No. 11-1545

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,

Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
KEVIN R. AMER
TEJINDER SINGH
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue, NW
Suite 404
Washington, DC 20015

THOMAS D. BUNTON
SENIOR DEPUTY
COUNTY COUNSEL
COUNTY OF SAN DIEGO
1600 Pacific Highway
Room 355
San Diego, CA 92101

Counsel for Petitioner County of San Diego, California

JOSEPH VAN EATON
Counsel of Record
JAMES R. HOBSON
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Avenue, NW
Suite 4300
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas; and Texas Coalition of Cities for Utility Issues

QUESTION PRESENTED

This case involves a challenge to the FCC's jurisdiction to implement § 332(c)(7) of the Communications Act of 1934, titled "Preservation of Local Zoning Authority." Section 332(c)(7) imposes certain limitations on State and local zoning authority over the placement of wireless service facilities, but authorizes the FCC to address only one of these limitations; it states that no other provision "in this Act" may "limit" or "affect" State and local authority over wireless facilities placement. The FCC concluded that other provisions "in this Act" authorize it to adopt national zoning standards to implement § 332(c)(7).

The Fifth Circuit deferred to the FCC's jurisdictional determination applying *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), but acknowledged that "[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to this issue." The Court granted certiorari to decide the following question:

Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners below are the City of Arlington, Texas, and the City of San Antonio, Texas. Intervenors supporting the Petitioners are the Cable and Telecommunications Committee of the New Orleans City Council; the City of Carlsbad, California; the City of Dallas, Texas; the City of Dubuque, Iowa; the County of Fairfax, Virginia; the City of Glendale, California; the City of Los Angeles, California; the County of Los Angeles, California; the City of Portland, Oregon; the City of San Antonio, Texas; the County of San Diego, California; the EMR Policy Institute; the International Municipal Lawyers Association; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; the National League of Cities; the Texas Coalition of Cities for Utility Issues; and the United States Conference of Mayors.

Respondents are the United States of America and the FCC. Intervenors supporting the Respondents are CTIA-The Wireless Association and Cellco Partnership.

None of the petitioners is a non-governmental corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

OPINION AND ORDER BELOW

The FCC's Declaratory Ruling (Pet. App. 69a-117a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (Pet. App. 172a-15a). The Fifth Circuit's opinion denying the petitions for review (*id.* 1a-68a) is published at 668 F.3d 229 (5th Cir. 2012).

JURISDICTION

The Fifth Circuit denied timely petitions for rehearing *en banc* on March 29, 2012. Pet. App. 195a-96a. This Court granted timely petitions for certiorari on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 332(c)(7) of the Communications Act of 1934, codified at 47 U.S.C. § 332(c)(7), provides in relevant part:

Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless

service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local

> government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Other relevant statutory provisions appear in the Appendix to the petition for certiorari.

STATEMENT OF THE CASE

This case involves a challenge to the FCC's asserted authority to render binding interpretations of Section 332(c)(7) of the Communications Act beyond the one provision (47 U.S.C. § 332(c)(7)(B)(iv) (addressing radio frequency ("RF") emissions)) over which Congress grants it authority. After the agency determined that it had such authority based on general provisions of the Communications Act, including Section 201(b), the agency issued a Declaratory Ruling construing the statute to impose, among other things, uniform national deadlines for State and local government action on applications to site wireless service facilities.

Petitioners challenged, *inter alia*, the FCC's authority to issue those rules. In considering the challenge, the Fifth Circuit began with the threshold question whether Congress had given the agency interpretive authority over the statute. However, rather than resolving this question *de novo*, the court

of appeals deferred to the FCC's view of the scope of its own statutory jurisdiction.

I. Statutory And Regulatory Framework

1. As part of the Telecommunications Act of 1996, Congress amended the Communications Act to add Section 332(c)(7). Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996) (codified at 47 U.S.C. § 332(c)(7)). That provision establishes "minimum federal standards" to govern the placement, construction, and modification of wireless communications facilities, while retaining the traditional authority of State and local governments over siting decisions and local land use processes. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring).

Section 332(c)(7) consists of two subparagraphs. Subparagraph (A) is a "General authority" provision stating that "[e]xcept as provided in this paragraph, nothing in [the Communications Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Subparagraph (B), in turn, sets forth five enumerated limitations on State and local zoning authority. *Id.* § 332(c)(7)(B)(i)-(v). The statute gives the FCC authority to address only one of those limitations – the bar on State and local siting decisions based on the environmental effects of RF emissions. *Id.* § 332(c)(7)(B)(iv); *see also id.* § 332(c)(7)(B)(v) (authorizing any person adversely affected by State or local action "that is inconsistent with clause (iv) [to] petition the Commission for re-

lief"). Otherwise, the statute directs courts to resolve issues arising under Section 332(c)(7) on an expedited basis. *Id.* § 332(c)(7)(B)(v).

The Conference Report accompanying the legislation confirmed that except for the provisions concerning the effects of RF emissions, Congress intended for the courts to have "exclusive jurisdiction over all other disputes arising under this section." H.R. Rep. No. 104-458 (1996) (Conf. Rep.) at 207-08, Pet. App. 209a. The Report accordingly directed that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service facilities should be terminated." *Id.*

Among the limitations in Section 332(c)(7)(B) is a requirement that a State or locality "shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed . . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). The Conference Report explained that "the time period for rendering a decision" under that provision "will be the usual period under such circumstances." Pet. App. 210a. It further noted that the requirement was not intended "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Id.*

In the twelve years subsequent to the statute's enactment, the FCC did not claim the general authority to adopt rules implementing the statute, in-

stead leaving it to the courts to resolve disputes based on local circumstances.

2. In 2008, the wireless industry – led by respondent CTIA-The Wireless Association – filed a petition for a declaratory ruling asking the FCC to, *inter alia*, adopt short, uniform deadlines for State and local action under Section 332(c)(7). States and local governments, including petitioners, responded that the FCC lacked jurisdiction to issue any binding rule implementing Section 332(c)(7), other than one related to RF emissions.

a. In 2009, the FCC rejected that objection and issued a Declaratory Ruling granting the industry its requested relief in significant part. As relevant here, the FCC adopted national standards defining what constitutes a State or local government's "failure to act" if it does not release a decision on a wireless facility application within "a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." Pet. App. 116a-20a, ¶¶ 46-48. The FCC ruled that absent an applicant's agreement, if the failure of a State or local government to release its decision 90 days after the applicant files a complete collocation application or within 150 days after the filing of all other complete applications, automatically constitutes a "failure to act," and presumptively constitutes an unreasonable "period of time" on the merits. Pet. App. 72a, 106a-08a, 111a-12a (¶¶ 4, 37, 42). Unless the applicant agrees otherwise, the rule forces the State or local government into court on a fixed timetable (regardless of how reasonable its delay may be), and then requires the State or local government to over-

come the presumption on the merits by explaining its delay. Pet. App. 111a-12a (¶ 42).

The FCC acknowledged that its 90- and 150-day deadlines would conflict with time periods in place in various States, but concluded that its policy choices would accommodate reasonable State and local processes "in most instances." Pet. App. 114a (¶ 44). However, in States where a longer period for review was in effect, an applicant could now sue the State or local government under the FCC's new, shorter timelines. Pet. App. 120a (¶ 50) (providing that the applicant "may bring suit under §332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired").

b. In addressing its power to issue the Declaratory Ruling, the FCC stated that it had "the authority to interpret Section 332(c)(7)" pursuant to four other provisions of the Act – Sections 1, 4(i), 201(b), and 303(r). Pet. App. 87a (¶ 23). Those provisions generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); Pet. App. 87a (¶ 23); *see id.* 90a (¶ 24) ("Section 332(c)(7) falls within the Act; accordingly, the Commission has the authority to interpret it."). On the basis of that asserted interpretive authority, the FCC construed Section 332(c)(7)(A) – the preservation clause stating that "nothing" else "in this Act" may "limit" or "affect" State and local authority – as only prohibiting the agency from creating additional "limitations" beyond those that the

statute enumerates. Pet. App. 90a, 134a (¶¶ 25, 64). Thus, the FCC concluded that it was free to adopt the specific time periods and issue other binding interpretations of Section 332(c)(7)(B) because, in its view, the rules "merely interpret[] the limits Congress already imposed on State and local governments." Pet. App. 90a (¶ 25).

The FCC also applied its claimed interpretive authority to Section 332(c)(7)(B)(v), which provides for judicial review of violations of Section 332(c)(7)(B), while providing a right to petition the FCC for one category of violations – those relating to RF emissions. The FCC ruled that this provision did not indicate that Congress intended for courts to have final authority to interpret Section 332(c)(7)(B). Instead, the agency construed the statute "not [to] divest the Commission of its authority . . . to adopt and enforce rules implementing" the statute. Pet. App. 92a (¶ 26).

II. Procedural History

The Fifth Circuit denied petitioners' petition for review. Pet. App. 68a. The court of appeals began its analysis by assessing whether the FCC had been granted the authority to adopt a binding interpretation of Sections 332(c)(7)(A) and (B)(v). The court recognized that the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "does not apply once it is determined that an agency lacks authority to interpret a statute." Pet. App. 36a. However, the court acknowledged a circuit conflict on "whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction." Pet. App. 36a-37a.

Looking to circuit precedent, the court concluded that it must apply *Chevron* to the FCC's assertion of interpretive authority over Sections 332(c)(7)(A) and (B)(v), rather than address that question *de novo*.

Applying that approach, the court found that the provisions did not "unambiguously indicate Congress's intent to preclude the FCC from implementing § 332(c)(7)(B)(ii) and (v)" through the issuance of binding rules. Pet. App. 41a-45a, 51a. That finding of ambiguity, the court believed, required it to defer to the agency's view of the scope of its own interpretive authority so long as that construction was "based on a permissible construction of the statute." *Id.* 45a, 51a. In so ruling, the court did not apply traditional canons of statutory construction to determine whether Congress empowered the FCC to displace State and local regulatory authority over zoning matters.

The court then proceeded to defer to the FCC again, this time with respect to the substantive validity of the 90- and 150-day time limitations. Pet. App. 51a-63a. Applying *Chevron*, the court concluded that the statutory terms "a reasonable period of time" and "failure to act" are ambiguous, and that it therefore owed "substantial deference to the FCC's interpretation of those terms." *Id.* 53a. The court upheld the regulation under *Chevron* Step 2 as a permissible construction of the statute. Again the court gave no consideration to whether the FCC was entitled to a lesser degree of deference in light of the regulation's expansion of federal power in relation to that of the States.

This Court subsequently granted certiorari.

SUMMARY OF THE ARGUMENT

There are three stages to a court's determination whether an agency has validly implemented a statute by adopting rules that have the force of law. The court begins with the threshold question (sometimes referred to as *Chevron* Step 0) whether Congress delegated the agency authority – *i.e.*, jurisdiction – to issue binding interpretations of the statute. If the court determines that the agency has this authority, it is in traditional "*Chevron*" territory. The court then determines (in *Chevron* Step 1) whether there is any substantive "gap" for the agency to fill, or whether Congress instead resolved the specific statutory question. If Congress did not, then the court determines (in *Chevron* Step 2) whether the agency's interpretation is sufficiently reasonable to be sustained.

The Fifth Circuit in this case correctly recognized the *Chevron* inquiry's three-stage structure. At the outset, the court addressed whether Congress intended the FCC to adopt binding interpretations of Section 332(c)(7)(B) – most notably, whether Congress intended to empower the FCC to issue rules specifying when a local government will have "fail[ed] to act" within a "reasonable period of time." Only after deciding this question did the court of appeals ask whether there was a gap for the agency to fill (*Chevron* Step 1) and whether the FCC's rules were substantively reasonable (Step 2).

Despite properly structuring its *Chevron* inquiry, when the Fifth Circuit sought to resolve the threshold question of whether Congress had granted the FCC the power to issue binding rules implement-

ing Section 332(c)(7), it erred. To decide this question, the court of appeals deferred to the FCC's views. The court found the jurisdictional question ambiguous. It then did not resolve the ambiguity itself with its best reading under a *de novo* standard. The court instead found that it must accept any FCC reading of its own statutory jurisdiction that is not "impermissible."

This was error. A court does not defer to an agency's determination of its own jurisdiction to adopt binding interpretations of a statute (*Chevron* Step 0). The Fifth Circuit's contrary decision is irreconcilable with decades of this Court's administrative law precedents. These decisions – none of which suggests deference to the agency at Step 0 – are firmly rooted in the distinct roles of courts and agencies in our constitutional structure. The federal courts are the arbiters of the allocation of power between the branches of government, and they generally have the final word on the meaning of congressional enactments. A court must make its own judgment whether Congress intended to compel the court to accept the agency's statutory interpretation over its own.

To be sure, Congress does in some circumstances assign to agencies the responsibility to resolve ambiguities in federal statutes and to make interstitial judgments about the scope of federal law, especially on statutory questions that require specialized or technical expertise. And when Congress demonstrates this intent, the agency's views on a statute's meaning may be entitled to substantial deference. But the antecedent determination – whether Con-

gress gave the agency that authority – is not a question that generally calls for agency expertise. And the mere fact that Congress did not unambiguously state that the agency lacks jurisdiction is not sufficient to shift ultimate authority from the courts to the agency.

The Fifth Circuit held to the contrary: that a statutory ambiguity on the threshold question whether Congress intended an agency to have interpretive jurisdiction obligates the court to accept the agency's reading over its own. In holding that ambiguity in the statute triggered deference, the court of appeals simply assumed the conclusion to the very question that the threshold jurisdictional analysis seeks to answer — in this case, whether Congress intended the FCC to implement Section 332(c)(7).

This Court accordingly can resolve this case by recognizing that the Fifth Circuit erred in according the FCC deference on the threshold question of the agency's interpretive authority over Section 332(c)(7). The court of appeals believed that the deference accorded to the FCC was essential to the court's ultimate decision upholding the agency's rule. The court emphasized its deference to the FCC's view that it had this final interpretive authority. And in turn the FCC's authority to issue its rules depends on the agency's claimed authority to determine the meaning of Sections 332(c)(7). The judgment accordingly should be vacated and the case returned to the court of appeals to make a *de novo* determination of the FCC's jurisdiction.

If this Court goes further, and applies a *de novo* standard to determine whether Congress delegated

the FCC authority to issue binding interpretations of Section 332(c)(7), the Court should hold that Congress did not do so. Under a *de novo* standard, any ambiguity regarding the agency's jurisdiction is resolved by applying standard rules of statutory interpretation. Where, for example, an agency's claim of authority to implement a statute would give it unprecedented new powers, subvert basic legal principles, trench on authority reserved to others, or implicate constitutional concerns, courts resolve any ambiguity by presuming that Congress did not grant the agency authority. That is the case here. Because Congress adopted Section 332(c)(7) to preserve State and local authority and deliberately elected to assign oversight to the courts (not the FCC), any ambiguity about the FCC's powers under this statute should be resolved *against* the agency.

ARGUMENT

Petitioners challenge the validity of rules promulgated by the FCC that purport to adopt binding interpretations of Section 332(c)(7). In considering this challenge, the Fifth Circuit correctly began its analysis by determining whether Congress intended to grant the FCC the power to authoritatively interpret the provision. But to make this threshold determination, the court of appeals erred by deferring to the agency's own views of its jurisdiction. The court should have instead made this jurisdictional assessment *de novo*.

I. A Court's Determination Whether An Agency Has Issued A Binding Statutory Interpretation Begins With Its *De Novo* – Not Deferential – Determination Of The Agency's Jurisdiction.

Within our federal system of limited and enumerated powers, political actors do not define the scope of their own authority. Those decisions are for the courts, a branch of government insulated from the political pressures that might otherwise influence these jurisdictional determinations. To this fundamental principle, the deference accorded agencies under the *Chevron* doctrine makes no exception. That deference does not attach to threshold jurisdictional questions, but follows after a court has independently confirmed an agency's jurisdiction.

A. An Agency's Statutory Construction Can Be Binding Only If Congress Has Conferred Interpretive Power On The Agency.

1. The administrative state operates at the intersection of the three branches of government under the Constitution. Article I "vest[s]" in Congress "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1. Article II gives the Executive the power to "enforce[]" the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). And under Article III, courts are generally the final arbiters of the meaning of the law. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to re-

solve a case or controversy."); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

These foundational principles are the starting point for any inquiry into the scope of an agency's authority. Consistent with Article II, an agency presumptively has the power only to enforce the law. An agency can acquire "lawmaking" authority only to the extent that Congress confers that power on it. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Likewise, an agency's resolution of a legal question is binding and trumps that of a court only if Congress intends the agency to have the final authority to interpret (and indeed make) "law." *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1950) ("As an administrative body, the [FCC] must find its powers within the compass of the authority given it by Congress"); 5 U.S.C. § 558(b) (a substantive rule or order may not be issued "except within jurisdiction delegated to the agency and as authorized by law").

Because an agency "may not confer power upon itself," *Louisiana PSC*, 476 U.S. at 374, the scope of an agency's legal authority is for a court to determine. Courts, not agencies, must "decide all relevant questions of law," "interpret constitutional and stat-

utory provisions," and set aside an agency conclusion that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

2. The *Chevron* doctrine fits comfortably within these constitutional principles. *Chevron* itself made clear that an agency may issue binding legal interpretations only with respect to statutes for which Congress has delegated the agency authority. 467 U.S. at 865 (indicating that an agency "to which Congress has delegated policymaking responsibilities" may make policy "within the limits of that delegation"). The Court repeatedly stated that the agency interpretation before it was entitled to deference because Congress had committed the statutory question to the agency's care. *Id.* at 842 (referring to statute "which [the agency] administers"); *id.* at 844 (noting that "weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *id.* at 845 (deference applies to "conflicting policies that were committed to the agency's care by the statute" (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961))); *id.* at 863 (describing the EPA as "the agency primarily responsible for administering this important legislation").

The assessment of agency deference accordingly always begins with the determination whether Congress intended to assign the agency authoritative interpretive power over the statute. This threshold determination is sometimes referred to as *Chevron* Step 0. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain,* 89 Geo. L.J. 833, 836 (2001). It addresses what might be called the agen-

cy's "interpretive jurisdiction": whether Congress empowered the agency, rather than the courts, to resolve ambiguities in the statute.

This Court's subsequent decisions have confirmed that "[a] *precondition* to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (emphasis added). Only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," is *Chevron* deference warranted. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ("[T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." (emphasis omitted)).

When it is apparent that Congress "has delegated the responsibility for administering [a] statutory program," courts must "respect" reasonable agency interpretations that are within the scope of the delegation. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 843-44. However, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650

(quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

If a court finds sufficient evidence "from the agency's generally conferred authority and other statutory circumstances" that Congress did intend to confer on the agency the authority to issue binding interpretations of a statute, *Mead*, 533 U.S. at 229, then the court will address the agency's resolution of substantive statutory interpretation issues under *Chevron*'s two-step formula. The two-step inquiry relates to the validity of what might be called the agency's "substantive jurisdiction" – the agency's power to fill statutory gaps in particular ways. If the court finds under *Chevron* Step 1 that Congress has not eliminated the agency's discretion over the specific subject matter by unambiguously addressing "the precise question at issue," *Chevron*, 467 U.S. at 842, then, under *Chevron* Step 2, the court will defer to the agency's construction so long as it is reasonable, *id.* at 843-44. But if Congress has not delegated the agency interpretive authority over the statute, then the agency's substantive interpretation "is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

B. A Court Determines Whether Congress Delegated An Agency Interpretive Authority *De Novo*.

At the threshold, Step 0 stage of the *Chevron* inquiry, a court determines Congress's intent *de novo*; it does not defer to an agency's views. This Court has considered the validity of agency regulations,

rules, and pronouncements in dozens of cases. Whenever an issue has arisen regarding the agency's authority to issue a binding statutory interpretation, the Court has uniformly considered the scope of the agency's authority *de novo* – assessing factors such as whether Congress empowered the agency to make rules with the force of law, whether the agency's expressed views are authoritative, and whether the agency's position is well-reasoned, to name a few. But contrary to the Fifth Circuit's decision in this case, this Court has *never* deferred to the agency's view that Congress intended to delegate it authority. *See, e.g.*, *Astrue v. Capato ex rel B.N.C.*, 132 S. Ct. 2021, 2033-34 (2012) (determining based on the language of the Social Security Act and the rulemaking procedure utilized by the Social Security Administration that Congress had empowered the Administration to make rules with the force of law); *Negusie v. Holder*, 555 U.S. 511, 515-16 (2009) (holding that the Board of Immigration Appeals generally has the power to make rules with the force of law, but when its interpretation was premised on a legal error, that interpretation was not entitled to deference until the Board had an opportunity to revisit it on remand); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (holding that "the [EEOC's] policy statements, embodied in its compliance manual and internal directives, interpret not only the regulations but also the statute itself," and therefore merited only *Skidmore* deference); *Long Island Care at Home, Ltd.*, 551 U.S. at 165 (conducting *de novo* textual analysis of the Fair Labor Standards Act and determining that the statute "explicitly leaves gaps" and "provides the Department with the power to fill

these gaps through rules and regulations" so that ensuing regulations merit *Chevron* deference); *Gonzales*, 546 U.S. at 258-68 (conducting full *de novo* review of the Controlled Substances Act and concluding that notwithstanding ambiguity in the statute, "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (recognizing on *de novo* review that Congress had delegated power to the FCC to enforce the Communications Act through binding legal rules); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (recognizing on *de novo* review that Congress has expressly delegated rulemaking authority to the Federal Reserve Board to enforce the Truth in Lending Act); *Alaska Dept. of Envt'l Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) (conducting *de novo* review to determine that the EPA's interpretation, "presented in internal guidance memoranda," lacked the force of law and therefore did not merit *Chevron* deference); *Barnhart v. Walton*, 535 U.S. 212, 217, 221-22 (2002) (conducting *de novo* review to defer to Social Security Administration rule enacted pursuant to "statutory rulemaking authority"); *Mead*, 533 U.S. at 233-34 (conducting *de novo* review to determine from the "face of the statute," the "agency practice," and "the amendments to the statute made effective after this case arose" that Customs' letter rulings did not have the force of law); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (conducting *de novo* review to hold that when "an administrative interpretation of a statute invokes the outer

limits of Congress' power, we expect a clear indication that Congress intended that result," and thus denying deference when an administrative regulation threatened the balance of federalism); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding on *de novo* review that interpretive rules that lack the force of law "do not warrant *Chevron*-style deference"); *Smiley v. Citibank, N.A.*, 517 U.S. 735, 739 (1996) (holding on *de novo* review that Congress intended for the Comptroller of the Currency to enforce and interpret the National Bank Act); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (conducting *de novo* review to "infer from the structure and history of the statute" whether Congress had delegated interpretive authority to the Secretary of Labor); *Bowen*, 488 U.S. at 212-13 (denying *Chevron* deference to an agency litigating position that was not rooted in the agency's delegated authority).

In *Adams Fruit*, the Court refused to defer to the Department of Labor's position that the private right of action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) was limited by state workers' compensation laws. Noting that "*Chevron* review of agency interpretations of statutes applies only to regulations 'promulgated pursuant to congressional authority,'" the Court held that Congress had not "empower[ed] the Secretary to regulate the scope of the judicial power vested by the statute." 494 U.S. at 649-50 (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 204, 208 (1987)). The Court accorded no deference to the agency's views in making that determination. Rather, it was based on the Court's *de novo* conclusion that "[n]o such dele-

gation regarding AWPA's enforcement provisions is evident in the statute." *Id*. at 650. The Court's own review of the statute indicated that "Congress established an enforcement scheme independent of the Executive." *Id*. Based on this determination, the Court concluded that "it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy." *Id.*

The Court likewise addressed the delegation issue *de novo* in *Mead*. The inquiry in that case was whether there was any "indication," either on "the face of the statute" or elsewhere, that "Congress meant to delegate authority to Customs to issue classification rulings with the force of law." 533 U.S. at 231-32. The Court's analysis of that question did not include any deference to the agency's views. Instead, the Court independently reviewed the statutory text – looking to, for example, a "provision for independent review" of the agency rulings at issue – and concluded that "[i]t is hard to imagine a congressional understanding more at odds with the *Chevron* regime." *Id.* at 232-33.

The Court followed the same approach in *Gonzales v. Oregon*, 546 U.S. 243 (2006). There, the Attorney General argued that an interpretive rule prohibiting the prescription of regulated drugs for use in physician-assisted suicide was entitled to *Chevron* deference in light of his rulemaking authority under the Controlled Substances Act (CSA). The Court, however, held that "[t]o begin with," it must be determined whether the rule was "promulgated pursuant to authority Congress has delegated to the offi-

cial." *Id.* at 258. In conducting this analysis, the Court accorded no deference at all to the Attorney General's view of the scope of his interpretive authority, but instead conducted a *de novo* review of the statute's text, structure, and history. *See, e.g., id.* at 262 (noting that the interpretive rule "cannot, and does not, explain why the Attorney General has the authority to decide what constitutes an underlying violation of the CSA in the first place"); *id.* at 263 ("The statutory terms 'public interest' and 'public health' do not call on the Attorney General . . . to make an independent assessment of the meaning of federal law."). That is, a statute's mere ambiguity does not automatically translate into jurisdictional authority to address the ambiguities.

Other decisions of this Court likewise recognize that the determination of the scope of an agency's delegated authority is to be conducted by the court *de novo* and without deference to the agency's views. *See, e.g.*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378-84, 387 (1999) (addressing "what might be called underlying FCC jurisdiction" without relying on *Chevron* deference, then applying *Chevron* to the agency's determinations on the merits); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). These cases reflect the logical principle that "if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency's views on whether a delegation has taken place." Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Jurisdiction, Agency Defer-*

ence, and Statutory Silences, 2009 U. Ill. L. Rev. 1497, 1564 (2009).

Even in the view of jurists who maintain that an agency's assertion of "jurisdiction" is entitled to deference, the question of whether Congress delegated an agency interpretive authority remains for the courts alone. For example, Justice Scalia has stated his understanding that it is "settled law" under the Court's precedents "that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment). But the cited precedents all involved a very different form of jurisdiction: the *scope* of the agency's delegated power, as opposed to the antecedent question whether Congress had delegated interpretive authority to the agency. In each, Congress's delegation of interpretive jurisdiction over the relevant statute had already been established.[1] In several other opin-

---

[1] *See City of New York v. FCC*, 486 U.S. 57, 67 (1988) (deference to regulations warranted where statute "grants the Commission the power to 'establish technical standards'" (citation omitted)); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 843, 845 (1986) (deference warranted where statute gave "broad grant of power" to agency to decide "whether a particular regulation" was reasonably necessary); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (deference warranted where "power delegated to the FCC plainly comprises authority to regulate" cable television signals); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (deference to agency "on an issue that implicates its expertise in labor relations" warranted where Court had

ions, Justice Scalia has adhered to the settled principle that the inquiry into an agency's delegated authority to interpret a statute is to be conducted *de novo*.[2]

Similarly, as the petition for certiorari explained, several courts of appeals hold that an

---

previously determined "that the task of defining the scope" of the statute was for agency); *CBS, Inc. v. FCC*, 453 U.S. 367, 386 (1981) (deference warranted where "Congress . . . charged the Commission with [statute's] enforcement"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (upholding regulations where Congress "ratified" agency construction "with positive legislation"). In the other cited case, *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351 (1941), the Court declined to defer to an agency construction that was inconsistent with the statute's "obvious meaning."

[2] *See, e.g.*, *Smiley*, 517 U.S. at 739 (1996) (Comptroller of Currency receives deference for reasonable interpretations of National Bank Act because Comptroller "'is charged with the enforcement of banking laws'" (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995))); *Gonzales*, 546 U.S. at 297 (Scalia, J., dissenting) (arguing, based on *de novo* analysis, that the Attorney General's interpretation of Controlled Substances Act was entitled to deference); *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring) (arguing that deference was owed to EEOC's interpretation of Age Discrimination in Employment Act because statute "confers upon the EEOC authority to issue 'such rules and regulations as it may consider necessary or appropriate for carrying out' the ADEA") (citation omitted)); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 601 (2004) (Scalia, J., dissenting) (arguing that EEOC's interpretation of ADEA was entitled to deference because EEOC is "the agency tasked by Congress with enforcing the ADEA").

agency's assertion of "jurisdiction" is entitled to deference. Pet. 13-16. But when presented with the issue in this case – whether Congress delegated interpretive authority – each of those courts decides the question *de novo*.[3]

---

[3] *See, e.g.*, *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 303 (3d Cir. 2012) (holding that the Commissioner of Social Security was only entitled to *Skidmore* deference because the relevant interpretation had not been issued pursuant to her delegated authority); *Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281 (3d Cir. 2005) (holding that the Secretary of Health and Human Services was owed *Chevron* deference because "in the case before us there is adequate indication of congressional intent in the statute to demonstrate substantial delegation of authority to the Secretary"); *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 453-54 (5th Cir. 2008) (rejecting government's request for *Chevron* deference to an IRS revenue ruling because the ruling was not issued pursuant to delegated authority and because the IRS, outside the litigation, had not treated it as having the force of law); *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 928 (5th Cir. 2012) (holding that statements made in a guidance document, as well as appellate counsel's statements, were entitled only to *Skidmore* deference); *Godinez-Arroyo v. Mukasey*, 540 F.3d 848 (8th Cir. 2008) (considering *de novo*, without deciding, whether unpublished orders of the Board of Immigration Appeals (BIA) have the "force of law" and therefore merit *Chevron* deference); *Carpio v. Holder*, 592 F.3d 1091, 1096-98 (10th Cir. 2010) (holding that unpublished BIA orders do not have the force of law and so do not merit *Chevron* deference); *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1243 (10th Cir. 2003) (rejecting a request for *Chevron* deference and applying *Skidmore* to the EPA's informal characterizations of events for purposes of assessing a CERCLA statute of limitations).

II. The Court of Appeals Erred By Not Resolving *De Novo* The Threshold Question Whether Congress Granted The FCC Interpretive Jurisdiction Over Section 332(c)(7).

The Fifth Circuit's decision cannot be squared with the precedents above. Indeed, the case underscores why a court must make the threshold, jurisdictional inquiry *de novo*.

A. The Fifth Circuit Should Not Have Deferred To The FCC's Determination Of Its Own Jurisdiction Over Section 332(c)(7).

The Fifth Circuit found that its own circuit precedent required it to resolve whether the FCC has interpretive jurisdiction over Section 332(c)(7) by deferring to the FCC's view. Pet. App. 37a. The court accordingly never sought to evaluate the FCC's statutory jurisdiction itself, by adopting the statute's best reading *de novo*. The court instead asked only whether the FCC's reading was "impermissible." Pet. App. 51a. This was wrong for several reasons.

First, this Court's decisions discussed above remove any doubt that the threshold determination whether Congress empowered an agency to implement a statute (Step 0) is for a court, not an agency. Deference to the agency does not apply to, but follows, the Court's confirmation of a delegation under this "precondition." *Adams Fruit Co.*, 494 U.S. at 649.

Second, applying *Chevron* to this preliminary jurisdictional question defies Congress's standard choice to leave jurisdictional questions to a neutral

body, the courts. The FCC has only those powers that Congress grants it. The agency also has an incentive to limit or expand these powers to further its own interests. Independent judicial review serves as an important check. But applying *Chevron* to an agency's determination of its own jurisdiction – as opposed to technical or specialized matters over which Congress has granted the agency authority – undermines Congress's ordinary allocation of authority between the branches. Here, Congress sought to preserve State and local zoning authority, not to structure the zoning process around a federal agency's "policy." Pet. App. 212a-13a. Yet now the FCC has implemented the statute, at least in part, to further national "goals that the Commission sought to advance" in other proceedings and under other statutes. *Id.* 105a. By requiring a court to accept any "permissible" reading over the court's best reading, the doctrine elevates an agency's self-interested reading over a neutral one. *See generally* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 244 (2004).

Third, deferring to an agency on the question of the scope of an agency's jurisdiction assumes that an agency has inherent authority to make jurisdictional determinations unless Congress uses unambiguous language to deny it. This view cannot be squared with the fundamental rule that an agency only has the powers that Congress has conferred upon it. *Louisiana PSC*, 476 U.S. at 374; *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

Fourth, the assumption of the court of appeals that Congress intended to confer interpretive au-

thority on the FCC runs afoul of settled nondelegation principles. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted). This Court accordingly has explained that "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928). Congress thus cannot be presumed to have intended to delegate legislative power to an agency, and federal statutes should be construed to avoid that constitutional issue if such a construction is "fairly possible." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

A rule treating statutory ambiguity as evidence that Congress has given interpretive authority to an agency stands these constitutional principles on their head. The power to define the scope of an agency's power to interpret federal law, and thereby to "create regulatory jurisdiction where none existed[,] is quintessentially 'legislative' power." Sales & Adler, *supra*, at 1565 n.246. In light of the grave constitutional concerns that such a delegation would create, a statutory ambiguity cannot provide a basis for presuming, as the Fifth Circuit did, that Congress intended that result. To the contrary, this Court's constitutional avoidance precedents teach that courts should instead adopt the opposite pre-

sumption.

Fifth, applying *Chevron* deference to this preliminary jurisdictional question does not fit the rationale of *Chevron* itself. In *Chevron*, the Court criticized the D.C. Circuit for rejecting the EPA's interpretation of a specialized, technical question: the definition of "stationary source." *Chevron*, 467 U.S. at 846. For this question, the court recognized that "[j]udges are not experts in the field"; the EPA is. *Id.* In contrast, the question whether Congress expressly or implicitly conferred authority is one on which courts, not agencies, are expert. *See, e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("Congress may have intended *not* to leave the matter of a particular interpretation up to the agency . . . where an unusually basic legal question is at issue.").

Finally, the Fifth Circuit's approach effectively assumes the answer to the very question that is antecedent to *Chevron* deference. In determining whether Congress intended for the FCC or the courts to resolve ambiguities in Sections 332(c)(7)(A) and (B)(v), the court of appeals held that those provisions' *own ambiguity* required it to resolve the question in favor of the FCC. *See* Pet. App. 45a, 51a (holding that "the FCC is entitled to deference" because "[t]he language of § 332(c)(7) is silent" regarding its interpretive authority). By assuming away the answer to that threshold question, the court failed to execute its Article III duty to ensure that Congress intended to confer interpretive power on

the agency. Instead, it allowed the agency to "confer power upon itself." *Louisiana PSC*, 476 U.S. at 374.

B. This Case Underscores Why Courts Do Not Defer To An Agency On This Threshold Jurisdictional Question.

This case underscores why courts do not – and must not – defer to an agency's views of its own interpretive jurisdiction. Here, the contextual evidence that Congress did not empower the FCC to structure Section 332(c)(7) around its own rules is overwhelming. Deferring to the FCC's view of its own jurisdiction forces a court to ignore this.

Congress made it abundantly clear that Section 332(c)(7) is not a garden-variety Communications Act provision for FCC implementation, but instead a unique effort to rely on State and local land use processes and the case-by-case oversight of the courts. The provision is titled "Preservation of local zoning authority," and it has been described as an "experiment in federalism." *Town of Amherst v. Omnipoint Commc'ns Enters. Inc.,* 173 F.3d 9, 17 (1st Cir. 1999). It provides that, "[e]xcept as provided in this paragraph," no other provision of the Communications Act shall "limit or affect" State or local authority regarding the location of personal wire service facilities. 47 U.S.C. § 332(c)(7)(A). It gives the FCC the power to address one of the statutory limitations on State and local authority – the bar on siting decisions based on the environmental effects of radio frequency (RF) emissions, *id.* § 332(c)(7)(B)(iv) – but otherwise leaves disputes to judicial resolution, *id.* § 332(c)(7)(B)(v). By its terms, then, the statute permits the FCC to act where Section 332(c)(7) gives

it a role (to address RF matters), while shielding State and local authority from any "limit" or "[e]ffect" caused by any other provision of the Act. Thus, like the provision at issue in *Louisiana PSC*, Section 332(c)(7) is an "express jurisdictional limitation[] on FCC power" that "fences off" State and local authorities "from FCC reach or regulation," except as specifically provided in the statute. 476 U.S. at 370.

The legislative history confirms Congress's purpose. The House of Representatives initially had passed language empowering the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). The bill directed the FCC to adopt "policies" requiring a local government to act "within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.* Congress, however, "ultimately rejected the national approach" and instead adopted the current Section 337(c)(7) – "a system based on cooperative federalism." *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring). Congress revised the statute's language to retain many of the House bill's limitations, but changed how they would be implemented: it struck all references to FCC "policy," and instead inserted a private right of action. 47 U.S.C. § 332(c)(7)(B)(v). The Conference Report accordingly directed the FCC to "terminate[]" its rulemakings, Pet. App. 209a, and confirmed that the statute establishes "limitations

on the role and powers of the Commission . . . relate[d] to local land use regulations." H.R. Rep. No. 104-458 (1996) (Conf. Rep.) at 207-08, Pet. App. 211a.

Moreover, Congress gave no hint that when it required State and local action within a "reasonable period of time . . . taking into account the nature and scope of such request," 47 U.S.C. § 332(c)(7)(B)(ii), that it intended to create national, presumptively binding deadlines for a particular industry. To the contrary, the legislative history reveals that Congress deliberately chose not to create fixed *federal* standards, but instead to prevent State and local governments from applying their *local* standards differently in this setting:

> If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

Pet. App. 210a.

A *de novo* standard would permit a court to adopt the best reading: that Congress did not empower the FCC to structure Section 332(c)(7) around national, administrative policy. A deferential standard on this jurisdictional question resulted in the Fifth Circuit allowing the FCC to use statutory am-

biguity to create a regulatory scheme that Congress specifically rejected.

* * *

Therefore, to decide this case, it is sufficient for this Court to hold that the Fifth Circuit erred by not determining *de novo* whether Congress intended to delegate to the FCC the power to issue its supposedly binding interpretation of Section 332(c)(7). This Court accordingly can vacate the judgment below and remand for the court of appeals to conduct the appropriate *de novo* inquiry.

III. The Court Of Appeals Should Have Presumed That Congress Did Not Delegate Interpretive Jurisdiction Over Section 332(c)(7) To The FCC.

If this Court instead elects to go further, it should either apply a *de novo* standard itself and hold that Congress did not intend for the FCC to adopt binding rules interpreting Sections 332(c)(7) or instruct the court of appeals that it may not adopt the FCC's jurisdictional determination without first finding a clear indication from Congress that it intended the agency to assume authority in this area. *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (reviewing *de novo* and with presumptions against preemption the meaning of "any entity" under 47 U.S.C. § 253, despite FCC adjudication interpreting statute); *Solid Waste Agency of N. Cook County ("SWANCC") v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001).

A. Congress Was Required To Speak With Particular Clarity If It Wished To Grant The FCC Authority To Adopt Rules Implementing Section 332(c)(7).

1. As shown, *supra*, the best *de novo* reading of Section 332(c)(7) is that the FCC lacks the authority to implement it. Any doubt in that regard is resolved by application of well-recognized statutory presumptions that require clear statements of delegation in certain circumstances. While this Court has recognized that the Communications Act generally gives the FCC broad authority to interpret provisions within the Act, *Gonzales*, 546 U.S. at 258-59, that rule is not absolute, as the courts and the agency itself have generally recognized. The FCC is given broad authority over communications by wire and radio, and over entities that communicate by wire, 47 U.S.C. § 152, but not over public or private property, or over State or local governments generally. The agency, therefore, concluded that it did not have authority to regulate attachments to facilities essential to communications absent a more specific grant of authority from Congress. *California Water & Power Co.*, 64 F.C.C.2d 753, 759 (FCC 1977) (citing *Ill. Citizens Committee for Broad. v. FCC*, 467 F.2d 1397 (7th Cir. 1972)). Congress itself has historically limited FCC authority to regulate State and local property (47 U.S.C. § 224) and historically limited FCC interference with intrastate regulation, *Louisiana PSC*, 476 U.S. at 374-75.

2. Here, the Fifth Circuit recognized that Section 332(c)(7) begins with jurisdiction-limiting language, albeit language that the court found ambiguous. But

that very ambiguity should have led the court to presume that Congress did not intend to give the FCC authority to regulate zoning. *Louisiana PSC* is illustrative. It involved a preservation clause stating that "except as provided" in certain sections, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters related to intrastate service. *See* 476 U.S. at 370. The FCC argued that the clause should be construed to preserve State authority only as to intrastate matters that were separable from interstate communication. The Court disagreed, noting that, although State regulations may be displaced to the extent that they obstruct the objectives of Congress, the statute at issue "constitutes . . . a congressional *denial* of power to the FCC." *Id.* at 374. The Court recognized that a delegation of authority to an agency cannot be implied in such circumstances: "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *Id.* at 374-75.

3. The rule in *Louisiana PSC* rests upon broader federalism principles that apply whenever a statutory interpretation question implicates the historic federal-state balance. This Court has long recognized an "'assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original). That assumption "applies with particular force

when Congress has legislated in a field traditionally occupied by the States." *Id.*

This Court has accordingly held, in a variety of contexts, that courts may not adopt a statutory interpretation abrogating traditional State authority absent a clear statement from Congress that it intended that result. *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" (internal quotation marks omitted) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))); *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *SWANCC*, 531 U.S. at 172-73; *United States v. Bass,* 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

Finding that the FCC has interpretive jurisdiction over Sections 332(c)(7) – and thus the power to implement zoning policies binding on States and localities – would trigger these very concerns. The subject matter of Section 332(c)(7) – local land use – is manifestly an area of traditional State regulation. The FCC has no experience in managing zoning. Indeed, just before Congress enacted this statute, the FCC explained that it "traditionally has been reluctant to become embroiled in zoning matters, believing that such issues are within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12631, 12633

(1995).

Congress did mean to limit local authority to discriminate against wireless providers, but it also did not wish to replace local zoning standards with a national zoning process. That the FCC's jurisdictional claim would displace State and local authority over local land use processes is clear from the Declaratory Ruling itself. Under that policy, if a State or local government does not release its decision on a siting application within the 90- or 150-day deadlines (without extension by mutual agreement), its decision automatically constitutes a "failure to act" and is presumptively an unreasonable "period of time" on the merits. Pet. App. 115a . Unless the applicant agrees otherwise, this forces the State or local government into court on an expedited timetable, requiring it to expend resources to defend its action, even if the time was necessary to comply with other binding obligations (such as State environmental laws) or to implement policies reflected in the State's or locality's own deadlines. Moreover, because these rules apply only to applications for personal wireless service facilities, a State or locality wishing to avoid litigation must give precedence and special treatment to wireless applicants at the expense of other zoning applicants and policies. That is to say, allowing the FCC to implement Section 332(c)(7) both "limits" and "affects" local authority in a fundamentally different way than court review of individual zoning decisions. Given the intrusion on traditional local authority, FCC jurisdiction cannot be presumed from ambiguous statutory language. The Fifth Circuit was required to apply this principle in construing Sections 332(c)(7).

4. The Fifth Circuit should have concluded that Congress did not empower the FCC to authoritatively interpret "failure to act" in Section 332(c)(7)(B)(v) for an independent reason: Congress committed the language in this private right of action to the courts.

As explained above, Congress rejected a model that would have established limits on State and local authority through a general FCC "policy." It replaced it with a regime rooted in judicial review, through cases brought under a private right of action. The FCC now seeks to restore the primacy of FCC policy by defining this private cause of action. The FCC may not do so. As in *Adams Fruit*, "even if . . . language establishing a private right of action is ambiguous, we need not defer" to the FCC's reading of it "because Congress has expressly established the Judiciary and not the [FCC] as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649. Here, the FCC openly acknowledged that it sought to define the "statutory trigger for seeking judicial relief," and that that its goal was to allow providers to "more vigorously" enforce the statute in court. Pet. App. 106a. This judicial matter, however, is well beyond the FCC's domain. Because Congress "established an enforcement scheme independent of the [FCC] . . . . it would be inappropriate to consult [FCC interpretations] to resolve ambiguities surrounding the scope of [Section 332(c)(7)'s] judicially enforceable remedy." *Adams Fruit*, 494 U.S. at 650.

In sum, because the FCC's claim of authority to implement Section 332(c)(7)(B) would encroach on

matters that Congress left to State and local governments, and to the courts, the court of appeals had ample grounds to require a clear delegation of authority. Not only was there no such delegation, but Section 332(c)(7)'s text and history in fact point in the opposite direction, with one exception: Section 332(c)(7) was included in the Communications Act. Pet. App. 39a. That was not sufficient. *See* Part III.B, *infra*. The FCC's substantive interpretations were at most entitled to consideration under *Skidmore*.

B. There Is No Reason To Conclude That Congress Delegated Interpretive Authority To The FCC Here.

To be sure, Congress does delegate interpretive authority to agencies, often under circumstances where there is little or no reason to believe that Congress would not intend it. But this is not such a case.

1. Courts have little trouble determining that Congress intended an agency to have interpretive jurisdiction over a particular statute when Congress says so expressly. Similarly, as the Court recognized in *Gonzales*, it may be easier to find that Congress implicitly intended an agency to interpret a provision that is included within a comprehensive statute that grants an agency broad, general authority. 546 U.S. at 258. To be sure, the Communications Act is such a measure. *Id.* Because of this, when Congress adds a provision to the Act – without more – the addition alone may imply a delegation. *AT&T*, 525 U.S. at 377. But when "statutory provisions. . . displace the Commission's general rulemaking author-

ity," this implication falls away. *Id.* at 385.

Within Section 332(c)(7) itself, Congress did not grant the FCC general interpretive jurisdiction: the statute empowers the FCC to address only a single issue, RF emissions. 47 U.S.C. § 332(c)(7)(B)(iv). Likewise, there is no express delegation of interpretive jurisdiction over Sections 332(c)(7) in any other provision of the Communications Act. The FCC contends that it has the power to implement Section 332(c)(7)(B) pursuant to 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r). These provisions, with slight variations, generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). That generalized grant of authority, however, cannot override the specific terms of Section 332(c)(7)(A), which preserves State and local zoning authority against federal regulation "[e]xcept as provided *in this paragraph*." 47 U.S.C. § 332(c)(7)(A) (emphasis added); *see AT&T*, 525 U.S. at 385; *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.' That is particularly true where . . . 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" (alteration in original) (citations omitted)). This exception to the general rule – *i.e.,* that "nothing in this Act" may "limit" or "affect" State or local authority – must be read narrowly. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). Nor do Sections 1, 4(i), 201(b), and 303(r) of the Communications Act provide anything approaching the "'clear and manifest'"

statement of congressional intent required to overcome the presumption against delegation in this case. *Bates*, 544 U.S. at 449 (citation omitted).

"[W]here one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that *Chevron* does not presumptively leave to agency resolution)," *Chevron* deference does not apply. *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting). This requirement that Congress give some affirmative indication of its intention to delegate interpretive jurisdiction to an agency is the natural outgrowth of *Chevron*'s status as a doctrine fundamentally rooted in congressional intent. *See* Merrill & Hickman, *supra*, at 872 ("In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is . . . important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority."). The decision of the court of appeals decision is squarely refuted by these precedents.

2. There may be cases where a statute's subject matter so plainly requires agency expertise that jurisdiction may be implied from imprecise delegations. This, however, is certainly not a case in which Congress can be presumed to have intended for the agency to have final interpretive authority because of the need for an "expert policy judgment" in a subject area that is "'technical, complex, and dynamic.'" *Brand X*, 545 U.S. at 1002-03 (quoting *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)); *see Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52

(1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). As noted above, the FCC has no expertise over State and local zoning matters. Likewise, whether Congress intended to delegate to the FCC final interpretive authority over Sections 332(c)(7) is a pure legal question that does not touch on the FCC's technical expertise in communications matters. Rather, expertise in deciding questions of jurisdiction and congressional intent lies with courts, not agencies. *See* Sales & Adler, *supra*, at 1535 ("However much expertise agencies may have at answering technical or policy questions, they have no institutional advantage over courts in resolving jurisdictional disputes.").

3. There may also be cases where there is such an evident need for a national standard that it can be implied that Congress intended an agency to implement the statute. This case presents no such circumstance. Far from contemplating a single timing standard, Section 332(c)(7) is specifically designed to require courts to evaluate challenged delays on a case-by-case basis, taking into account local conditions and giving deference to the expertise of local zoning officials. That is in fact precisely how the statute was understood to operate during the twelve years between its enactment and the issuance of the Declaratory Ruling. *See, e.g., Omnipoint Communications*, 173 F.3d at 17 (describing statute as a "refreshing experiment in federalism" that "does not offer a single 'cookie cutter' solution for diverse local situations" but instead contemplates "individual solutions best adapted to the needs and interests of particular communities"). More importantly, such a

view comports with the will of Congress, which directed courts to apply the "reasonable period of time" requirement by examining the "usual period" established by State and local zoning experts, H.R. Rep. No. 104-458, at 207-08 (1996), Pet. App. 210a, not by looking to the FCC for guidance.

* * *

In sum, the court of appeals should not have applied *Chevron* to review the FCC's interpretation of its own statutory jurisdiction. The court instead should have answered *de novo* the preliminary jurisdictional question of whether Congress delegated to the FCC final interpretive authority over Sections 332(c)(7)(A) and (B)(v). In conducting that inquiry, the court should have applied traditional canons of statutory construction, including the presumption that Congress does not intend to expand agency jurisdiction into areas of traditional State and local regulation.

CONCLUSION

The Court should reverse the court of appeals' judgment, or vacate that judgment and remand the case.

Respectfully submitted,

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
KEVIN R. AMER
TEJINDER SINGH
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015

THOMAS D. BUNTON
SENIOR DEPUTY
COUNTY COUNSEL
COUNTY OF SAN DIEGO
1600 Pacific Highway
Room 355
San Diego, CA 92101

Counsel for Petitioner County of San Diego, California

JOSEPH VAN EATON
Counsel of Record
JAMES R. HOBSON
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Ave. NW
Suite 4300
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas; and Texas Coalition of Cities for Utility Issues

November 19, 2012