at 37-42). It will be too late for USDA to respond to these arguments in its reply brief. *Benton*, 121 F. Supp. 3d at 51; *Performance Contracting*, 267 F.R.D. at 425.

Instead of grappling with Plaintiffs' individual arguments, USDA responds with two blanket assertions, neither of which is persuasive. *First*, USDA asserts that Plaintiffs "compare apples and oranges" in analyzing USDA's shift from encouraging, to excluding, LSAs as waiver areas—on the ground that "LSAs are not themselves a geographical concept." Defs' Br. at 58. There is no basis for that assertion. A "civil jurisdiction," as applied to an area (a Labor Surplus *Area*), is inherently a geographical concept. Indeed, an LSA could not be inconsistent with LMA boundaries if it were not a geographical concept. USDA concedes as much. Defs' Br. at 43. ("LSA designations 'are often geographically inconsistent' with LMAs . . . ."). It is of no moment that an LSA must be "designated."

*Second*, USDA argues that the regulation must exclusively define an "area" as an LMA because it is the only DOL designation that specifically accounts for commuting patterns. Defs' Br. at 58 n.2. If USDA had not displaced the adjudication process with a prospective categorical rule, there would be no need to attempt to find a "one-size-fits-all" definition of "area" that covers the broad variety of commuting patterns throughout the country. Adjudications would permit States to submit additional data—such as academic or other studies—that could explain current commuting trends (not those from 2006) as they apply to ABAWDs. Furthermore, USDA does not contemplate that since LSAs are smaller than LMAs, they must necessarily encompass jobs within some commuting distance. Nevertheless, USDA defines LMAs as the sole unit of

measuring waiver "areas" due to its unsubstantiated preoccupation with "gerrymandered" waiver requests. Mem. Op. at 37 (citing *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006)) ("Professing that an [agency action] ameliorates a real . . . problem but then citing no evidence demonstrating that there is in fact a[ ] . . . problem is not reasoned decisionmaking.").[14]

While LMAs ostensibly consider commuting patterns, USDA oversells LMAs' significance as applied to ABAWDs. USDA claims that DOL can include an outlying county in a metropolitan LMA if residents of one county commute to another part of the LMA in sufficiently high numbers. Defs' Br. at 58 n.26. Yet DOL's definition of "sufficiently high numbers" underlying an LMA requires that "*at least 25%* of the employed residents of *one county* commuted to work in another county" and "*at least 25%* of the employment in *one county* [was] accounted for by workers' commuting from one county to another." ABAWD00000464 (emphasis added).

[14] To explain the devastating impact the USDA rule would have on Plaintiffs and others in the District, Plaintiffs' opening brief cited to unemployment statistics and the Declarations of the individual Plaintiffs (Damon Smith and Geneva Tann). USDA argues unpersuasively that the Court should not consider this information because it is not within the administrative record. Defs' Br. at 42 n.20. The Declarations and unemployment statistics document continuing harm under the rule, arising from the inability of the District to get a waiver, even under the devastating economic conditions visited by the pandemic. *See, e.g.*, Pl. Br. at 40 n.21. At a minimum, these facts go to standing. It is well established that the Court can consider extra-record evidence supporting standing in an APA case. *See, e.g., Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, 78 F. Supp. 3d 208, 217 (D.D.C. 2015) (citing *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). Other extra-record information is offered simply as background information, which is another exception to the administrative-record limitation in an APA case where, as here, it is offered to demonstrate that the agency failed to consider the factors that it should have. *See, e.g., Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). Here, among other things, USDA failed to consider the possibility that a future event like the current pandemic might destroy the generally favorable economic conditions prevailing at the time the rule was proposed and finalized. *See, e.g.*, Final Rule, 84 Fed. Reg. at 66,787 (emphasizing that the general unemployment rate from May 2017 through June 2019 was 3.9%). Extra-record facts regarding the impact of the pandemic demonstrate dramatically how short-sighted USDA's assumptions were (and how ill-suited the Final Rule is for the current economic circumstances faced by ABAWDs).

That is a standard that could not conceivably describe commuting patterns of ABAWDs, given the significant transportation barriers that they face.[15]

Furthermore, it appears that DOL adds a city or county to an LMA's "economically linked area" if the 25-percent commuting threshold is satisfied in only *one* of the adjacent cities or counties already included in the LMA. It is mathematically impossible for 25 percent of the population in one area to commute to, and find employment in, every area in the District's 17-county LMA. DOL states only that (1) the areas must be contiguous and (2) the employment in *one county* must be accounted for by at least 25 percent of residents in another single county. Yet USDA acknowledges that ABAWDs "who live near the urban core of a metropolitan LMA" are not expected to "commute to the outer boundaries of the LMA to find work," and "it is common sense that areas near urban centers tend to have the largest quantity of available jobs in the LMA." Defs' Br. at 58 n.26. As applied to the District's LMA, that rule attenuates even further any relationship between the whole LMA's unemployment rate, on the one hand, and ABAWD job opportunities in the District, on the other. It therefore is arbitrary and capricious for USDA to consider those outlying areas' unemployment rates in evaluating job opportunities for ABAWDs in the District. Defs' Br. at 58 n.26. Yet USDA ties the States' hands and allows only LMA data to be considered.

[15] The failure to consider the lack of access to transportation of ABAWDs would harm Ms. Tann and Mr. Smith, both of whom are low income and rely on public transportation. *See* Tann Decl., Dkt. 4-5, at ¶ 12; Smith Decl., Dkt. 4-4, at ¶ 17. One study found that, like Ms. Tann (Tann Decl., Dkt. 4-5, at ¶ 12), 40 percent of ABAWDs lack access to "reliable transportation," and like Mr. Smith (Smith Decl., Dkt. 4-4, at ¶ 17), 60 percent do not have valid driver's licenses. *See* Comprehensive Report on Able-Bodied Adults Without Dependents, Franklin County, Ohio Work Experience Program, Ohio Association of Foodbanks (2015), at 8, available at: http://admin.ohiofoodbanks.org/uploads/news/ABAWD_Report_2014-2015-v3.pdf. Center on Budget Priorities Comment, at ABAWD00110142. Thus, implementation of the final rule poses continuing harm to them.

Finally, USDA focused on commuting patterns because "unlike individual jurisdictions, which turn on invisible boundaries that people can and do cross for work, LMAs incorporate the economic reality of commuting in an attempt to define [a] job market." Defs' Br. at 56. But the USDA rule's reliance on LMAs creates invisible lines too. USDA simply shifts the invisible lines based on an undefined (yet allegedly substantial) number of individuals that commute elsewhere for work. Individuals at the outer boundaries of an LMA are *also* free to look outside the LMA for job opportunities. USDA has not demonstrated that its choice of LMAs was the product of well-reasoned decisionmaking.

### C. The Final Rule is Arbitrary and Capricious Because USDA Did Not Adequately Explain Its Justification for Refusing to Include Extended Unemployment Benefits as a Factor for Evaluating ABAWD Job Opportunities.

USDA engaged in classic arbitrary and capricious decision-making when it failed to provide an adequate justification for abandoning the consideration of extended unemployment benefits in waiver decisions. In the Proposed Rule, USDA emphasized that it would continue considering extended unemployment benefits because they have "been a clear indicator of lack of sufficient jobs and an especially responsive indicator of sudden economic downturns, such as the Great Recession." Proposed Rule, 84 Fed. Reg. at 985. In the Final Rule, USDA failed to articulate a rational basis for abandoning this important criterion.

USDA's Opposition offers a single justification: that the "extended unemployment benefits qualification conflicts with Rule's general bar on statewide waivers as insufficiently tied to job markets." Defs' Br. at 43 (citing Final Rule, 84 Fed. Reg. at 66,789-90). USDA then argues that it "did not act irrationally by relying on its interpretation of the waiver 'area' in rejecting" extended unemployment benefits as a criterion, on the ground that "consistency in the application

of an interpretation is a significant factor in determining the reasonableness of agency action." *Id.* USDA's arguments are unavailing.

*First*, USDA relies upon an unproven premise. USDA argues that its definition of "area" requires that extended unemployment benefits be eliminated as a criterion and to do otherwise would require an inconsistent application of USDA's interpretation of "area." *See* Def. Mem. Opp. at 43. Yet USDA makes no attempt in the Final Rule, or its opposition briefing, to explain how using extended unemployment benefits as a criterion requires such an inconsistency. Because USDA does not tether the decision to exclude extended unemployment benefits to the definition of "area" its decision to omit the criterion was arbitrary and capricious.

*Second*, USDA fails to explain why such statewide information—which by the agency's own assessment is "a clear indicator of lack of sufficient jobs" (84 Fed. Reg. at 985)—could never be relevant or probative evidence of ABAWD job opportunities in a substate area. USDA's Opposition is internally inconsistent on this point. USDA rejects use of extended unemployment benefits on the ground that they are an inexact measurement of job sufficiency for a substate area, yet earlier in its briefing, USDA advocates utilizing a less exact measurement—an unemployment rate for the general public—to define sufficient jobs. *See* Def. Opp. Br. at 19-28, 43.

In *Mississippi Commission on Environmental Quality v. EPA*—USDA's sole support for its rationale—the Court noted that "the EPA must adequately explain why it declined to rely on [more recent] data." 790 F.3d 138, 160 (D.C. Cir. 2015). Here USDA had an obligation to explain why it abandoned extended unemployment benefits as a criterion in waiver decisions. USDA's failure to provide a well-reasoned explanation of this substantial change in position rendered the Final Rule arbitrary and capricious. *See e.g.*, *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1105

(D.C. Cir. 2019) (finding agency's actions arbitrary and capricious for "not providing a reasoned explanation for its change of policy that is supported by record evidence.").

## III. USDA'S ELIMINATION OF EXTENDED UNEMPLOYMENT BENEFITS AS A WAIVER CRITERION VIOLATES NOTICE AND COMMENT REQUIREMENTS.

Plaintiffs' opening brief demonstrated that USDA violated notice and comment requirements when it did not provide proper notice before eliminating extended unemployment benefits as a waiver criterion. Pl. Br. at 44-45. USDA responds by asserting that the Final Rule is a logical outgrowth of the Proposed Rule, but USDA interprets that standard much too broadly. Simply invoking words such as "revise" and "change" does not allow the agency to "justify any final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy 'notice.'" *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

### A. USDA's Cited Cases Are Distinguishable

USDA relies on two cases to argue that an agency's refusal to adopt its proposal is *always* a logical outgrowth of the proposal. *See* Defs' Br. at 67. Both cases are distinguishable. In *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), the Court noted that it was the "status quo ante" that provided "two readily foreseeable outcomes that could result from the proposal." *Id*. at 44. Here the use of the extended unemployment benefits criterion (which the Proposed Rule proposed continuing to use) *is* the status quo ante. In *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), the Court held that EPA's Final Rule was a logical outgrowth of its proposed rule because it gave adequate notice to the public to comment on judicial review provisions, and the final rule was not "wholly unrelated or surprisingly distant from what EPA initially suggested." *Id*. at 1299. USDA's Final Rule was a much farther leap from the Proposed Rule, which proposed continuing use of a criterion unexpectedly abandoned in the Final Rule.

Furthermore, in both of USDA's cited cases the agency received extensive comments on the proposal, signifying that public notice was adequate. *See New York v. EPA*, 413 F.3d at 44 ("EPA received *extensive* comments on all aspects of the rule, including whether to integrate elements into . . . requirements.") (emphasis added); *Ariz. Pub. Serv. Co.*, 211 F.3d at 1300 (noting that EPA's proposal "elicited responses from both tribal and industry commenters."). By contrast, for the Proposed Rule at issue here, USDA "did not receive many comments with regard to retaining the extended unemployment benefits standard" and cited to all but one comment as "supportive" of retaining the standard. Final Rule, 84 Fed. Reg. 66,789; Pl. Br. at 16, fn.16. USDA's cited cases do not prove that its decision here—to do the opposite of its proposal—constitutes a logical outgrowth. And numerous other cases do prove that there was no logical outgrowth here.[16]

### B. USDA's Reliance on Particular Words Does Not Grant an Unlimited License to Make any Alterations to the Proposed Rule.

Using words such as "amend," "change," and "revisions" (indicia, USDA argues, of the agency's proposed "wholesale revision to its waiver criteria") was not enough to give adequate

[16] *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108-09 (D.C. Cir. 2014) (rejecting logical outgrowth argument for more reasons than just the word "clarify" but also because "[t]here is nothing in the text of the notice . . . to suggest that the Secretary was thinking of reconsidering a longstanding practice . . . . [W]ould a reasonable member of the regulated class—even a good lawyer—anticipate that such a volte-face with enormous financial implications would follow the Secretary's proposed rule."); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (noting that despite the fact that the "[Notice of Proposed Rulemaking] proposed several revisions to the existing system, it nowhere even hinted that the Board might consider expanding the number of years from which comparison groups could be derived."); *Envtl. Integrity Project*, 425 F.3d at 994-95, 998 (agency was codifying prior interpretation; however, court noted that logical outgrowth "certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse"); *Int'l Union, UMW of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-61 (D.C. Cir. 2005) (similar to the instant matter, "no comments suggested a maximum velocity cap of 500 fpm," which demonstrated that the final rule was not a logical outgrowth of the proposal to set minimum permissible rates.).

notice to the public for the specific change of excluding "extended unemployment benefits qualifications in the new waiver criteria." *See* Defs' Br. at 68. If words such as "amend" and "change" permitted agencies to make *any* wholesale revision in a finale rule, the logical outgrowth requirement would lose its meaning. A logical outgrowth requires a much more specific indication of the amendment or change proposed, to give the public an adequate opportunity to comment.

For example, in *Abington Memorial Hospital v. Burwell*, the Court found that the agency did more than just say "revise" and "changes" in putting the public on proper notice that broad changes were being proposed to the methodology and data hospitals would use to obtain Medicare reimbursement. 216 F. Supp. 3d 110, 131-32 (D.D.C. 2016) (noting that the agency, in addition to stating that it was "clarifying" existing policy, "also (1) repeatedly and explicitly referenced 'revis[ions]' and 'changes [to] the wage data . . .'; (2) specifically directed that hospitals would henceforth have to submit wage data pursuant to Medicare program instructions . . . and (3) unmistakably decided to authorize a delay in implementation, thereby indicating the agency's belief that things were changing." *Id*. at 133 (alterations in original) (citation omitted)). By contrast, USDA's proposal did not refer to any potential change to the consideration of extended unemployment benefits and certainly did not propose a delay in implementation to signal the scale of alterations it would make. *See* Proposed Rule, 84 Fed. Reg. at 985.

In sum, USDA's analysis does not prove adequate notice, because it requires too many inferential steps between its Proposed and Final Rule. USDA argues that maintaining extended unemployment benefits as a criterion "was in obvious tension" with its directive to "drastically curtail the availability of statewide waivers." Defs' Br. at 68; *see also* Proposed Rule, 84 Fed. Reg. at 985. But USDA has never suggested that its Proposed Rule was internally inconsistent. Here there was no "blunder [in] the proposed rule, [for which] a simple retreat to the status quo

ante can properly be viewed as logical outgrowth of the proposed rule." *American Iron and Steel Institute v. EPA*, 886 F.2d 390, 400 (D.C. Cir. 1989) (citation omitted). To the contrary, USDA's Proposed Rule advocated continuing the status quo, and the Final Rule marked a dramatic change, not a "retreat" to the status quo. The Court should conclude that USDA failed to comply with notice and comment requirements, because the Final Rule was not the logical outgrowth of the Proposed Rule.

## CONCLUSION

The Court should grant the Private Plaintiffs' motion for summary judgment and deny Defendants' cross-motion for summary judgment. The Court should issue a declaratory judgment holding that Final Rule is unlawful and set it aside.

Respectfully Submitted,

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