UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Civil Action No. 1:20-cv-00119-BAH
BREAD FOR THE CITY, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Civil Action No. 1:20-cv-00127-BAH

REPLY IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

USDA promulgated the Final Rule at issue in this litigation to remedy the substantial weaknesses in the 2001 Regulation that became apparent in administering the waiver program, as States were submitting requests that were inconsistent with congressional intent.[1] To that end, the Final Rule redefines waiver areas to correspond to the best available geographic delineation of job markets; revises the waiver criteria to correspond to that new delineation and to rely on standardized, reliable data; and limits the indefinite accumulation and retention of unused discretionary exemptions, while still affording States flexibility to deal with unforeseen circumstances. Plaintiffs oppose these changes because they want continued freedom to define eligibility as they see fit, even if Congress never intended the program to operate in such a fashion. The APA does not mandate such a result.

First, the text and context of the PRWORA and the BBA make clear that Congress afforded USDA substantial discretion to define when and how waivers should be granted and to regulate the allocation and retention of discretionary exemptions. It is equally clear that the regulatory choices USDA made in the Final Rule are within the range of reasonableness under that discretion. The decisions to use a waiver criterion—general unemployment rates—that USDA has used for decades without controversy and to eliminate other criteria because they either do not correspond to the waiver area, are ambiguous, or are less standardized and reliable than metrics based on BLS data are, at a minimum, consistent with USDA's authority under the PRWORA. The decision to link waiver areas to job markets and to select the best available delineation for that purpose was also consistent with USDA's broad authority. And USDA's restriction of the indefinite carry over of discretionary exemptions is, as this Court has found, consistent with the provisions of the BBA.

[1] All defined terms used herein their definitions from Defendants' opening Memorandum.

Second, USDA's regulatory choices also pass muster under the APA's deferential arbitrary and capricious standard. Plaintiffs do not meaningfully explain why, if it was reasonable under the 2001 Regulation for USDA to make determinations about ABAWD job sufficiency in hundreds of waivers by looking *solely* to metrics based on general unemployment rates, it is now unreasonable for USDA to rely on general unemployment rates as a proxy for ABAWD job availability. Their criticisms of the LMA definition of a waiver area fall flat, given that Plaintiffs do not dispute that USDA could consider the reality of commuting when designing the waiver area and that the record is devoid of any more reasonable alternative delineation that also factors in commuting. Further, USDA's restriction of the indefinite carry over of discretionary exemptions was justified because it was based on USDA's understanding of congressional intent and the findings of USDA's OIG. And Plaintiffs' remaining challenges—that USDA ignored potential impacts of the Rule and failed to provide a meaningful opportunity to comment—are meritless for the reasons previously explained.[2]

ARGUMENT

I. THE FINAL RULE IS NOT CONTRARY TO LAW.

The text of 7 U.S.C. § 2015(o)(4) demonstrates that Congress delegated substantial discretion to USDA to construe the provisions at issue in this case. The term "area" is ambiguous at *Chevron* step one. *See Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1164 (D.C. Cir. 2015). "The phrase 'sufficient number of jobs to provide employment for the individuals'" is as well, "especially when

[2] Defendants' Consent Motion for an Enlargement of the Page Limits for this Reply (ECF No. 102) remains pending before this Court as of the time of the filing of this Reply. Pursuant to § 2 of the Court's Standing Order (ECF No. 6), Defendants were uncertain whether contacting the Court, even jointly with Plaintiffs, was permitted. Accordingly, Defendants have filed this Reply of 35 pages, as their Consent Motion remains pending. In the event that the Court denies their Consent Motion, Defendants respectfully request an additional two days to file a single reply consistent with the ordinary page limits under the Local Rules, to which Plaintiffs do not object.

read in light of the context, which signals congressional intent to delegate aspects of waiver determinations to the agency: 'the Secretary *may waive*' the work requirements if 'the Secretary makes a determination that the area in which the individuals reside does not have a sufficient number of jobs to provide employment for the individuals.'" *District of Columbia v. U.S. Dep't of Agriculture*, 444 F. Supp. 3d 1, 24 n.13 (D.D.C. 2020), [hereinafter *D.C.*] (quoting 7 U.S.C. § 2015(o)(4)), *appeal docketed*, No. 20-5136 (D.C. Cir. 2020). Despite conceding that the "statute's express language does not reveal Congress's intent," the State Plaintiffs suggest that the "traditional tools of statutory construction" may override the ambiguity apparent in the statutory text. State Opp'n at 7.[3] But they never explain how § 2015(o)(4) requires the statutory interpretation that the State Plaintiffs proffer or how that supposedly unambiguous interpretation is consistent with the statutory structure. *See* Defs.' Mem. at 17-19. This Court should reject those efforts and conclude that USDA's construction of the statute—one that effectuates the intent of the PRWORA—is "within the bounds of reasonable interpretation." *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

A. Unemployment Rates Continue to be a Reasonable Metric for Determining if an Area Has Sufficient Jobs for ABAWDs.

The phrase "sufficient number of jobs" is not unambiguous. Nothing in the statute directs USDA to define a "sufficient number of jobs" in any particular way. *Id.* at 18-20. As such, it is a textbook example of an ambiguous statute, which reflects Congress's intent to delegate the authority to define the contours of the waiver program.

For the first time in this litigation, the State Plaintiffs argue that because § 2015(o)(4)(A)

[3] In this Reply, Defendants cite Defendants' Cross-Motion for Summary Judgment (ECF No. 92) as "Defs.' Mem.," the BFC Plaintiffs' Opposition to that Motion (ECF No. 95) as "BFC Opp'n," and the State Plaintiffs' Opposition to that Motion (ECF No. 96) as "State Opp'n."

uses the "present tense" when authorizing a waiver if the Secretary finds that an area "has" a 10% unemployment rate or "does not have" a sufficient number of jobs, USDA cannot use a waiver criterion based on a 24-month window in deciding whether to issue waivers. State Opp'n at 8. Putting aside the question why this argument has not appeared until this stage if it so clearly bars USDA from continuing to implement this longstanding policy, Plaintiffs' "argument confuses the rule"—that the Secretary must determine whether there is presently a lack of sufficient jobs before choosing to issue a waiver for that area—with USDA's "analysis of whether that rule was satisfied." *See Mont v. United States*, 139 S. Ct. 1826, 1834 (2019). Under the 2001 Regulation, USDA has *always* required an area to have a 24-month period of high unemployment before issuing a waiver under § 2015(o)(4)(A)(ii) based on the 20% standard. *See* Final Rule, 66 Fed. Reg. 4438, 4462 (Jan. 17, 2001) (requiring proof of "24 month average unemployment rate that exceeds the national average by 20 percent for any 24-month period"). It would make little sense for a waiver to be granted to an area that has a short-term spike in unemployment rates, when that deviation may be an outlier for the area that is unlikely to recur, particularly when waivers are routinely granted for a yearlong period. *See* Proposed Rule, 64 Fed. Reg. 70920, 70945 (Dec. 17, 1999) ("data must cover a certain period before a waiver will be granted" because "[u]nemployment rates fluctuate from month to month.").

The State Plaintiffs' focus on the purportedly impermissible use of a 24-month window to "den[y]" waivers, State Opp'n at 8—presumably as opposed to the permissible use of a 24-month window to approve waivers—fares no better. Section 2015(o)(4)(A) sets conditions precedent that must be satisfied before the Secretary can choose to grant a waiver. If a 24-month window is inconsistent with the present conditions in an area, then granting waivers based on a 24-month average unemployment rate would be just as impermissible as denying them.

USDA's interpretation is within the range of reasonableness. At *Chevron* step two, the State Plaintiffs return to their theme that the statute prohibits the use of unemployment rates for the general population. Recognizing the difficulty inherent in this argument in light of USDA's longstanding use of such data, the State Plaintiffs argue that even if USDA has long "considered a general unemployment rate in a particular area *sufficient*" to grant a waiver, that "does not mean such data *alone* . . . supports the summary denial of waivers to the exclusion of all other relevant material." State Opp'n at 10. There is no basis to their argument that the PRWORA compels USDA to consider metrics other than what it has determined to be the best available proxy for ABAWD job sufficiency that corresponds to waiver areas.

Plaintiffs' argument flips the statutory scheme on its head. As a reminder, the default assumption under the PRWORA is that individuals should be working when possible, and waivers for able-bodied adults are a "limited exception to th[is] . . . main rule." *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990). USDA therefore cannot grant a waiver under clause (ii) *unless* it "make[s] a determination" that an area has insufficient jobs for ABAWDs. Nothing in this statutory language supports Plaintiffs' contention that USDA lacks discretion to rely only on what it believes is the best available metric in the record that is tailored to the relevant waiver area. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863 (1984) ("The fact that the agency has from time to time changed its interpretation of the term . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute.").

The record is replete with instances where USDA has determined that an area has insufficient jobs based on unemployment rate data *alone*. *See* Defs.' Mem. at 22. If the State Plaintiffs are correct, then the PRWORA precludes USDA from determining job insufficiency based *solely* on a general unemployment rate and requires it to employ a multifaceted examination

of job markets before granting a waiver, which would invalidate hundreds of past determinations made under the prior administrative scheme. But the PRWORA does not require such a result. It leaves those decisions, including what metrics for insufficient jobs best correspond to the overall waiver framework, to USDA's reasonable judgment. And because adjudicating hundreds of past waiver requests based on an unemployment rate alone falls "within the bounds of reasonable interpretation," *City of Arlington*, 569 U.S. at 296, then surely it is within those bounds to use the same proxy moving forward.

What is apparent from the State Plaintiffs' Opposition is that their objection is not really to the use of unemployment rates as a proxy for determining a lack of sufficient jobs under the core standards, but to USDA's limitations on *additional* alternative measures of job insufficiency. However, USDA is obligated to "consider varying interpretations and the wisdom of its polic[ies] on a continuing basis." *Chevron*, 467 U.S. at 863-64. And in doing so, it identified specific problems with each of the other data sources permitted under the 2001 Regulation, which justified USDA's determination that those criteria were, in the main, no longer suitable. *See* Defs.' Mem. at 43-44. Specifically, the criteria omitted from the core standards and other metrics mentioned by commenters, *see* State Opp'n at 24-25, were either incompatible with USDA's new definition of "area" or ambiguous, less standardized, or less reliable than unemployment rates. *See* Final Rule, 84 Fed. Reg. 66782, 66790-791 (Dec. 5, 2019). In contrast, BLS "produces unemployment data that is accurate, objective, relevant, timely, and accessible, and that is generally considered by experts to be reliable and robust evidence for evaluating labor conditions." *Id.* at 66784; *see also id.* at 66791 (revised regulations "provide States with a set of consistent criteria for approval based on reliable and robust available evidence"). The State Plaintiffs point to no "relevant material" before USDA in the rulemaking other than the criteria USDA considered and rejected.

In no way did USDA's choices to omit these criteria from the core standards and rely on the most commonly used proxy under the prior rule "discard the statute's command to answer the sufficient-jobs inquiry for ABAWDs." State Opp'n at 12. Rather, the Final Rule establishes a standard to do just that—one that is consistent with USDA's authority to use proxies for ABAWD job availability, particularly given the undisputed absence of any measure of job availability specific to ABAWDs.[4]

The cases cited by the State Plaintiffs to the contrary are inapposite, as they involve agencies violating the APA by ignoring the type of specific statutory command that does not exist in the waiver provisions of the PRWORA. *See* State Opp'n at 10, 12-13. In *Public Citizen v. Federal Motor Carrier Admin.*, Congress passed a statute directing the agency "to issue 'an advanced notice of proposed rulemaking dealing with a variety of fatigue-related issued pertaining to commercial motor vehicle safety (including . . . *automated and tamper-proof recording devices*).'" 374 F.3d 1209, 1221 (D.C. Cir. 2004) (quoting 49 U.S.C. § 31136 note). Despite proposing to require truck drivers to use electronic onboard recorders ("EOBRs")—a type of automated and tamper-proof device for monitoring compliance with agency rules—the agency ultimately did not require EOBRs in the final rule, in part on the ground that the costs and benefits

[4] The State Plaintiffs half-heartedly attempt to distinguish a series of cases standing for the principle that USDA's construction of the statute must be evaluated in light of plausible alternatives on the record. *See* State Opp'n at 13 n.8, 14 n.9. The State Plaintiffs do nothing more than describe certain factual details of those cases, missing the point entirely. *Id*. They claim that *Baystate Franklin Medical Center v. Azar*, 950 F.3d 84, 86-93 (D.C. Cir. 2020) is distinguishable because "[h]ere, the purported absence of information is not based on a regulated party's failure to timely supply it." State Opp'n at 12. But the absence of information here is based on a failure of not just regulated parties but *anybody* commenting on the Proposed Rule to supply a metric that corresponds to job markets, is more tailored to ABAWDs, and is similarly accurate, objective, timely, and accessible as BLS unemployment rate data. *See, e.g., Champion v. Shalala*, 33 F.3d 966 n.4 (8th Cir. 1994) (agency construction reasonable where "none of the commenters suggested another source of evidence or data.").

of EOBRs were unknown because the agency had not tested existing EOBRs. *Id*. at 1220-21. In dicta, the court concluded that the agency could not wholly refuse to test EOBRs in light of Congress's clear statutory "command" to "deal[] with" such devices. *Id.* at 1221-22 (quoting 49 U.S.C. § 31136 note). In contrast, Congress did not command USDA to consider any specific metric for determining sufficient jobs for ABAWDs. *See id*. at 1221. Moreover, unlike in *Public Citizen*, USDA sought viable alternative metrics for determining job sufficiency through notice and comment, and then explained the problems with plausible alternatives, as explained *supra*.

The State Plaintiffs' reliance on *Cigar Ass'n of America v. FDA*, 964 F.3d 56 (D.C. Cir. 2020), is similarly misplaced. There, the D.C. Circuit held that FDA's failure "even to consider" how a rule "would affect the number of smokers" rendered the rule arbitrary and capricious in light of a clear statutory command that conditioned the FDA's authority to regulate tobacco products on a "finding [that] 'shall take into account' . . . the 'likelihood that existing users of tobacco products will stop using such products.'" *Id.* at 61-63. That case says little about USDA's statutory authority to use proxies for ABAWD job availability, particularly given the obvious relationship between the unemployment rate in a job market and job availability in that market for able-bodied adults—a relationship confirmed by Congress in the PRWORA. Defs.' Mem. at 23; *see also* 84 Fed. Reg. at 66785 (explaining how "6 percent" general unemployment "was a meaningful threshold for economic distress" for "demographics associated with poverty").

The State Plaintiffs' attempt to distinguish *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011) fails. State Opp'n at 13. There the Court found reasonable at *Chevron* step two an agency's easily-administered and ascertainable test for "whether employment predominated over education" which it selected "*to the exclusion of all other factors*." *Id*. (emphasis added). The basic principle that agencies can select reasonable

standards to administer statutory criteria often "to the exclusion of all other" plausible standards, *see id.*, is exactly what the State Plaintiffs suggest USDA may not do here. Just like the plaintiffs in *Mayo*, the State Plaintiffs here are trying to convince the Court that the PRWORA requires USDA to apply different metrics to separate job sufficiency determinations as part of a detailed "case-by-case inquiry." *See id.* at 58-59. That is not required by the PRWORA. "Regulation, like legislation, often requires drawing lines," as USDA did here. *Id*. at 59.

Moreover, the State Plaintiffs continue to discount the non-existence of any ABAWD-specific measure of job availability. *See* State Opp'n at 13-15. Given that there is no way of measuring job availability specifically for ABAWDs, USDA's authority under § 2015(o)(4)(A) necessarily encompasses the ability to select proxies for ABAWD job availability. The State Plaintiffs have not shown how it is outside the scope of USDA's statutory authority to set a proxy that all parties agree can and has been used for this very task since the statute's enactment. *See* Defs.' Mem. at 21-22.

Finally, the State Plaintiffs continue to rely on subsequent legislative history to mischaracterize USDA's discretion to administer the regulatory scheme even though the authority they rely on "was made in the specific context of explaining the Conference Committee's decision to reject the House's [proposals in 2018] and does not purport to bar agency action in the future." *D.C.*, 444 F. Supp. 3d at 18. *See* State Opp'n at 11-12. The statutory scheme "signals congressional intent to delegate aspects of waiver determinations to the agency." *D.C.*, 444 F. Supp. 3d at 24 n.13. The State Plaintiffs point to nothing to suggest that Congress intended to limit USDA's discretion to implement the statute only in the manner adopted under the 2001 Regulation. The 2018 conference committee report that they rely on "struck modifications to the [waiver] criteria" from a House Bill that would have modified the statute to *limit USDA's*

discretion in this area. *See* State Opp'n at 11 (citation omitted). But if Congress had intended to modify USDA's flexibility to administer the waiver requirements by regulation, it would have included language doing so in the final bill that was signed into law. *See INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Disagreement with [an agency's decision]—no less than Congress's original choice to delegate to the [agency] the authority to make a decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President."); *IBEW, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 711-12 (D.C. Cir. 1987); *D.C.*, 444 F. Supp. 3d at 18 ("a congressional command requiring USDA to retain forever into future rulemakings the 2001 regulation's method[s] . . . would need to be clearly stated in the statute").[5] And the President could then have decided whether to exercise his veto authority. *See* Defs.' Mem. at 39-40 (discussing *amici* briefs). But Congress did not do that—perhaps *because* it recognized that removing the agency's flexibility was not the best way to address the House's concerns. Instead, Congress simply retained the longstanding flexibility it conferred on USDA to implement the PRWORA. Congress "acted with a 'scalpel, not a cudgel' to address" the House's concerns, *see* State Opp'n at 12 (quoting *Hearth, Patio*, 706 F.3d at 505), to the extent Congress acted at all,[6] by leaving it to the agency to fix legitimate problems with the waiver

[5] *Hearth, Patio & Barbecue Ass'n v. U.S. Department of Energy*, 706 F.3d 499 (D.C. Cir. 2013), a case the State Plaintiffs cite repeatedly, *see* State Opp'n at 12, 21, is instructive. In that case, the court determined that a Department of Energy rule invalidly regulated the energy efficiency of "[d]ecorative fireplaces" as "direct heating equipment," even though "[d]ecorative fireplaces, of course, were not designed to heat rooms-never mind heat them *efficiently*." 706 F.3d at 505. Congress had made "carefully crafted changes," such that "[h]ad Congress wished to regulate decorative fireplaces, it would have." *Id.* The same is true here. Congress used specific language in PRWORA "delegat[ing] aspects of waiver determinations to the agency." *D.C.*, 444 F. Supp. 3d at 24 n.13. If Congress had instead "wished to regulate" waivers in the way the State Plaintiffs prefer, "it would have." *Hearth, Patio*, 706 F.3d at 505.

[6] "Congress can not express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious

scheme—not by cementing solutions in the statute where they cannot be as easily tweaked.

B. USDA Reasonably Required Waiver Areas to Bear Some Relationship to Actual Job Markets.

The State Plaintiffs' claim that the LMA definition is an impermissible construction of § 2015(o)(4)(A) is based on a flawed statutory reading that cherry picks the statutory text.

The State Plaintiffs first argue that using LMAs is inconsistent with the statute's purported "focus on economic conditions *within* states and localities." State Opp'n at 16. They point to the statutory language providing that a State's "request may be for '*any* group of individuals,'" *id*. (quoting 7 U.S.C. § 2015(o)(4)(A)), as evidence that the statute reflects a "broad delegation to states," which presumably includes the scope of the waiver area. *Id.* But the full text of the statute specifies that "the Secretary may waive the applicability of [work requirements] to any group of individuals in the State," 7 U.S.C. § 2015(o)(4)(A), indicating that the *Secretary*, not the State, determines the scope of the individuals covered by a waiver once a State makes a waiver request.

Further, while the "'group of individuals'" covered by a waiver "must be '*in the State*,'" it does not follow that "the 'area' in which those individuals 'reside' is necessarily" within the State. *See* State Opp'n at 16. To the contrary, the waiver provision here only authorizes USDA to act if an "area" lacks "a sufficient number of jobs" for ABAWDs, suggesting that USDA should consider the realities of the job market in the given area. And it cannot reasonably be disputed that many job markets cross State boundaries. The State Plaintiffs' suggestion that the statute compels USDA to ignore the realities of a particular job market because of political boundaries is not only unsupported by the plain text but "would make no sense." *King v. Burwell*, 576 U.S. 473, 489 (2015), as it would require the USDA to elevate geography over the availability of jobs, which is

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discussion of the law." *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring in part and concurring in the judgment).

exactly what Plaintiffs say USDA cannot do in other contexts.[7]

It might be that SNAP "generally operates through states and localities," State Opp'n at 16, but the provisions the State Plaintiffs point to on are fundamentally dissimilar from § 2015(o)(4)(A). The cited provisions that recognize State and local government involvement in *administering* SNAP, *id.* at 16, shed no light on how Congress intended to define the "area in which the individuals reside" under § 2015(o)(4)(A). Nor do provisions defining the scope of *State* obligations vis-à-vis employment and training programs. *See id.* at 16-17. As discussed, the text of § 2015(o)(4)(A)(ii) demonstrates that Congress entrusted USDA, not States, with determining when waivers are warranted under that standard, including the determination of how to define the "area in which the individuals reside." That Congress may have chosen to provide a role for States as a partner to USDA in administering SNAP or to require States credit "multistate" private training programs, *see* State Opp'n at 16-17, says little about how Congress intended to cabin *USDA's* discretion over the waiver program. And that is particularly the case given that job markets are not necessarily limited by State boundaries.

The State Plaintiffs also argue that "it is indisputable that the District of Columbia is a more reasonable and aligned area within which to evaluate the job prospects of D.C. SNAP recipients than a far flung area." State Opp'n at 17. However, they do not explain why it is reasonable to evaluate the job prospects of D.C. SNAP recipients by ignoring nearby areas that fall outside of D.C. boundaries. This omission notably conflicts with the State Plaintiffs' own focus on the importance of public transit, *see id.*, which does not abruptly end at the borders of the District—

[7] Plaintiffs' position that USDA is *foreclosed* from defining a waiver area to include out-of-state locations makes little sense in light of numerous State boundaries that separate towns and cities that are plainly within the same job market. Plaintiffs cannot reasonably argue that job availability in Arlington, VA or Silver Spring, MD is irrelevant to that in D.C. or that job availability in Kansas City, KS is irrelevant to that in Kansas City, MO.

or generally at jurisdictional boundaries—but extends into the multi-state area included in the LMA. In any event, courts "are bound to uphold agency interpretations regardless whether there may be other reasonable, or even more reasonable, views." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (citation omitted). USDA has never contended that its LMA definition is perfect, but no definition of area could ever be. "Regulation, like legislation often requires drawing lines." *Mayo Found.*, 562 U.S. at 59. And USDA's definition is reasonable because its focus on job markets, instead of political boundaries, effectuates the PRWORA's purposes.

C. USDA Reasonably Curtailed Unlimited Accumulation of Discretionary Exemptions.

The State Plaintiffs argue that the BBA's exemptions adjustment provision can be broken down into a "simple" mathematical formula. State Opp'n at 19-20. USDA must merely calculate and carry forward the difference between the "average monthly exemptions estimated" for a State "for such preceding fiscal year under this paragraph" (defined by the State Plaintiffs as "X") and the "average monthly exemptions in effect in the State for the preceding fiscal year" (defined as "Y"). *Id.* at 19. Even assuming that they are correct, the State Plaintiffs' characterization of § 2015(o)(6)(G)'s "math problem," *id.* at 20, falls apart because it relies on the unsupported contention that "X"—the "average monthly number of exemptions estimated . . . for such preceding fiscal year under this paragraph," 7 U.S.C. § 2015(o)(6)(G)—necessarily "includes exemptions *carried into* the preceding fiscal year from the prior year." *Id.* at 19. That contention is nowhere to be found in the statute.[8]

"By statute, USDA calculates each state's available exemptions annually based on an

[8] Although Plaintiffs' reading may be a reasonable one, it is not the only reasonable one. As USDA's OIG concluded, "apparent inconsistencies in the authorizing statute itself" permit USDA "discretion to interpret and implement the exemption provision as it ha[d] done," even though it "may not meet the intent of the statute." ABAWD00000294-95.

'estimate' of the total number of 'covered individuals' in a given state." *D.C.*, 444 F. Supp. 3d at 9. In other words, the State Plaintiffs' "X" is defined as "the average monthly number of exemptions *estimated* for the State agency for *such preceding fiscal year* under this paragraph." 7 U.S.C. § 2015(o)(6)(G) (emphases added). The "estimat[ion]" refers to § 2015(o)(6)(C)-(E), which direct USDA to estimate "the number of covered individuals in the State" each year to allow States to exempt up to 12% of covered individuals as "estimated by the Secretary." So "X" just reflects USDA's yearly estimate of 12% of the covered individuals in a State the previous year, or the quantity of discretionary exemptions that the paragraph provides to States for that year.

Thus, the statute does not require USDA—from the perspective of 2020—to "look[] to the number estimated 'under this paragraph' for 2019 . . . *includ[ing] those retained from 2018 under subparagraph (G),*" State Opp'n at 19 (emphasis added) because the 2019 estimate of covered individuals *did not also estimate the number of covered individuals from 2018 or any year prior to 2019*. There is simply no statutory basis for the claim that the "estimated" number of exemptions for a State includes exemptions carried over from prior years. "[S]tate plaintiffs construe the phrase 'average monthly number of exemptions estimated for the preceding fiscal year' to mean the number of exemptions *available* in the prior year, without regard to whether those exemptions were initially granted [or estimated] in the prior year or, say, twenty years ago in 1999." *D.C.*, 444 F. Supp. 3d at 17. That reading is not compelled by the statute.

The State Plaintiffs once more invoke *Arkema Inc v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), *see* State Opp'n at 21-22, but that was a case in which "EPA had effectively 'regulated past transactions,'" Defs.' Mem. at 50 n.15 (quoting *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996)). The State Plaintiffs make no serious effort to explain how, *in this case*, USDA's Final Rule "imposes new sanctions on past conduct" instead of merely "'upset[ting] expectations'

which is secondarily retroactive and invalid only if arbitrary and capricious." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 159 (D.C. Cir. 2010). The APA "does not preclude agencies from considering, and . . . dealing with past transactions in prescribing rules for the future." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (citation omitted). "A rule with exclusively future effect . . . can unquestionably *affect* past transactions," *see id.*, including States' past decisions not to use exemptions in a given year based on its expectation of how USDA would set discretionary exemption rates in future years. The Final Rule does nothing more than determine how USDA will set the number of discretionary exemptions that Congress grants to the States in *future years*.

D. USDA Exercised Its Discretion to Proceed by Rulemaking.

Defendants did not "fail[] to respond to [BFC] Plaintiffs' arguments" that Congress somehow silently barred USDA from construing § 2015(o)(4) by rulemaking and required USDA to construe the statute by adjudication. *See* BFC Opp'n at 2 (citation omitted). To the contrary, Defendants explained that "nothing in the statute prohibits USDA from filling the statutory gaps by rulemaking" consistent with "black letter law that agencies have discretion to proceed by rulemaking or adjudication." Defs.' Mem. at 34.

Since Defendants explained why USDA has discretion to decide issues common to all waiver requests by rulemaking instead of adjudication, Defendants had no need to address directly BFC Plaintiffs' novel contention that "[t]he *Chevron* deference question would only arise if the agency had conducted any statutory interpretation in adjudication." BFC Opp'n at 7. To the contrary, *Chevron* deference applies here because "*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress . . . desired the agency (rather than the courts) to possess whatever degree of discretion [statutory] ambiguity allows,'" *City of Arlington*, 569 U.S.

at 296, and this Court has explained that the statute's illustrative language "signals congressional intent to delegate aspects of waiver determinations to the agency," *D.C.*, 444 F. Supp. 3d at 24 n.13. As Defendants explained why its construction is reasonable under *Chevron*, Defs.' Mem. at 16-37, they never "conceded that *Chevron* deference is not pertinent here," BFC Opp'n at 7.

To be sure, an agency cannot "choose between rulemaking and adjudication when Congress specifies which of the two processes to use." *Id.* at 2. But Congress did not do so here. When Congress strips an agency of its discretion to proceed by rulemaking or adjudication, it "clearly expresses an intent to withhold that authority." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991). For example the Nuclear Waste Policy Act of 1985 provides that the Secretary of Energy "shall establish a demonstration program . . . for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, *by rule*, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." 42 U.S.C. § 10198(a) (emphasis added). BFC Plaintiffs have never pointed to any similar language anywhere in the SNAP statutory scheme.

To the extent BFC Plaintiffs are arguing that the Final Rule does not allow for adjudication of waiver requests, that is incorrect. The Supreme Court has long recognized that "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *Am. Hosp. Ass'n*, 499 U.S. at 612. Rules may establish "general principles to guide the required case-by-case . . . determinations." *Id.* (citation omitted). What is more, "[s]ince [USDA], unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc

adjudication to formulate new standards of conduct" and "[t]he function of filling in the interstices of [the PRWORA] should be performed, as much as possible," through rulemaking., *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *see also Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 101 (1983) ("Administrative efficiency and consistency of decision are both furthered by a generic determination of [issues common to adjudications], which are subject to [an agency's discretion] in any event.")—a directive that USDA has properly complied with here. And BFC Plaintiffs ignore the fact that the 2001 Regulation did more than direct USDA to consider issues like the scope of a waiver area in case-by-case adjudications, but instead determined by rule that USDA must approve *any* area grouped by States as long as it is contiguous and, for example, met the 20% standard. Final Rule, 66 Fed. Reg. at 4471 (codifying 7 C.F.R. § 273.24 and describing waivers that are readily approvable). All USDA has done here is resolve generally applicable issues through rulemaking, while reserving decisions for individual applications on a case-by-case basis. That is hardly remarkable, and certainly not illegal.

The BFC Plaintiffs purport to identify "six material distinctions between the rules at issue in USDA's cited cases and the USDA rule challenged here." BFC Opp'n at 4; *id.* at 11-12. It is not clear how real any of these distinctions are or why they have the purported relevance the BFC Plaintiffs place on them. But even if they mattered, the BFC Plaintiffs' chart relies on mischaracterizations of the Final Rule. For example, the Final Rule *does* "promote[] efficiency without sacrificing fairness, because it addresses . . . issue[s] that will not vary from case to case," *id*. at 5—the scope of a job market area and the metrics USDA will use to determine whether that area will have insufficient jobs. Those issues could equally be established through a "common law" of adjudicative decisions, but because these issues "are common to all" waivers "it would be absurd that the issue . . . should have to be separately considered on every application." *Ecology*

Action v. AEC 492 F.2d 998, 1002 (2d Cir. 1974) (Friendly, J.).

II. USDA ADEQUATELY JUSTIFIED THE FINAL RULE.

A. USDA's Revisions to the Waiver Criteria are Reasonable.

USDA adequately justified its revisions to the criteria for demonstrating a lack of sufficient jobs. *See* Defs.' Mem. at 41-49. Plaintiffs' arguments to the contrary are unavailing.

i. Plaintiffs challenge USDA's decision to omit a number of the 2001 Regulation's waiver criteria from the Final Rule's core standards on two grounds. First, they argue that the omission of three waiver criteria—LSA designation, qualification for extended unemployment benefits, and employment-to-population ratios—and USDA's refusal to add U-6 data "solely" because "data for these criteria is not available at the LMA level" is unreasonable because the LMA definition is purportedly unreasonable itself. State Opp'n at 22-23; *see also* BFC Opp'n at 11. This argument fails for a number of reasons.

As an initial matter, USDA did not reject employment-to-population ratios or U-6 data based "solely" on the conflict with the LMA definition. As USDA explained, employment-to-population ratios have an ambiguous meaning with respect to job availability, as they can fluctuate based on demographic shifts. *See* Defs.' Mem. at 44. And USDA has never accepted U-6 data as an accurate proxy for a lack of sufficient jobs. *See id.* (citing ABAWD000004482-83). The fact that neither is measured at the substate level was an *additional* reason for rejecting these criteria.

Further, it is entirely reasonable for USDA to exclude criteria from the core standards that do not correspond to the scope of waiver areas under the Final Rule. *See* Defs.' Mem.at 43. USDA adopted the LMA definition to link waiver areas to coherent job markets. *See* Defs.' Mem. at 49-59. It naturally follows that criteria that do not correspond to that delineation should not be considered when other data is available because those criteria do not shed light on whether there

are sufficient jobs for ABAWDs in a particular job market.

Second, the State Plaintiffs dispute USDA's conclusion that certain omitted criteria are less reliable and standardized than general unemployment rates. *See* State Opp'n at 24-25. To be clear, USDA's conclusion applied only to employment-to-population ratios, a lack of jobs in declining industries and occupations, and description in academic studies. *See* Final Rule, 84 Fed. Reg. at 66791. And that conclusion was based on far more than a mere recitation of the words "reliable" and "standardized." *See* State Opp'n at 24. Employment-to-population ratios—which USDA acknowledged was based on standardized data—is less reliable because, as explained, it does not necessarily reflect job market strength. Final Rule, 84 Fed. Reg. at 66790. Jobs in "declining industries or occupations" and descriptions in academic studies are not as standardized or reliable because they are inherently subjective. *Id.* at 66791. Neither is based on standardized data. Instead, they turn on determinations of what counts as a "declining" industry or occupation or on particular methodological choices of individual academics. USDA's decision to disfavor these criteria where hard data exists is not unreasonable.

ii. Plaintiffs do not dispute that there are no ABAWD-specific measures of job availability and that, as a result, USDA must rely on proxy measurements to assess ABAWD job prospects. They do not dispute that all of the 2001 Regulation's proxies similarly reflected job market strength for the general population. *See* Defs.' Mem.at 21; *id.* at 42-43. Nor do they dispute that in recent years, USDA, with rare exceptions, has based waivers for a lack of sufficient jobs solely on proxy measurements that are tied to general unemployment rates. *See id.* at 22.[9]

[9] The BFC Plaintiffs argue that "the general unemployment rate [is] an *unreliable* criterion" for assessing job sufficiency for ABAWDs. BFC Opp'n at 10; *see also id.* at 10-11 ("not a reliable basis for determining that an area lacks sufficient jobs for ABAWDs"). But that contention cannot be squared with the record or their concession that general unemployment rates are a valid criterion for waivers based on a lack of sufficient jobs. *See id.* at 8.

Instead, they argue those facts can be disregarded because, under the 2001 Regulation, States could have, in theory, supported waiver requests with data other than general unemployment rates. *See* State Opp'n at 27-28; BFC Opp'n at 8. Without the specter of those criteria, they claim, the Rule is now unreasonably focused on general unemployment rates. But the theoretical availability of other criteria is a thin reed on which to rest. For starters, as explained, USDA had good reason for rejecting each of the other criteria in the 2001 Regulation. *See supra* at p. 6. Second, none of the 2001 Regulation's waiver criteria are specific to ABAWDs, and the criteria that States actually used—the 20% standard, LSA designation and qualification for extended unemployment benefits—are all tied to unemployment rates for the broader (*i.e.*, non-ABAWD) public. *See* Defs.' Mem. at 21-22.[10] If it was permissible for USDA to adjudicate hundreds of waivers based solely on the general unemployment rate in the waiver area, it is not now unreasonable for USDA to rely solely on general unemployment rates to adjudicate waivers.[11]

Plaintiffs further discount this nearly uniform history of waiver requests by claiming that waivers "*granted* based on general unemployment rates do not demonstrate that it is reasonable to *deny* waivers on the basis of general unemployment rates alone." State Opp'n at 27; *see also* BFC Opp'n at 8. That is a distinction without a difference. Under the 2001 Regulation, scores of waivers were granted for areas with unemployment rates high enough to meet the 20% standard,

[10] Though Plaintiffs emphasize the purported unreasonableness of omitting qualification for extended unemployment benefits as a waiver criterion, *see* State Opp'n at 28-29; BFC Opp'n at 15-16, they nowhere explain how that the inclusion of that criterion would make the Rule any less focused on general unemployment rates. *See* Defs.' Mem. at 22.

[11] The State Plaintiffs claim that "States have relied on" the omitted criteria "for decades." State Opp'n at 28 n.21. But the criteria that States have actually used are all tied to general unemployment rates. *See* Defs.' Mem. at 22. The BFC Plaintiffs' assertion that USDA's "practice was to accept all manner of evidence," BFC Opp'n at 8, fails for the same reason. Whatever the 2001 Regulation allowed States to do in theory, in practice they submitted evidence tied to general unemployment rates.

but those waivers did not cover areas with unemployment rates that did not meet that standard. That is why States like Georgia and California carved out certain counties from their waiver requests that, if included, would have jeopardized their ability to satisfy the 20% standard. *See* Defs.' Mem. at 52-54. The standard under the Final Rule operates no differently—it will approve waiver requests for areas that meet the standard, but not cover areas that do not meet the standard.

Finally, the State Plaintiffs deny that they "seek[] to substitute their own judgment" for USDA's as to the best proxy measure for ABAWD job availability, *see* State Opp'n at 25, while simultaneously arguing that other data sources are better measures, *see id.*; *id.* at 27; *see also* BFC Opp'n at 9-10. Nevertheless, USDA explained why it omitted other criteria from the Final Rule. *See* Defs.' Mem. at 43-45. It therefore excluded these criteria and retained unemployment rates as a reasonable proxy that corresponds to the definition of a waiver area. *See id.* at 22-25.

iii. The purpose of the Final Rule's addition of an unemployment floor to the 20% standard is simple: to ensure that waivers meet an objective measure of labor market weakness, rather than showing only that the unemployment rate is are higher than the national average. *See id.* at 47-48. The State Plaintiffs argue that the barriers to employment for ABAWDs are so unique that USDA cannot show why areas with low unemployment rates actually have sufficient jobs for ABAWDs. *See* State Opp'n at 25. That theory is inconsistent with Congress's assumptions underlying the PRWORA and the operation of the waiver scheme. *See* Defs.' Mem. at 48-49.

Under the PRWORA, the default rule is the work requirement, and waivers are a limited exception to that default. *See id.* Waivers turn on whether *States* can point to sufficient data for USDA to determine that there is a *lack of sufficient jobs*; they do not presumptively apply unless USDA can prove to a State's satisfaction that sufficient jobs exist in an area. And even assuming the burden was on USDA to demonstrate the sufficiency of jobs for ABAWDs, if areas with

historically low unemployment rates cannot do so, it is unclear how any available standard could. But that logic is inconsistent with Congress's choice to impose a time limit only on ABAWDs and to make waivers an exception to that default rule. *See id.*

iv. Finally, the State Plaintiffs' attempt to invoke the "detailed justification" requirement of *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), *see* State Opp'n at 26, fails because that requirement only applies if a new policy "rests upon *factual findings* that contradict" the factual findings underlying an agency's prior policy, *Fox*, 556 U.S. at 515. Whether States are "best equipped" to judge the availability of jobs for ABAWDs and what proxies are best "suited to the waiver inquiry," State Opp'n at 26, are policy judgments, not factual findings. *See* Defs.' Mem. at 46-47; *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 142 (D.D.C. 2017) (detailed justification not required for policy change that "did not rest on new factual findings . . . or ignore or countermand prior factual findings absent reasoned explanation"). In any event, USDA met all applicable requirements, as it acknowledged its change in position and explained its reasons for revising the waiver criteria. *See* Defs.' Mem. at 46-47.[12]

B. USDA Reasonably Tied Waiver Areas to Job Markets.

USDA adopted the LMA definition to link waiver areas with cohesive job markets. *See* Defs.' Mem. at 49-59. Plaintiffs offer no legitimate basis to upset that reasoned determination.

i. The impetus behind the Rule's redefinition of a waiver "area" was USDA's conclusion that allowing States to self-define waiver areas meant that waiver areas did not necessarily reflect cohesive job markets. *See id.* at 49-50. As the record shows, States could obtain waivers for jurisdictions with low unemployment rates simply by grouping them with high

[12] For the same reasons, the State Plaintiffs' reliance on *Fox*'s "detailed justification" requirement to challenge the LMA definition, *see* State Opp'n at 29, is misplaced. *See* Defs.' Mem. at 50.

unemployment rate jurisdictions—whether or not ABAWDs in the former were in the same job market as those in the latter—and, conversely, to obtain waivers for individual jurisdictions while ignoring the availability of jobs in neighboring or nearby jurisdictions. *See id.* at 51-54.[13]

The State Plaintiffs claim that there are "alternative explanations" for these sorts of waiver areas. State Opp'n at 30. But despite a liberal view of the use of extra-record evidence, *see infra* pp. 31-32, they offer no actual explanation why, for example, an area that groups San Diego and Modoc Counties or that excludes San Francisco but includes some of its low-unemployment suburbs reflects anything more substantial than a State's interest in maximizing the scope of the waived area. *See* Defs.' Mem. at 52-53. The State Plaintiffs counter that States were not required to explain the reasons for their waiver areas, State Opp'n at 30, but that is precisely the point. The 2001 Regulation gave States extremely broad discretion in defining waiver areas, without requiring any detailed explanation as to if or how the area represented a labor market. And USDA justifiably sought to remedy this issue by tying waiver areas to economically integrated areas in order to further Congress's intent in PRWORA.[14]

The State Plaintiffs again claim that USDA could have asked States to justify suspect waiver areas or even denied such waivers, State Opp'n at 31, but as explained, USDA could not

[13] The State Plaintiffs argue that the Final Rule never discussed the problem of waiver areas drawn too broadly to reflect commuting ties, State Opp'n at 31 n.23, but that is based on a crabbed reading of the Rule. USDA was clear about its concerns that State flexibility allowed waivers for "nearly all" counties in a State simply because they were contiguous, 84 Fed. Reg. at 66794, and that waiver areas should be tied to economically integrated areas in order to reflect the availability of jobs within a commutable distance, *see id.* at 66793; *id.* at 66796. These grounds plainly encompass USDA's view that overbroad waiver areas insufficiently reflect job markets.

[14] The State Plaintiffs also argue that Defendants "new[ly] indict[]" States for not explaining "why their requests met the statutory provision" for waivers. State Opp'n at 30. Not so. These waiver areas may have been permissible under § 2015(o)(4)(A), given USDA's prior interpretation of that statutory provision. *See* Defs.' Mem. at 30-32. But the fact that the statute may have given USDA broad discretion to adopt this permissive policy does not prohibit USDA from later concluding that a different approach is more consistent with congressional intent.

have done so under the 2001 Regulation. *See* Defs.' Mem. at 54-55; *see also Erie Blvd. Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("It is axiomatic . . . that an agency is bound by its own regulations." (citation omitted)); *Cherokee Nation of Okla. v. Babbit*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) ("An agency is required to follow its own regulations."). The State Plaintiffs try to manufacture inconsistency between this noncontroversial claim and "other positions" USDA has taken, State Opp'n at 31-32, but there is no such inconsistency. The language they cite from Defendants' brief concerns USDA's *statutory* discretion. *See id.* at 31 (citing Defs.' Mem. at 30). Having exercised its broad discretion to allow States to define waiver areas under the 2001 Regulation, USDA was then bound by the terms of its regulation. Further, even if States were required to "document[]" the rationale for the applicable waiver area, *see id.* at 32 (citing ABAWD00000324 and ABAWD00000212), it was enough for a State to show that the waiver area was either "contiguous" or included some, but not necessarily all, of the jurisdictions in an economic region, *see* ABAWD00000324; *see also* 7 C.F.R. § 273.24(f)(6). That is why waiver areas that were incompatible with coherent job markets sufficed under the 2001 Regulation. *See* Defs.' Mem. at 52-53 & n.24. The meager documentation requirement does nothing to change the analysis or, accordingly, USDA's need to revise its interpretation of "area."

The State Plaintiffs next argue that maximizing waived areas is simply "good government," State Opp'n at 30, but one sovereign's "good government" can be another's loophole. States may have had their own sensible reasons to seek waivers as broadly as possible, and they may believe this is the preferable approach as a matter of policy. *See, e.g.*, ABAWD00000289 & n.15 (OIG finding that certain States sought "waivers in as many parts of the State as possible to minimize" administrative burdens). But that does not preclude USDA from deciding that continuing to allow this flexibility was inconsistent with Congress's intent, which is the only relevant inquiry.

ii. Plaintiffs next argue that, even if USDA was justified in concluding that waiver areas should reflect commuting patterns, LMAs are an unreasonable choice because they do not capture commuting patterns specific to ABAWDs. *See* State Opp'n at 32-33; BFC Opp'n at 12-15. However, Plaintiffs do not dispute that there is no geographic delineation that reflects ABAWD-specific commuting patterns. *See* Defs.' Mem. at 56. Without a clear alternative linked to ABAWDs, USDA was justified in adopting LMAs as the "best available delineation of areas that are economically integrated based on commuting ties." Final Rule, 84 Fed. Reg. at 66793.

The State Plaintiffs next argue that it is inconsistent for USDA to reject State flexibility because it does not reflect commuting patterns while adopting LMAs, which "do not match realistic commuting patterns for ABAWDs." State Opp'n at 32. But, even if an imperfect measure of ABAWD commuting patterns, LMAs do in fact take into account real commuting patterns. State flexibility, by contrast, does not need to match real or even realistic commuting patterns for *any population*, ABAWD or otherwise. It is therefore rational to reject one approach (State flexibility) that entirely ignores commuting patterns for one that factors them in (LMAs), even if it cannot do so perfectly in every application. Nor is there any merit to the BFC Plaintiffs' avowal that civil jurisdictions "necessarily encompass jobs within some commuting distance." BFC Opp'n at 12. Treating civil jurisdictions as waiver areas means that States can ignore any jobs within commuting distance that exist across invisible county or municipal boundaries.

Plaintiffs next assert that the overbreadth and underbreadth that results from State flexibility is less significant than that arising from LMAs. *See* State Opp'n at 33; BFC Opp'n at 13-15. That argument does not stand up to scrutiny. Plaintiffs do not explain why it is patently unreasonable to consider unemployment rates in a single county in West Virginia—whose residents do in fact commute within the D.C. LMA—when determining the sufficiency of jobs in

D.C., but it is entirely reasonable to consider unemployment rates in Del Norte County when determining the sufficiency of jobs in San Diego, some 800 miles away. All they offer is the hollow claim that USDA "has not established" that a waiver was granted for "an area where ABAWDs in fact had sufficient jobs." State Opp'n at 33. As explained, "sufficient jobs" is not an unambiguous term with an objective meaning. *See* Defs.' Mem. at 19-20. Locations that qualified for waivers under the prior regulatory regime did so not because they satisfied a Platonic ideal of insufficiency of jobs; they did so because they met the standard set by USDA in an exercise of its discretion under § 2015(o)(4)(A). Thus, the fact that under the 2001 Regulation, for example, Marin County could get a waiver with an unemployment rate substantially lower than the national average simply because counties hundreds of miles away had high unemployment rates, *see* Defs.' Mem. at 52-53, does not "establish" that jobs were not reasonably available for Marin County ABAWDs. Thus, Plaintiffs' argument does little to undermine USDA's conclusion that the definition of a waiver area needed to be strengthened.

The BFC Plaintiffs note that the LMA definition "creates invisible lines" between locations within an LMA and those outside an LMA. BFC Opp'n at 15. Maybe so, but that is inescapable when defining an "area," an inherently ambiguous term. And unlike political boundaries, LMAs reflect actual commuting patterns. That LMAs are not perfect does not render them unreasonable. *See Barnhart v. Thomas*, 540 U.S. 20, 29 (agency interpretation not invalid because it "can give rise to undesirable results in some circumstances"). More fundamentally, Congress tasked USDA—not States or private parties—with defining the contours of waiver areas in order to balance the competing goals of the PRWORA. *See* Defs.' Mem. at 57-58. State flexibility may be one way of striking this balance, but it is not the only lawful way.

iv. The BFC Plaintiffs' claim that LSAs were arbitrarily "exclud[ed]" as "a waiver

'area,'" BFC Opp'n at 11, lacks merit because LSAs are not a geographical concept, but rather are based on civil jurisdictions. *See* Defs.' Mem. at 58-59. Their argument for LSAs therefore is simply an argument for using civil jurisdictions as a waiver area. As explained, USDA considered and rejected civil jurisdictions because they are not tied job markets. *See id.* at 52-53.[15]

C. USDA Reasonably Explained its Decision to Limit Carryover Exemptions.

The State Plaintiffs argue that "USDA does not even attempt to explain . . . why Congress's decision to impose an annual limit on accumulation of exemptions is incompatible with allowing states to store exemptions for when they need them most." State Opp'n at 33-34. As this Court concluded, however, USDA's reading—that "the statutory language's focus on the 'preceding fiscal year' . . . means that Congress intended USDA to credit unused exemptions granted in the preceding year but not unused exemptions granted in any number of prior years"—is a permissible one. *D.C.*, 444 F. Supp. 3d at 17-18. And "concerns about whether such vast accumulation of exemptions was what the statute intended . . . [is an] 'entirely rational' reason[] to revise how discretionary exemptions were carried over." *Id.* at 19 (citations omitted). Although the State Plaintiffs argue that indefinite carryover is consistent with statutory intent, what matters is that "the agency *believes* [the Rule] to be" more consistent with the statute. *See Fox*, 556 U.S. at 515; *see also D.C.*, 444 F. Supp. 3d at 19 ("deeming 'justified' with reasoned analysis' a change in policy that the agency viewed as 'more in keeping with the original intent of the statute'" (quoting *Rust v. Sullivan*, 500 U.S. 173, 187 (1991)); *id.* at 20 ("An explanation of why one 'policy is more consistent with statutory language than alternative policies' is a good reason for a policy change."

[15] The BFC Plaintiffs also curiously argue that Defendants failed to respond to "specific arguments" in favor of LSAs, BFC Opp'n at 11-12, but that is inaccurate. *See* Defs.' Mem. at 58-59 (responding to argument that LSAs reflect more recent data than LMAs); *id.* at 44 n.22 (responding to argument that USDA was inconsistent in its treatment of DOL data); *id.* at 58 n.27 (responding to argument that LMA definition is arbitrary as applied to D.C.).

(quoting *Encino Motorcars*, 136 S. Ct. at 2127)). And USDA's reliance on an OIG report that "'expressed' 'concerns' about whether . . . vast accumulation [of exemptions] was what the statute intended" was also an "'entirely rational'" reason[] to revise how discretionary exemptions were carried over." *Id*. (citations omitted).

What is more, USDA explained that "indefinite carryover and accumulation of such significant amounts of unused exemptions [was] an unintended outcome of the current regulations." 84 Fed. Reg. at 66802. When promulgating those regulations, USDA emphasized its belief that states would actually *use* their exemptions. Interim Rule, 64 Fed. Reg. 48246, 48248 (Sept. 3, 1999). By declining to use exemptions, USDA's old approach provides at least one State with enough exemptions "to exempt all 125,000 ABAWDs from the time limit and work requirement for over 1 year," which as USDA's OIG concluded, "may not meet the intent of the statute." ABAWD00000294.

And though Plaintiffs continue to complain that USDA inadequately addressed their reliance interests, *see* State Opp'n at 34-35, this Court has explained exactly how "the Final Rule explicitly confronted and considered the states' reliance interests." *D.C.*, 444 F. Supp. 3d at 20.

D. USDA Did Not Ignore Potential Costs or Disparate Impacts.

The State Plaintiffs' claim that USDA did not adequately consider the potential costs to States and disparate impacts is belied by the administrative record. *See* Defs.' Mem. at 59-64.

First, the State Plaintiffs argue that USDA ignored evidence of the Rule's potential effect on State administrative costs and State economies and health care. *See id.* at 36-37. To the extent this claim is reviewable, *see* Defs.' Mem. at 59, USDA met its obligation. USDA was required only to consider the costs and benefits of the Rule, not to quantify every potential cost posited by commenters. *See id.* at 61-62. The RIA estimated State administrative costs, and even if the State

Plaintiffs disagree with it, they have not shown any difference to be material. *See id.* at 60.

Similarly, USDA adequately considered the downstream impacts of the Rule, even if it did not reduce these impacts to a quantified estimate. *See id.* at 60-61. Most significantly, it balanced those costs on the one hand and the quantifiable and unquantifiable benefits in encouraging work and self-sufficiency—the very benefits underlying Congress's imposition of the ABAWD work requirement—on the other, and reasonably concluded that it could not "accurately estimate[]" the net effects of the Final Rule. ABAWD00000422; *see also* Defs.' Mem. at 61. In other words, USDA did not ignore the costs of the Rule. It considered them, but nevertheless concluded that the Rule better implemented Congress's goals in the PRWORA. *See* Defs.' Mem. at 62.

Contrary to the State Plaintiffs' suggestion, *see* State Opp'n at 37-38, *Michigan v. EPA*, 576 U.S. 743 (2015), does not contradict Defendants' position. There, the Supreme Court held only that EPA could not wholly decline to consider the costs of its regulation where Congress had authorized it to regulate emissions only if it "finds regulation 'appropriate and necessary.'" *Id.* at 752 (quoting 42 U.S.C. § 7412(n)(1)(A)). The Court expressly disclaimed any requirement that agencies must "conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 759. Here, USDA did not wholly decline to consider costs; it merely concluded that the balance between costs and benefits was not accurately estimable and that the Rule was more consistent with Congressional intent. *See Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 406-07 (D.D.C. 2017) (rejecting argument that agency "shirked" its duty to quantify benefits and certain costs in cost-benefit analysis where it considered them but concluded that they were "difficult to quantify" (citation omitted) (cleaned up)).

Second, the State Plaintiffs' claim that USDA ignored potential disparate impacts, *see* State Opp'n at 38-39, fails for similar reasons. The State Plaintiffs argue that USDA "threw up its hands

at the problem" because the CRIA stated that USDA lacked specific demographic data about the particular ABAWDs who may become ineligible for SNAP under the Final Rule. *Id.* at 38. But, as they concede, *see id.* at 39, USDA did not do that. Instead, the CRIA used a similar category of individuals—"Nondisabled Individuals aged 18 through 49 in Childless Households"—to assess the potential impacts of the Final Rule. ABAWD00000357. USDA considered those potential impacts along with the outreach and mitigation strategies laid out in the CRIA before issuing the Rule. *See* Defs.' Mem. at 63. That is all that is required under the APA.

E. The COVID-19 Pandemic Does Not Diminish the Reasonableness of the Rule.

As in their opening briefs, Plaintiffs once again seek to use extra-record evidence to undermine the Rule based on how its provisions would purportedly apply in the current circumstances of the COVID-19 pandemic—a situation that did not exist when the Rule was implemented. *See* State Opp'n at 3-4, 29, 35-36, 39-40; BCF Opp'n at 13 n.14. This counterfactual is substantively incorrect and procedurally improper.

As Plaintiffs concede, *see* State Opp'n at 36 n.25, the ABAWD time limit has been suspended since March (subject to a limited exception) as Congress specifically addressed the implications of the pandemic by enacting the FFCRA. *See* Defs.' Mem. at 42 n.20. That in and of itself demonstrates that Congress can and will respond to extreme circumstances that implicate the effect of the ABAWD time limit, as it has done so previously. *See id.* at 7-8. Even if Congress had not done so, the entire purpose of the exceptional circumstances provision in the Final Rule is to relax the Rule's ordinary requirements in the face of "extreme, dynamic circumstances." Final Rule, 84 Fed. Reg. at 66791-92. The State Plaintiffs baselessly claim the Court can disregard this provision because the "examples" provided in the Rule "indicate that waivers would be granted on that ground only in very limited, short-term circumstances." State Opp'n at 36 n.25. But those

examples are expressly non-exhaustive. Final Rule, 84 Fed. Reg. at 66792. And the Rule says nothing about "short-term circumstances;" rather, it says that the provision applies if "the impact of the exceptional circumstance is ongoing at the time of the request." *Id.* It proves little to attack the supposed "ramifications" of the Rule, State Opp'n at 3, while ignoring how the Rule would actually operate under current circumstances.

Plaintiffs' argument also fails procedurally because it relies entirely on extra-record evidence. *See* Defs.' Mem. at 42 n.20. Plaintiffs now claim that these post hoc declarations are "background information" that is "needed to determine whether the agency considered all the relevant factors." State Opp'n at 40 (quoting *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (citation omitted)); *see also* BFC Opp'n at 13 n.14. However, consideration of extra-record evidence is permissible only in rare cases involving "gross procedural deficiencies—such as where the administrative record is so deficient as to preclude effective review." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (quoting *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013)). Plaintiffs' suggestion that, with a 180,000-page record and a thorough explanation of the bases for the agency's decisions, the Court needs more for effective judicial review is far-fetched. In any event, the record confirms that USDA considered the potential for "sudden declines in employment caused by [a] crisis," State Opp'n at 35, which refutes Plaintiffs' claims of necessity. *See* Final Rule, 84 Fed. Reg. at 66791-92 (discussing provision for exceptional circumstances); *id.* at 66803 (allowing greater carryover of discretionary exemptions "in order to deal with potential unforeseen sharp economic declines or other quickly changing circumstances").

The BFC Plaintiffs also note that courts can consider extra-record evidence to determine standing, BFC Opp'n at 13 n.14, but ignore that they never briefed standing and instead cited extra-record evidence in support of their merits arguments. *See* BFC Pls.' Mot. for Summ. J. at 28 n.13,

40 n.21, 42 n.22, 43, ECF No. 66; BFC Opp'n at 14 n.15. Finally, the State Plaintiffs' *ipse dixit* that they may introduce new *evidence* at their whim "to amplif[y] the reasoning provided by commenters," State Opp'n at 40 n.27, is irreconcilable with basic principles of record review.

III. THE FINAL RULE IS A LOGICAL OUTGROWTH OF THE PROPOSED RULE.

The Proposed Rule provided adequate notice. *See* Defs.' Mem. at 66-70.

First, although USDA proposed retaining qualification for extended unemployment benefits as a core standard for waiver approval but subsequently declined to do so, the Final Rule remains a logical outgrowth of the Proposed Rule. *See id.* at 67-68. That is because "[o]ne logical outgrowth of a proposal is surely . . . to refrain from taking the proposed step." *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 400 (D.C. Cir. 1989). Plaintiffs argue that this principle applies only when an agency proposes "a *change* to the status quo" but decides not to adopt that change. *See* State Opp'n at 5-6; BFC Opp'n at 17-18. But the cases they point to do not adopt a categorical distinction between proposals to change the status quo and proposals to retain a prior provision under a new regulatory regime, and Plaintiffs ignore critical context in those cases that is not applicable here. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 108 (D.C. Cir. 2014) (public was not on notice that "'proposal to clarify' could have meant that the Secretary was open to reconsidering existing policy" because "[t]he word 'clarify' does not suggest that a potential underlying major issue is open for discussion"); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005) (agency proposal to "codify" prior interpretation of regulation did not provide adequate notice where "final rule not only did not adopt the proposed [interpretation] but also adopted a 'reinterpretation' of the unamended [regulatory] text").[16]

[16] Plaintiffs' other cases, *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C.

Rather, this case mirrors that of *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000). There, EPA proposed a regulation to implement amendments to the Clean Air Act that permitted EPA to delegate authority to regulate air quality to Native American tribes, an authority that States already possessed under the Act. *Id.* at 1284-85. In relevant part, the agency proposed that tribes would "have to meet the same requirements" as States in terms of providing for judicial review of permitting decisions. *Id.* at 1298 (citation omitted). But in the final rule, the agency changed its mind and required tribes to meet only some of those long-standing State requirements. *Id.* The D.C. Circuit held that the public had adequate notice because by "proposing that tribes would have to meet the 'same requirements' as states, EPA effectively raised the question as to whether this made sense." *Id.* at 1299. Thus, "any reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments." *Id.* at 1300.

So too here. The Proposed Rule made clear that USDA was considering revising its criteria for waivers, and it proposed that going forward, it would use three core standards. *See* Proposed Rule, 84 Fed. Reg. at 983-84. In doing so, USDA effectively asked whether these criteria made sense. Particularly given the substantial public importance of the Proposed Rule, interested parties should have understood that USDA might simply choose not to retain one of these three standards. *See Ariz. Pub. Serv.*, 211 F.3d at 1299-1300 (noting that "proposal raised a highly visible and controversial issue"); *cf. Allina*, 746 F.3d at 1108-09 (finding insufficient notice in part because issue was not one where interested parties "can usually anticipate fierce opposition"). In fact, other commenters understood as much. *See* Final Rule, 84 Fed. Reg. at 66789 (noting that commenters

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Cir. 2005), do not involve an agency's decision not to adopt a proposal, and thus do not implicate the principle set forth in cases like *American Iron*.

"supported the proposal to retain the extended unemployment benefits standard").[17]

Second, the State Plaintiffs concede, as they must, *see* State Opp'n at 6, that the Proposed Rule discussed USDA's belief that its prior approach to waiver areas should be changed to "[e]liminate" waiver areas that did not reflect "economically tied" areas. Proposed Rule, 84 Fed. Reg. at 982. They nevertheless argue that there was no opportunity to comment on USDA's adoption of the LMA definition because any concerns with economic targeting were consistent with allowing "waivers of areas other than LMAs, such as cities or counties." State Opp'n at 6. However, agencies are permitted to alter a proposed rule in response to comments without creating a notice problem—indeed, that is the point of notice and comment. *See Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 252-53 (D.C. Cir. 2013) (agency's narrowing of statutory exemption in response to comments was logical outgrowth of proposed elimination of exemption); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973) (agencies may change rules without creating notice issue, as "[a] contrary rule would lead to the absurdity that in rule-making . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary").

Here, USDA identified its concerns with the 2001 Regulation's definition of a waiver area and was convinced by commenters to adopt the LMA-definition.[18] There is no reason why other

[17] The BFC Plaintiffs' argument that the use of "words such as 'amend,' 'change,' and 'revision'" did not provide "adequate notice . . . for the specific change" regarding extended unemployment benefits, BFC Opp'n at 18-19 attacks a strawman. The use of these words is of course not enough *on its own* to provide notice. Rather, the use of such language in the overall context of the Proposed Rule indicated that USDA was fundamentally reworking the regulatory waiver criteria, which put interested parties on further notice that USDA might not choose not to include all of the proposed core standards in the resulting final rule. *See* Defs.' Mem. at 68.

[18] The State Plaintiffs argue that commenters who addressed the issue did not advocate for the same definition of a waiver area that USDA ultimately adopted, State Opp'n at 6 n.3, but USDA is not prohibited from adopting a rule unless it corresponds exactly to a comment. In any event, commenters raised the very concern that ultimately motivated the adoption of the LMA-definition.

interested parties had no opportunity to comment on this issue. For that matter, the State Plaintiffs' hand-wringing about inadequate notice is inconsistent with their claim that numerous commenters challenged the merits of using LMAs. *See* State Pls.' Mot. for Summ. J. at 31 & n.15, ECF No. 65; State Opp'n at 32.

Third, the claim that the public lacked an opportunity to comment on USDA's operational experience, *see* State Opp'n at 6-7, remains unconvincing. *See* Defs.' Mem. at 69-70. USDA cited its experience while identifying what it believed were weaknesses in the 2001 Regulation. *See id.* The State Plaintiffs fail to identify any reason why the public was unable to comment on the validity of USDA's beliefs and whether they justified a change to the 2001 Regulation. In fact, they repeatedly argue that the public did address these issues. *See, e.g.*, State Opp'n at 24, 28, 32.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motions for summary judgment and grant Defendants' cross-motion for summary judgment.

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Respectfully submitted,

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See ABAWD00078212 ("When determining a waiver application for single jurisdictions, waivers should be denied for areas that reside within low-employment LMAs."); ABAWD00034773 (arguing that USDA "should prohibit waivers in areas where there are sufficient jobs within a reasonable commuting distance," and not allow "states to pick and choose when to use the [LMA] definition and when to apply for a single-jurisdiction waiver").

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