Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether, in reviewing an agency's interpretation of its statutory authority, a court should apply the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 668 F.3d 229. The order of the Federal Communications Commission (Pet. App. 69a-171a) is reported at 24 F.C.C.R. 13,994, and its order denying reconsideration (Pet. App. 172a-195a) is reported at 25 F.C.C.R. 11,157.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2012. Petitions for rehearing were denied on March 29, 2012 (Pet. App. 196a-197a). The petition for a writ of certiorari in No. 11-1545 was filed on June 27, 2012, and the petition in No. 11-1547 was filed on June 22, 2012. The petitions were granted on October 5, 2012, limited to Question 1 in No. 11-1545. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. An effective national wireless telecommunications network requires the construction of numerous communications towers and antennas. Local zoning boards can impede the development of that necessary infrastructure, however, by "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements." H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 94 (1995) (House Report). As a result, "zoning approval for new wireless facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 F.C.C.R. 10,785, 10,833 ¶ 90 (1997).

In 1996, Congress enacted comprehensive telecommunications reform legislation "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (quoting Telecommunications Act of 1996 (1996 Act), Pub. L.

No. 104-104, preamble, 110 Stat. 56). Part of the 1996 Act was designed to "reduc[e] * * * the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *Ibid.* In that portion of the statute, Congress enacted a "National Wireless Telecommunications Siting Policy," 1996 Act § 704, 110 Stat. 151 (capitalization altered), in order to "speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range [of] options for such services," House Report 94.

The new provision, which Congress made part of the Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities." *City of Rancho Palos Verdes*, 544 U.S. at 115; see 47 U.S.C. 332(c)(7)(B) ("Limitations"). The statute provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government * * * shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). The statute also requires that a state or local government "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." 47 U.S.C. 332(c)(7)(B)(ii). Any person "adversely affected by" a government's "failure to act" on such a request "may, within 30 days after such * * *

failure to act, commence an action in any court of competent jurisdiction." 47 U.S.C. 332(c)(7)(B)(v).

Section 332(c)(7) also includes a savings clause. Entitled "General authority," that provision states that, "except as provided in" Section 332(c)(7), 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); see 47 U.S.C. 332(c)(7) (heading) ("Preservation of local zoning authority").

2. Before the Federal Communications Commission (FCC or Commission) issued the order at issue here, wireless service providers that wished to invoke Section 332(c)(7)'s protections were in an uncertain position. Under the statute, a party seeking to challenge a local government's "failure to act" must file suit "within 30 days after such * * * failure to act." 47 U.S.C. 332(c)(7)(B)(v). The statute, however, provides no clear standard for determining what constitutes a "reasonable period of time" for action, or when a government can be deemed to have "fail[ed] to act" on a request. Absent such guidance, wireless carriers faced the unenviable choice of either waiting for the local government to act, and potentially missing the 30-day window to file suit, or expending resources to file a suit that might be dismissed as premature. See Pet. App. 92a-93a.

In an effort to resolve that dilemma and speed deployment of wireless infrastructure, CTIA—The Wireless Association (CTIA), a trade association of wireless service providers, filed a petition for a declaratory ruling with the FCC to clarify the meaning of "failure to act" in Section 332(c)(7)(B)(v). Pet. App. 71a. In response to CTIA's petition, hundreds of comments were

filed by wireless providers, state and local governments, and other interested parties. See *id.* at 78a-79a, 144a-152a. After reviewing the record, the FCC issued a declaratory ruling granting in part and denying in part CTIA's petition. *Id.* at 69a-171a.

As a threshold matter, the Commission determined that it had "the authority to interpret Section 332(c)(7)." Pet. App. 87a. The FCC noted that Congress had "delegated to the Commission the responsibility for administering the Communications Act," and that several sections of the Communications Act grant the FCC broad authority to implement its provisions. *Id.* at 87a-88a (citing 47 U.S.C. 151, 154(i), 201(b), 303(r)). "These grants of authority," the FCC explained, "necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular." *Id.* at 88a. The FCC further explained that exercise of its authority to interpret Section 332(c)(7) did not contravene that provision's savings clause, see 47 U.S.C. 332(c)(7)(A), because the Commission was not "impos[ing] new limitations" on local zoning authorities, but instead was "merely interpret[ing] the limits Congress already imposed" in Section 332(c)(7) itself. Pet. App. 90a; see *id.* at 134a.

The FCC found that, despite Section 332(c)(7)'s requirement that zoning boards act expeditiously, "personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services." Pet. App. 96a-97a; see *id.* at 98a-102a, 105a-106a. In addition, the agency explained, the delays hindered competition, as wireless providers seeking to provide broadband access struggled to keep

up with their wireline broadband competitors. *Id.* at 102a-105a.

In response to that record evidence, the Commission determined that the public interest would be served by defining the statutory terms "reasonable period of time" and "failure to act" to clarify when an adversely affected provider may seek relief in court under Section 332(c)(7)(B). Pet. App. 106a. The agency concluded that clarification would further the statutory goals by enabling wireless service providers to enforce the statute's protections against unreasonable delays that would otherwise "impede[] the deployment of services that benefit the public." *Ibid.*

In assessing how to define a "reasonable period of time" for processing zoning applications, the Commission focused "on actual practice as shown in the record." Pet. App. 111a. The large majority of zoning authorities that participated in the proceeding stated that they processed applications for wireless collocation (*i.e.*, the addition of one or more antennas to an existing tower or other structure) within 90 days, and applications for other wireless siting requests (involving the construction of a new structure, or a substantial increase in an existing structure's size) within 150 days. *Id.* at 117a-120a. The Commission therefore concluded that "a lack of a decision within [those] timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v)." *Id.* at 115a.

The FCC emphasized that the presumption it described was rebuttable, and it rejected CTIA's proposal that an application pending beyond the deadlines be deemed granted. Pet. App. 106a-108a, 112a. The Commission recognized that "certain cases may legitimately require more processing time," *id.* at 107a, and it stated

that "courts should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications," *id.* at 108a-109a. In addition, the FCC clarified that the time periods could be extended by "mutual consent" of a carrier and local government in the event those entities were "working cooperatively toward a consensual resolution." *Id.* at 120a.

4. After the FCC denied petitions for reconsideration (Pet. App. 172a-195a), the court of appeals denied a petition for review. See *id.* at 1a-68a.

a. The court of appeals rejected petitioners' argument that the savings clause in Section 332(c)(7)(A) "precludes the FCC from exercising authority to implement" Section 332(c)(7). Pet. App. 34a. The court emphasized that it "ordinarily review[s] an agency's interpretation of the statutes it is charged with administering using the *Chevron* two-step standard of review." *Id.* at 35a (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Under that framework, the agency's construction "must be upheld" so long as the statute is "ambiguous" and the agency's construction is "permissible." *Id.* at 35a-36a (citation omitted).

The court of appeals rejected petitioners' contention that "an agency's interpretation of its own statutory authority" should be "subject to de novo review." Pet. App. 36a. In accordance with Fifth Circuit precedent "apply[ing] *Chevron* to an agency's interpretation of its own statutory jurisdiction" (*id.* at 37a-38a n.94), the court applied "the *Chevron* framework" to "determin[e] whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames." *Id.* at 37a.

The court of appeals found that Section 332(c)(7) "is ambiguous with respect to the FCC's authority to establish [those] time frames." Pet. App. 44a-45a. It noted that the FCC has "general authority to make rules and regulations to carry out the Communications Act." *Id.* at 39a (citing 47 U.S.C. 201(b)). The court also stated that "Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC" when it enacted Section 332(c)(7)(B)'s limitations on state authority. *Id.* at 41a-42a. Given that background, the court reasoned, "[h]ad Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly." *Id.* at 41a.

The court of appeals rejected petitioners' contention that Section 332(c)(7)(A) "unambiguously preclude[s] the FCC from establishing the 90- and 150-day time frames." Pet. App. 41a; see 47 U.S.C. 332(c)(7)(A) ("Except 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."). The court recognized that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. It held, however, that the savings clause "does not provide a clear answer" as to "[w]hether the FCC retains the power" to use its longstanding administrative authority to implement the limitations established by Subparagraph (B). *Ibid.*

The court of appeals also rejected the argument that, because Congress had given carriers a right of action in

court against local zoning authorities, it must have intended to except Section 332(c)(7) from the FCC's general authority to administer the Act. The court explained that Section 332(c)(7) can reasonably be read as "allowing the FCC to issue an interpretation of [Section] 332(c)(7)B)(ii) that would guide courts' determinations of disputes under that provision." Pet. App. 43a. It therefore found that the statute's "vesting in the courts of jurisdiction over disputes arising under [Section] 332(c)(7)(B)(ii)" did "not unambiguously preclude the FCC from taking the action at issue in this case." *Id.* at 44a.

Having found the Communications Act ambiguous with respect to the agency's authority to construe Section 332(c)(7)(B), the court of appeals upheld as reasonable the Commission's decision to exercise that power. Pet. App. 45a-51a. In reaching that conclusion, the court rejected petitioners' contention that the FCC had no authority to displace state law in this case because Congress had not stated its preemptive intent in unmistakable terms. See *id.* at 48a. The court explained that the federal statute "already preempt[s]" state law "at least to the extent that the state time limits violate [Section] 332(c)(7)(B)(ii)'s requirement that state and local authorities rule on zoning requests in a reasonable amount of time." *Ibid.* Accordingly, the FCC's "action interpreting what amount of time is 'reasonable' under [Section] 332(c)(7)(B)(ii) only further refines the extent of the preemption that Congress has already explicitly provided." *Id.* at 49a.

b. Finally, the court of appeals concluded that "the FCC's 90- and 150-day time frames are based on a permissible construction" of the statute. Pet. App. 54a. The court found that the agency's action reflected a

reasonable response to record evidence "that wireless service providers in many areas of the country face significant delays with respect to their facilities zoning applications." *Id.* at 67a. The administrative record included "a survey of [CTIA's] members indicat[ing] that of the 3,300 wireless siting applications currently pending before local governments, 760 had been pending for more than one year and 180 had been pending for over three years." *Id.* at 65a. In addition, several wireless service providers had filed comments complaining of protracted delays in the processing of their zoning applications. *Id.* at 65a-66a. In the court's judgment, "the FCC properly considered this information" and reasonably "determined that both wireless service providers and zoning authorities would benefit from FCC guidance on what lengths of delay would generally be unreasonable under [Section] 332(c)(7)(B)(ii)." *Id.* at 67a.

SUMMARY OF ARGUMENT

For nearly three decades, courts, agencies, and Congress have relied on the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), for reviewing agency interpretations of ambiguous statutory language. Petitioners contend that this framework does not apply to agency interpretations of statutory provisions that bear on the scope of an agency's administrative authority. That argument should be rejected.

A. Under *Chevron's* familiar two-part test, where Congress's intent is clear, that intent controls. 467 U.S. at 842-843. If the statute is ambiguous, however, a reviewing court must defer to the agency's reasonable interpretation, even if that interpretation is not neces-

sarily the one the court would have reached on its own. *Id.* at 843-844.

Chevron is based on the recognition that, when Congress leaves a gap or an ambiguity in a statutory scheme that has been entrusted to an agency's administration, Congress has implicitly delegated to that agency the power to reasonably fill the gap or resolve the ambiguity. *Chevron* also reflects this Court's understanding that the resolution of open questions under a statute often requires the application of technical expertise and the balancing of competing policy interests. Unlike courts, agencies are closely familiar with the policies underlying the statutes they implement, and as institutions in one of the politically accountable branches, agencies are entitled to make the policy judgments that may properly inform their reading of a statute.

There is no exception to *Chevron* for interpretive decisions that involve the scope of an agency's statutory authority. To the contrary, this Court has repeatedly applied the *Chevron* framework in reviewing agency interpretations of that character. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 333-341 (2002); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844-845 (1986). That consistent practice reflects the underlying rationale of *Chevron*. An agency's interpretation of provisions defining the scope of its authority is based on an implied delegation by Congress, and can involve the same complex regulatory considerations and rest on the same competing policy concerns that govern any other exercise in statutory construction.

Any attempt to distinguish for *Chevron* purposes between "jurisdictional" and "non-jurisdictional" statutory provisions would be inadministrable in practice. As

Justice Scalia has explained, there is no "discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment). The attempts of petitioners (and of the private respondents who support them) to articulate the line this Court should draw bear out Justice Scalia's observation. Those efforts are both internally inconsistent and at odds with this Court's precedents.

Petitioners contend that agencies will engage in self-aggrandizement if courts apply principles of *Chevron* deference to agency interpretations of "jurisdictional" provisions. The *Chevron* framework, however, is fully adequate to address that concern. If Congress expresses a clear intent to circumscribe an agency's authority, an agency's attempt to exercise broader powers can be rejected at *Chevron* Step One. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

B. Petitioners contend that, in determining whether Congress has carved out discrete exceptions to an agency's general authority to administer a statute, courts must decide de novo whether such exceptions exist. That is incorrect. *Chevron* deference is appropriate whenever an agency administers its organic statute through rulemaking, adjudication, or other actions that carry the force of law. When Congress intends to take the unusual step of withholding an agency's general rulemaking authority from a particular provision of a statute that the agency administers, it would ordinarily do so expressly. See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991). An agency's conclusion that an ambiguous provision does not negate its general rule-

making authority is entitled to deference under *Chevron*. See *id.* at 614.

Examination of the statutory scheme at issue here illuminates these principles. The FCC has broad and longstanding authority to administer the Communications Act. It performs that role through such mechanisms as rulemaking and adjudication, in which it speaks with the force of law. Nothing in Section 332(c)(7), or in any other provision of the Communications Act, suggests that Congress carved out Section 332(c)(7)(B)(ii)'s "reasonable period of time" requirement from the FCC's general authority to administer and construe the Act. In any event, the FCC's determination that no such exception exists is reasonable and therefore entitled to deference. See *American Hosp. Ass'n*, 499 U.S. at 613-614.

C. An agency's power to interpret the terms of a statute it administers encompasses federal statutory provisions that displace state law. Congress unambiguously displaced state law in Section 332(c)(7), which "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). When Congress expressly preempts state and local authority, it is free, as in other areas, to leave to the implementing agency the task of resolving any remaining gaps or ambiguities in the scope of that preemption. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-744 (1996).

D. The FCC's determination that it had authority to administer Section 332(c)(7) was correct under any standard of review. The FCC has broad power to administer the Communications Act, see *AT&T Corp.* v.

Iowa Utils. Bd., 525 U.S. 366, 378-379 (1999), and nothing in Section 332(c)(7) removes that provision from the scope of the FCC's general administrative authority. That provision's savings clause, on which petitioners principally rely, does not negate the FCC's powers to interpret Section 332(c)(7) itself. Instead, that clause merely provides that *other* portions of the Communications Act should not be construed to impose separate limitations on local zoning authority. And while Congress authorized courts to determine in particular instances whether state or local zoning officials have engaged in unreasonable delay, see 47 U.S.C. 332(c)(7)(B)(v), it did not preclude the FCC from announcing presumptive time frames that will guide that judicial inquiry.

ARGUMENT

CHEVRON APPLIES TO AN AGENCY'S INTERPRETATION OF ITS STATUTORY AUTHORITY

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*), this Court articulated the now-familiar framework for reviewing an agency's interpretation of "the statute which it administers." *Id.* at 842. *Chevron* reflects the Court's recognition that an agency's administration of any statute often entails the interpretation of ambiguous statutory provisions, and that the choice between competing constructions may turn on policy choices that are better made by democratically accountable bodies than by courts. That long-settled framework is fully applicable when an agency construes an ambiguous statutory provision that relates to the scope of the agency's delegated authority.

A. *Chevron* Is Triggered When An Agency Interprets A Statute That Has Been Generally Entrusted To Its Administration

1. Chevron *reflects congressional intent and principles of democratic accountability*

a. *Chevron* "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996)). As a result of that presumption, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

The interpretation of regulatory statutes routinely involves "reconciling conflicting policies," *Chevron*, 467 U.S. at 865, a task that is more appropriately performed by "legislators or administrators, not * * * judges," *id.* at 864. Judicial deference permits the "political branch of the Government to make such policy choices" by "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-866. Conversely, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866; see *Brand X*, 545 U.S. at 980 (explaining that the resolution of statutory ambiguities "involves difficult policy choices

that agencies are better equipped to make than courts").[1]

In addition, "[j]udges are not experts" in the "technical and complex" fields that agencies are often charged with overseeing. *Chevron*, 467 U.S. at 865. Agency expertise results not only from the employment of specialized staff, but also from the familiarity with the issues that necessarily results from the agency's day-to-day administration of a statute. Agencies, unlike courts, are also institutionally well situated to engage in the type of broad factual inquiry that may be necessary to a well-informed resolution of a policy dispute. The *Chevron* framework thus rests in part on a recognition that the choice between competing interpretations of ambiguous statutory language often "turn[s] upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency * * * possesses." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 167-168 (2007).

b. The *Chevron* analysis proceeds in two familiar steps. A reviewing court first considers "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. The court, which is the "final

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[1] Respondent Cellco Partnership argues (Br. 23) that principles of *Chevron* deference should not apply to independent agencies like the FCC. That contention is foreclosed by this Court's precedents, which have repeatedly used the *Chevron* framework in reviewing FCC orders. See, *e.g.*, *Brand X*, 545 U.S. at 980; *Iowa Utils. Bd.*, 525 U.S. at 387, 397. While independent agencies like the FCC may be subject to less direct presidential control, they are still more politically accountable than courts, both through congressional oversight and through political appointment of Commissioners. See *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality op.) ("[I]ndependent agencies are sheltered not from politics but from the President.").

authority on issues of statutory construction," "employ[s] traditional tools of statutory construction" to determine whether that standard is satisfied. *Id.* at 843 n.9. "If the intent of Congress is clear, * * * the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843.

"If, however, the court determines Congress has not directly addressed the precise question at issue," it proceeds to Step Two of the *Chevron* analysis. 467 U.S. at 843. In the absence of any clearly expressed congressional intent, "the court does not simply impose its own construction on the statute." *Ibid.* Rather, if the statute is silent or ambiguous with respect to the disputed question, the court must decide "whether the agency's answer is based on a permissible construction of the statute." *Ibid.* At Step Two of *Chevron*, the court defers to the agency's statutory construction so long as the agency's approach "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

The two-step *Chevron* framework ensures that reviewing courts will respect congressional intent. If Congress has clearly expressed its intent, then the court will give it effect. See *Chevron*, 467 U.S. at 842-843. But where Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-844. The "legislative delegation to an agency on a particular question" may also be "implicit rather than explicit." *Id.* at 844. In either circumstance, "a court may not substitute its own construction of a statutory provision for a reasonable

interpretation made by the administrator of an agency." *Ibid.*

2. This Court has consistently applied* Chevron *to questions of statutory interpretation that bear on the scope of an agency's administrative authority

In applying the *Chevron* framework, this Court has not recognized any exception for statutory provisions that define the agency's regulatory "jurisdiction." To the contrary, "it is settled law that the rule of [*Chevron*] deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); accord *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting) ("This Court has never accepted [the] argument * * * that *Chevron* should not apply * * * because [the agency's] regulations actually determine the scope of its jurisdiction" under its statute.); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 187 (5th ed. 2010) (Pierce) ("Judging by the Court's pattern of decisions, it seems clear that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.").

The Court has often applied the *Chevron* framework in reviewing agency interpretations of statutory provisions that define the agencies' authority to act. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 333, 341 (2002) (citing *Chevron* and explaining that, if the relevant statutory provisions were ambiguous as to whether the FCC's authority could extend to certain wireline and wireless pole attachments, the Court would defer to the agency's assertion of jurisdiction); *FDA* v. *Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 132 (2000) (applying the *Chevron* framework to analyze the FDA's "assertion of authority," under the Food, Drug, and Cosmetic Act, "to regulate tobacco products")[2]; *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993) (citing *Chevron* and characterizing as "at least * * * reasonable * * * , and hence * * * binding," the Interstate Commerce Commission's position that the Interstate Commerce Act gave the agency no "jurisdiction" to award reparations); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844 (1986) (according "considerable weight" under *Chevron* to construction of the Commodity Exchange Act by the Commodity Futures Trading Commission (CFTC) on a question that concerned the agency's "power to take jurisdiction" over certain state law counterclaims).[3] The same is true of the Court of Appeals for the District of Columbia Circuit, which, because of its specialized jurisdiction, has more experience applying *Chevron* than any other court of appeals. See *Cellco P'ship* v. *FCC*, Nos. 11-1135, 11-1136, 2012 WL 6013416, at *4 (Dec. 4, 2012) (noting that the D.C. Circuit has "repeatedly" rejected the contention that "*Chevron* deference does not extend to interpretive questions * * * that implicate the scope of an agency's jurisdiction").

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[2] Cf. Br. of Resp. Brown & Williamson Tobacco Corp. 37-38, *Brown & Williamson Tobacco Corp.*, *supra*, No. 98-1152 (contending that *Chevron* was inapplicable because FDA statutory interpretation involved "regulatory expansion of jurisdiction").

[3] Indeed, in *Chevron* itself, EPA's regulatory definition of the ambiguous statutory term "stationary source" dictated when a permit was required, and thus bore on the agency's administrative jurisdiction. 467 U.S. at 840.

3. There is no sound reason for this Court to alter its approach to interpretive questions bearing on the scope of agency authority

This Court has "expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action,'" and it has therefore resisted efforts "to carve out" exceptions to *Chevron*'s applicability. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 713 (2011) (*Mayo*) (quoting *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999)). Consistent with that practice, the Court should reaffirm that *Chevron* deference applies when an agency interprets statutory provisions that define the scope of its administrative authority.

a. The rationales for *Chevron* (see pp. 15-16, *supra*) apply with equal force to questions concerning the scope of an agency's authority. As with any other question of statutory construction, "Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction." *Mississippi Power*, 487 U.S. at 381-382 (Scalia, J., concurring in the judgment). And, contrary to petitioners' contention (*e.g.*, Cable, Telecomms., & Tech. Comm. of the New Orleans City Council Br. 28-29 (New Orleans Br.)), resolution of statutory ambiguities bearing on the scope of an agency's authority will often turn on policy judgments that are more appropriately made by agencies than by courts. See Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 235 (2006) ("If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision.").

In *Schor*, for example, the court of appeals declined to defer to the CFTC's conclusion that it could exercise jurisdiction over state-law counterclaims under the Commodities Exchange Act. 478 U.S. at 844-845. The court of appeals based that holding in part on its view that "the question was not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, had superior expertise." *Ibid.* This Court rejected that reason for withholding deference as "insubstantial," recognizing that "an agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing." *Id.* at 845.

Agencies are also better equipped than courts to collect and evaluate the facts that may bear on the choice between competing interpretations of an agency's governing statute. In this case, for example, the Commission adopted its declaratory ruling after considering hundreds of comments about the costs and benefits of having the Commission define (or refuse to define) the statutory terms "reasonable period of time" and "failure to act." Pet. App. 78a-79a. After reviewing those comments, the FCC concluded that, in the absence of agency guidance, "unreasonable delays" in the consideration of facility siting requests were "impeding the deployment of advanced and emergency services." *Id.* at 96a-97a.

Unlike a single lower court, moreover, an agency can announce an interpretation with nationwide effect, thereby promoting the uniform administration of the policies reflected in the governing federal statute.[4] Such

[4] In this case, for example, the FCC noted that a circuit split had developed on an interpretive issue involving Section 332(c)(7). See

an interpretation serves one of the core purposes underlying *Chevron* deference. See *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and concurring in the judgment) (explaining that *Chevron* deference is essential "to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies"); cf. *Brand X*, 545 U.S. at 983 (Under *Chevron*, agencies should have authority to revisit "unwise judicial constructions of ambiguous statutes.").

b. An exception to *Chevron* for an agency's interpretations of its statutory authority would be unworkable. As Justice Scalia has explained, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). "To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Ibid.* A leading administrative law treatise agrees: "courts will routinely encounter intractable characterization problems if they attempt to distinguish between jurisdictional and nonjuridictional disputes" because "[a]ny good lawyer can make a plausible argument that a high proportion of disputes

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Pet. App. 127a-128a & nn.175-176 (discussing whether a local government could permissibly deny a carrier's facility application on the ground that other carriers were already serving the area). The FCC determined that this split was "appropriately resolved by declaratory ruling," *id.* at 128a, and concluded that local governments could not deny applications solely on that basis, *see id.* at 131a (finding this procompetition rule most consistent with the statutory purpose of "improv[ing] service quality and lower[ing] prices for consumers").

about the meaning of ambiguous language in agency-administered statutes are jurisdictional disputes." Pierce § 3.5, at 188; accord *Railway Labor Executives' Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 676 (D.C. Cir. 1994) (Williams, J., dissenting) ("In the absence of a manageable line between jurisdictional and other issues, non-deference for 'jurisdictional' issues is just a tag for the court's conclusion."), cert. denied, 514 U.S. 1032 (1995); Sunstein, 92 Va. L. Rev. at 235 ("[T]he line between jurisdictional and nonjurisdictional questions is far from clear; hence any exemption threatens to introduce more complexity into the world of *Chevron*.").[5]

This case illustrates that difficulty. The FCC has well-established general authority to implement and construe the Communications Act. In arguing that those agency powers do not extend to Section 332(c)(7), petitioners rely on 47 U.S.C. 332(c)(7)(A) (which provides that portions of the Communications Act *other*

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[5] This Court has previously struggled without success to identify a discrete set of administrative-law questions that are uniquely "jurisdictional." In *Crowell* v. *Benson*, 285 U.S. 22, 62-65 (1932), the Court held that agency findings as to "jurisdictional" facts—those on which its power to act "depend[ed]"—must be retried de novo by a reviewing court. The Court viewed that rule as necessary to "confine[]" agencies to their "proper sphere." *Id.* at 65. Subsequent cases, however, illustrated the complexity of any effort to identify uniquely jurisdictional questions in administrative review, and *Crowell*'s attempt to create a special rule for "jurisdictional" determinations by agencies has thus been "undermined." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 82 n.34 (1982) (plurality op.); see *id.* at 110 n.12 (White, J., dissenting); see also Richard J. Pierce, Jr. et al., *Administrative Law and Process* § 5.2.2, at 140 (5th ed. 2009) (jurisdictional fact doctrine "is now moribund," and "[m]odern courts accord to agency findings of facts of this type the same degree of deference they accord to other findings of fact on which the validity of the agency's action depends").

than Section 332(c)(7) should not be construed to restrict state and local zoning authority) and 47 U.S.C. 332(c)(7)(B)(v) (which establishes a judicial remedy when state or local officials fail to act in a timely manner on a wireless siting application). Neither of those provisions, however, refers explicitly to the FCC or to the scope of its regulatory authority. Petitioners thus appear to view as "jurisdictional" any statutory provision that is alleged to render unlawful the agency's chosen course of action. *Chevron* would be largely eviscerated if it were deemed inapplicable to "jurisdictional" provisions so defined.

Respondents International Municipal Lawyers Association, et al. (IMLA) contend (Br. 33) that the line distinguishing "jurisdictional and non-jurisdictional questions * * * is neither illusory nor incapable of judicial administration." In IMLA's view, "agency jurisdiction is a question of *who*, *what*, *where*, or *when* an agency has authority to regulate," in contrast to the "[a]pplication of administrative authority," which "concerns *how* an agency exercises its authority over those subjects within its regulatory realm." *Ibid.* According to IMLA, *Chevron* applies only to agency interpretations of statutory provisions that fall within the "how" category.

IMLA's proposed rule is flatly inconsistent with this Court's precedents. And far from illustrating the ease of differentiating between jurisdictional and non-jurisdictional questions, IMLA's formulation demonstrates the permeability of the line between the two concepts. In *Gulf Power*, for example, this Court stated that the FCC's decision "to assert jurisdiction" over attachments that provide both high-speed Internet access and cable television service, as opposed to those attachments used only for the latter, was entitled to

Chevron deference. 534 U.S. at 333, 342. The disputed issue in *Gulf Power* involved "what" the FCC could regulate—in that case, a particular type of pole attachment. Likewise in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court deferred under *Chevron* to the "exercise [of] jurisdiction" by the Army Corps of Engineers and the Environmental Protection Agency (EPA) over wetlands adjacent to navigable waters. *Id.* at 131-135. In IMLA's proposed taxonomy, the question whether discharges into wetlands are subject to Corps and EPA regulation would naturally be viewed as a "where" or "what" question.

In other settings as well, the Court has applied *Chevron* in a manner inconsistent with IMLA's formulation. See *Mayo*, 131 S. Ct. at 711 (applying *Chevron* to Treasury Department's conclusion that medical residents are not "students" and are therefore subject to taxation under the Federal Insurance Contributions Act—a "who" question); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 394, 398-399 (1996) (applying *Chevron* to NLRB's decision that certain workers were not "'agricultural laborer[s],' a category of workers exempt from the National Labor Relations Act coverage"—another "who" question); *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (applying *Chevron* to Department of Health and Human Services' determination of the necessary predicate for a hearing before the Provider Reimbursement Review Board—a "when" question).[6]

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[6] The malleability of the proposed line between "jurisdictional" and "non-jurisdictional" questions is highlighted by the City of Arlington's briefs in this case. At one point in its merits brief, Arlington attempts to distinguish "the *scope* of the agency's delegated power" from what it characterizes as the "very different" question it claims

c. Petitioners, and the private respondents who support them, contend that deferring to an agency's determination regarding its statutory authority is unwarranted because doing so "would inevitably lead to the expansion of that authority." Cellco P'ship Br. 22; see New Orleans Br. 30; City of Arlington et al. Br. 28 (Arlington Br.); IMLA Br. 26. Similarly, IMLA argues (Br. 30) that applying *Chevron* to questions of agency authority would "collapse the Constitution's separation of powers" and allow an agency to determine "the limits of its own authority without significant review from another branch." As an initial matter, this Court has applied *Chevron* deference principles to agency decisions *disclaiming* authority to act. See, *e.g.*, *Reiter*, 507 U.S. at 269 (holding that Interstate Commerce Commission's understanding of its governing statute "as giving it no

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is presented here, *i.e.*, "whether Congress ha[s] delegated interpretive authority to the agency," a question Arlington says must be evaluated de novo. Br. 24-25. Elsewhere in its brief, however, Arlington repeatedly collapses the two supposedly "very different" questions, contending that "the determination of the *scope* of an agency's delegated authority is to be conducted by the court *de novo*." *Id.* at 23 (emphasis added); see *id.* at 4, 9, 14, 15, 19, 23, 28, 29 (also characterizing this case as about the "scope" of the agency's authority). Similarly, in its petition for a writ of certiorari, Arlington claimed that the Third, Eighth, and Tenth Circuits, like the Fifth Circuit here, erroneously "resolve jurisdictional questions by applying *Chevron*." Arlington Pet. 14-15. In its merits brief, however, Arlington disclaims the circuit split it asked the Court to resolve in its certiorari petition, now positing that "when presented with the issue in this case—whether Congress delegated interpretive authority—each of those courts decides the question *de novo*." Br. 26 & n.3 (citing decisions from the Third, Fifth, Eight, and Tenth Circuits). Arlington's difficulty in identifying which questions should be classified as jurisdictional is a preview of the administrability problems that would follow from acceptance of its position.

power to decree reparations relief" was "at least a reasonable interpretation of the statute, and hence a binding one" under *Chevron*). Petitioners are therefore wrong in suggesting that application of *Chevron* to agencies' "jurisdictional" determinations will inevitably lead to expansion of agency authority.

In any event, *Chevron*'s two-step framework itself protects against agency usurpation of power not granted by Congress. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9; see pp. 16-17, *supra*. Under *Chevron* Step One, this Court has sometimes set aside agency assertions of authority as inconsistent with the relevant statutory text.

In *Brown & Williamson Tobacco Corp.*, for example, the Court considered (and ultimately rejected) "the FDA's assertion of authority to regulate tobacco products." 529 U.S. at 132. The Court explained that, "[b]ecause this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*." *Ibid.* The Court nevertheless rejected the agency's construction of the relevant statute under *Chevron* Step One, finding it "clear that Congress intended to exclude tobacco products from the FDA's jurisdiction." *Id.* at 142. In reaching that conclusion, the Court observed that the *Chevron* Step One inquiry was "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133.

Similarly in *Dole* v. *United Steelworkers*, the Court reviewed the disapproval by the Office of Management

and Budget (OMB) of a Department of Labor rule mandating disclosure of information to third parties. Because "the language, structure, and purpose" of the statute in question revealed that Congress did not intend to grant OMB authority to review such a rule, 494 U.S. at 35, the Court declined to defer to OMB's contrary interpretation, *id.* at 42-43 (citing *Chevron*). Conversely, an agency's attempt to disclaim jurisdiction will be rejected where a contrary congressional intent is clear. See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 529 (2007) (statute "unambiguous" in giving EPA authority to regulate greenhouse gases).

Even at the second step of the *Chevron* analysis, an agency's discretion to interpret its governing statute is hardly "unreviewed or unchecked." IMLA Br. 30. Under Step Two, courts defer to an agency's reading of ambiguous statutory language only if the agency's interpretation is "reasonable." *Chevron*, 467 U.S. at 845. And, under the Administrative Procedure Act (APA), agencies have an obligation to explain the basis for their statutory interpretation, and the agency's actions cannot be "arbitrary" or "capricious." 5 U.S.C. 706(2)(A); see *Judulang* v. *Holder*, 132 S. Ct. 476, 483-484 & n. 7 (2011) (court at *Chevron* Step Two "ask[s] whether an agency interpretation is 'arbitrary or capricious in substance'") (citation omitted).

In sum, "*Chevron* is no blank check to agencies." Sunstein, 92 Va. L. Rev. at 227-228. "It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in

any way. These constraints produce significant checks on potential agency self-interest and bias." *Id.* at 233.[7]

B. The *Chevron* Framework Applies To The Determination Whether Congress Has Created An Exception To An Agency's Generally-Applicable Administrative Authority

For *Chevron* to apply, an agency's interpretation must be of a "statute which [the agency] administers." 467 U.S. at 842. Moreover, the *Chevron* framework applies 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." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (emphasis added). Contrary to petitioners' submission, these preconditions are satisfied whenever an agency administers its organic statute through rulemaking, adjudication, or other actions that carry the force of law. *Chevron* thus applies when an agency uses rulemaking or adjudication to construe ambiguous language in an affirmative statutory grant of administrative power. *Chevron* likewise applies to an

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[7] Petitioner New Orleans suggests that de novo review is appropriate when an agency interprets "jurisdictional" provisions of its governing statute because the APA "recognizes jurisdiction as a distinct legal inquiry." Br. 46; see IMLA Br. 26 n.4. But while the APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. 706(2)(C), the court has the same power to invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). In resolving contentions that particular agency actions are "not in accordance with law," courts routinely defer under *Chevron* to agency interpretations of ambiguous statutory language. Nothing in the APA suggests that courts should apply a different standard of review when resolving challenges brought under Section 706(2)(C).

agency's resolution of a claim that a particular statutory provision strips it of its generally applicable administrative authority.

1. When Congress intends to exempt part of an agency's organic statute from the agency's generally-applicable administrative authority, Congress can ordinarily be expected to state that intent explicitly

In *American Hospital Association* v. *NLRB*, 499 U.S. 606 (1991), this Court considered the scope of the general rulemaking authority of the National Labor Relations Board (NLRB). See *id.* at 609 (explaining that the NLRB had express statutory "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the National Labor Relations Act (NLRA)) (quoting 29 U.S.C. 156). As in this case, a party in *American Hospital Association* contended that a separate provision of the NLRA imposed "a limitation on the [agency's] rulemaking powers." 499 U.S. at 611. That challenger argued, in particular, that an NLRB regulation defining bargaining units was ultra vires because Section 9(b) of the NLRA "prevent[ed] the Board" from using its rulemaking authority to "impos[e] any industry-wide rule delineating the appropriate bargaining units." *Ibid.*

This Court squarely rejected that argument. The Court explained that, "[a]s a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted" by 29 U.S.C. 156, the Court "would have expected [Congress] to do so in language expressly describing an exception" from that provision, "or at least referring specifically to the section." *American Hosp. Ass'n*, 499 U.S. at 613; see *Wyoming* v. *USDA*, 661 F.3d 1209, 1270-1271 (10th

Cir. 2011) ("If Congress [when enacting a later statute] had intended to curtail the Forest Service's broad rulemaking authority under [16 U.S.C. 551], it is assumed that it would have at least referenced that provision in some manner."), cert. denied, 133 S. Ct. 144, 417 (2012); *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 394-395 & n.18 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005).

Based on the absence of any express statement of intent to create an exemption to the NLRB's general rulemaking authority, the Court in *American Hospital Association* found it "clear" that Congress had intended no such limitation. See 499 U.S. at 614. The Court went on to state, however, that even if there were "any ambiguity" on the question, the Court "would still defer to the [NLRB's] reasonable interpretation of the statutory text." *Ibid.* (citing *Chevron*, 467 U.S. at 842-843). Accordingly, this Court has already rejected petitioners' argument that *Chevron* does not apply when a party claims that Congress has exempted part of the statute an agency administers from its generally-applicable rulemaking authority.

Contrary to petitioners' contentions, principles of separation of powers and constitutional avoidance have no bearing on the resolution of the present dispute. See Arlington Br. 29; New Orleans Br. 38-39; see also IMLA Br. 28-29. The issue in cases like this one is not whether an agency can exercise a "'legislative' power" to "create regulatory jurisdiction where none existed." Arlington Br. 29 (citation omitted). If Congress wishes to foreclose an agency from exercising regulatory authority over a particular category of matters, it need only make that intent clear, either by defining the agency's affirmative powers in a way that unambiguously excludes the relevant activities, or by enacting a specific

exception to a general grant of regulatory authority. But if the statutory text is ambiguous—either with respect to the scope of the agency's affirmative powers, or with respect to the existence or scope of any carve-out from that authority—the appropriate inference under *Chevron* is that Congress intended the agency to resolve that ambiguity.

Here, for example, Congress has unambiguously vested the FCC with general authority to implement the Communications Act through rulemaking and adjudication. The disputed question is whether Congress has disabled the agency from exercising those general powers to define the term "reasonable period of time" in Section 332(c)(7)(B)(ii). Applying the *Chevron* framework to that question is consistent with the principles that generally govern the interpretation of ambiguous statutory provisions, and it promotes separation-of-powers principles by leaving permissible policy choices to policy-making bodies.

2. Chevron *does not require a provision-by-provision search for delegation*

Petitioners emphasize that no "provision of the Communications Act" gives the FCC an "express delegation of interpretive jurisdiction over Section 332(c)(7)." Arlington Br. 41; see New Orleans Br. 21 (explaining that the "actual language of Section 332(c)(7)" does not include an "affirmative indication * * * on the part of Congress of its intention to delegate interpretive jurisdiction to the FCC") (emphasis omitted). That is true but irrelevant. By vesting the Commission with general authority to implement the Communications Act (see 47 U.S.C. 151, 154(i), 201(b), 303(r)), Congress obviated the need for the sort of provision-specific authorizations whose absence petitioners view as significant.

In some pre-*Chevron* decisions, this Court indicated that agency interpretations should be given greater weight when Congress had included an "explicit delegation of substantive authority" over a particular statutory provision or term than when an agency interpretation was the product of its general rulemaking authority. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); see, *e.g.*, *Rowan Cos.* v. *United States*, 452 U.S. 247, 253 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 424-425 (1977). But "the administrative landscape has changed significantly" since those cases were decided. *Mayo*, 131 S. Ct. at 713. Under *Chevron* and *Mead*, the "inquiry * * * does not turn on whether Congress's delegation of authority was general or specific." *Id.* at 713-714. Indeed, the Court in *Mayo* identified the Communications Act provisions that vest the FCC with general regulatory authority as a paradigmatic example of provisions that trigger *Chevron* deference. See *id.* at 714 (citing *Brand X*, 545 U.S. at 980-981, 47 U.S.C. 151, 201(b)).

3. Because Section 332(c)(7) includes no express negation of the FCC's general administrative authority over the Communications Act, that general administrative authority remains

The FCC unquestionably "administers" (*Chevron*, 467 U.S. at 842) the Communications Act. See *Brand X*, 545 U.S. at 980 ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act * * * and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act.") (quoting 47 U.S.C. 151, 201(b)); see generally 47 U.S.C. 151 ("[T]here is created a commission to be known as the 'Federal Communications Commission', * * * which shall execute

and enforce the provisions of" the Communications Act). The FCC's authority to administer the Act includes the power to make rules carrying the force of law, both through rulemaking and adjudication. See *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); see generally 47 U.S.C. 151, 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. 201(b), 303(r) (Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Communications Act); see generally Pet. App. 87a-88a.

This Court has consistently applied the *Chevron* framework to both FCC rules, see, *e.g.*, *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 502 (2002); *Gulf Power*, 534 U.S. at 333, and adjudications, see, *e.g.*, *Brand X*, 545 U.S. at 980-981.[8]

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[8] Like the order at issue in *Brand X*, the order in this case was, as a formal matter, the result of an adjudication. See Pet. App. 83a ("Under Section 1.2 of the [FCC's] rules, the Commission 'may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.'"). As the court of appeals recognized, "[i]t is well-established that agencies can choose to announce new rules through adjudication rather than rulemaking." *Id.* at 18a-19a (citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)). Although the court of appeals questioned the FCC's choice to proceed by adjudication rather than rulemaking in this matter, see *id.* at 22a-25a, the court found that any error in that regard was harmless, see *id.* at 26a-31a (explaining that

In *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), the Court cited the Communications Act as an example of a statute in which the administering agency's delegated authority to speak with the force of law "is clear because the statute gives [the] agency broad power to enforce all provisions of the statute." *Id.* at 258-259 (citing *Brand X*, 545 U.S. at 980); cf. *id.* at 259 (contrasting the Attorney General's "limited powers" and lack of "broad authority to promulgate rules" in administering the Controlled Substances Act).[9]

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the FCC had published notice of CTIA's petition in the *Federal Register* and had received and considered multiple comments). In this Court, petitioners have not renewed their objection to the FCC's use of adjudication.

[9] Petitioners' reliance (*e.g.*, New Orleans Br. 20) on *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), is also misplaced. The respondents in *Adams Fruit* alleged that their employer had violated the motor vehicle safety provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *Id.* at 640. They sought actual and statutory damages under the AWPA's private right of action for injuries they had allegedly suffered as a result of the violations. *Id.* at 641. In ruling for the employees, the Court in *Adams Fruit* declined to defer to a Labor Department regulation providing that, in specified circumstances, state workers' compensation benefits would be the exclusive remedy for violations of the AWPA. See *id.* at 649. The Court explained that, although the AWPA authorized the agency "to promulgate *standards* implementing AWPA's motor vehicle provisions," that authorization did "not empower the [agency] to regulate the scope of the judicial power vested by the statute." *Id.* at 650 (citing 29 U.S.C. 1841(d)).

Here, by contrast, the FCC's declaratory ruling does not purport to limit the relief a court may award in a private suit brought under 47 U.S.C. 332(c)(7)(B)(v). To the contrary, the Commission recognized that courts in such cases "should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications." Pet. App. 108a-109a. Rather than "regulat[ing] the scope of the judicial power vested by the statute," *Adams*

"Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC." Pet. App. 41a-42a. Indeed, in a nearby section of the Communications Act, Congress carved out a narrow exception to the statute's general grant of rulemaking authority to the Commission. See 47 U.S.C. 334(a) ("Except as specifically provided in this section, the Commission shall not revise * * * the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees"). The absence of any similar language in Section 332(c)(7) confirms that the FCC's general authority to administer the Communications Act encompasses the implementation of that provision. See *American Hosp. Ass'n*, 499 U.S. at 613. And even if the statute were ambiguous on that point, the Commission's resolution of that ambiguity would be entitled to deference under *Chevron*. See *id.* at 614.

Fruit, 494 U.S. at 650, the FCC's declaratory ruling clarifies the substantive obligations of regulated parties by defining the "reasonable period of time" within which state and local zoning officials must act on wireless siting applications. The declaratory ruling is thus more properly analogized to the promulgation of AWPA motor vehicle standards (which the Court in *Adams Fruit* recognized to be appropriate exercises of agency authority, see *ibid.*) than to the regulation designating state workers' compensation benefits as the exclusive remedy for AWPA violations (to which the Court declined to defer).

C. *Chevron* Applies With Full Force To Agency Interpretations Of Federal Statutes That Limit State Power

Petitioners contend that *Chevron* should not apply in this case because the Commission's reading of Section 332(c)(7)(B) entails an "intrusion on traditional local authority." Arlington Br. 36-38; see New Orleans Br. 36-37; see also IMLA Br. 35-43. That argument lacks merit. Because the FCC action at issue here simply interprets a statutory phrase that explicitly constrains the discretion of state and local zoning authorities, principles of federalism afford no basis for withholding *Chevron* deference.

Section 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *Rancho Palos Verdes*, 544 U.S. at 115. In particular, Section 332(c)(7)(B)(ii) requires state and local authorities to act on a particular category of siting requests "within a reasonable period of time." In the order at issue here, the FCC merely interpreted those statutory limitations on state and local authority. See Pet. App. 49a.

In *Smiley*, the Court squarely held that principles of *Chevron* deference apply to an agency's interpretation of expressly preemptive statutory language. The Court explained that a contrary argument "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. Even assuming that "the latter question must always be decided *de novo* by the courts," the Court explained, that "is *not* the question at issue here." *Ibid.* "As *Smiley* showed, a federal agency's construction of an ambiguous statutory term may clarify the pre-emptive scope of enacted fed-

eral law." *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 555-556 (2009) (Thomas, J., concurring in part and dissenting in part).

If the FCC had not acted to clarify the term "reasonable period of time" as it appears in Section 332(c)(7)(B)(ii), federal courts would have been required to determine in suits brought before them whether that *federal* requirement had been satisfied. Thus, as the court of appeals recognized, the question in this case is not "whether the States [and local governments] will be allowed to do their own thing," but "whether it will be the FCC or the federal courts that draw the lines to which they must hew." Pet. App. 49a n.117 (quoting *Iowa Utils. Bd.*, 525 U.S. at 378 n.6). "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," *Iowa Utils. Bd.*, 525 U.S. at 397, particularly when the statute in question (like the Communications Act) vests the relevant agency with broad general administrative authority. In Section 332(c)(7)(B)(ii), Congress required state and local officials to act on particular zoning requests "within a reasonable period of time," but it enacted no statutory definition of that self-evidently imprecise term. That course can reasonably be understood only as a delegation of authority to the FCC to clarify the applicable timing requirements pursuant to its general power to implement the Communications Act.

D. The FCC's Conclusion That It Has Authority To Promulgate Reasonable Time Limits On Local Zoning Authorities Is Correct Under Any Standard Of Review

Petitioners also argue that the FCC's interpretation of its own statutory authority would be rejected if that interpretation were not subject to the *Chevron* frame-

work. See Arlington Br. 31-44; see also New Orleans Br. 21-25, 32-38. That argument lacks merit.

The statutory provision at issue was enacted as part of the Communications Act of 1934. See 1996 Act §704(a), 110 Stat. 151 ("adding" the provision as a new paragraph "at the end" of 47 U.S.C. 332(c)). Pursuant to 47 U.S.C. 201(b), the Commission is generally empowered to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [that Act]." As this Court held in *Iowa Utilities Board*, 525 U.S. at 378, Section 201(b) authorizes the Commission to implement the provisions of the Communications Act—even those, like Section 332(c)(7), that were added by Congress in 1996. This broad grant of authority empowered the Commission to interpret the ambiguous language of Section 332(c)(7)(B). See Pet. App. 41a-42a (In enacting Section 332(c)(7), Congress "surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC."); see also 47 U.S.C. 151, 154(i), 303(r).

In arguing that the FCC's broad authority to administer the Communications Act does not encompass the FCC action at issue here, petitioners rely in part on the savings clause in Section 332(c)(7)(A). The savings clause states that, "[e]xcept as provided in [Section 332(c)(7)], 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). As the court of appeals explained, however, Section 332(c)(7)(A) says nothing about the Commission's authority to *interpret* the limitations that Section

332(c)(7)(B) itself imposes. The savings clause merely "prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a.[10]

As explained above, this Court has recognized that, when Congress intends "to curtail in a particular area the broad rulemaking authority granted" by an agency's general rulemaking provision, the Court would "expect[] [Congress] to do so in language expressly describing an exception" from that rulemaking provision, "or at least referring specifically to the section." *American Hosp. Ass'n*, 499 U.S. at 613. If Congress had intended to except Section 332(c)(7) from the FCC's rulemaking authority under 47 U.S.C. 151, 154(i), 201(b), and 303(r), it could have referred specifically to those provisions, or it could have expressly precluded the Commission from interpreting the provisions of Section 332(c)(7) (or the "reasonable period of time" requirement in particular). Congress did not do so. Cf. 47 U.S.C. 334(a).

Petitioners also maintain that, because Congress intended for courts to resolve disputes regarding particular zoning officials' compliance with 47 U.S.C. 332(c)(7)(B)(ii), the FCC lacks power to construe that

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[10] The FCC explained in the declaratory ruling that, "under the regime that we adopt today, the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." Pet. App. 112a. Thus, even if a state or local zoning authority fails to rule on a particular wireless siting application within the 90- or 150-day period described in the declaratory ruling, a reviewing court may conclude based on all the relevant circumstances that the authority did not fail to act "within a reasonable period of time." See *id.* at 59a, 60a, 62a-63a. That fact makes it particularly clear that the declaratory ruling does not subject state and local officials to obligations going beyond those imposed by the 1996 Act itself.

provision. Arlington Br. 31-32; New Orleans Br. 50-52. This Court rejected a similar argument in *Iowa Utilities Board*. There, the Court upheld the FCC's decision to issue rules governing state commissions' resolution of disputes between telephone companies regarding their statutory duties to interconnect with other carriers, even though the Communications Act provides for judicial review of state commission decisions arbitrating such disputes. The Court explained that Congress's "assignment[ ]" of the adjudicatory task to state commissions did "not logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments." *Iowa Utils. Bd.*, 525 U.S. at 385. Similarly here, the fact that Congress entrusted the resolution of particular disputes to the courts did not preclude the FCC from assisting the courts in that endeavor by exercising its general authority to interpret ambiguous terms of the Communications Act.

Under the rebuttable presumptions established by the agency, the courts remain the ultimate arbiters as to whether a local zoning authority has failed to act on a wireless facility siting application "within a reasonable period of time." As the court of appeals recognized, while Section 332(c)(7)(B)(v) authorizes judicial enforcement of the "reasonable period of time" requirement, it "does not address the FCC's power to administer [Section] 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act." Pet. App. 42a-43a. The FCC's guidance regarding the meaning of Section 332(c)(7)(B)(ii)'s ambiguous terms will not impair the courts' authority under Section 332(c)(7)(B)(v) "to make factual determinations, and to apply those determinations to the law."

United States v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

Petitioners also contend that the legislative history supports their view that Congress did not intend for the FCC to interpret Section 332(c)(7)(B). Arlington Br. 32-33. They emphasize that the Conference Report on the legislation directed the FCC to terminate its pending rulemakings. See Pet. App. 209a. It is hardly surprising that Congress discountenanced possible regulatory action that was premised on the pre-amendment Communications Act and that might have undermined the new legislation.[11] Nothing in the Conference Report suggested, however, that Congress intended to displace the settled principle of administrative law that the FCC may resolve ambiguities in the Communications Act, including ambiguities in the new Section 332(c)(7).[12]

Finally, petitioners identify no plausible reason that Congress would have excepted Section 332(c)(7)(B) from

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[11] A petition for rulemaking pending at the Commission when the 1996 Act was enacted asked the FCC to preempt state and local governments from enforcing zoning restrictions that inhibited construction of wireless infrastructure. That petition argued that the Commission had authority to do so under pre-1996 Act provisions of the Communication Act: 47 U.S.C. 332(a) and 332(c)(3)(A) (1994). See Cellular Telecomms. Indus. Ass'n's Pet. for Rule Making 4-5 (1994).

[12] Petitioners assert that Congress did not intend "to give preferential treatment" to zoning applications filed by wireless telecommunications providers. Arlington Br. 33 (quoting Pet. App. 210a). But no zoning applicants other than wireless service providers have a federally enforceable right to receive a ruling on their applications "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). And "nothing in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by [Section] 332(c)(7)(B)(ii) itself." Pet. App. 61a.

the Commission's general authority to construe ambiguous provisions of the Communications Act. Based on its pre-existing expertise and on the information it acquired through the notice-and-comment process, the FCC was clearly better positioned than any court to determine what period of time is generally "reasonable" for acting on wireless siting applications. By identifying periods of time for acting that the expert agency views as presumptively reasonable, and by bringing greater consistency and predictability to judicial interpretations of the "reasonable period of time" standard, the declaratory ruling should serve the interests of applicants, regulators, and courts alike. The Commission's issuance of the declaratory ruling thus serves precisely the interests that the agency's gap-filling authority under the Communications Act is generally intended to further. If the agency were disabled from construing Section 332(c)(7)(B)(ii), by contrast, each court adjudicating a suit brought under Section 332(c)(7)(B)(v) would be required either to assess the defendant's "reasonableness" without reference to the practices that generally prevail in this context, or to attempt to replicate the inquiry that the FCC conducted. There is no evident reason that Congress would have preferred either of those approaches to the one that the Commission adopted.[13]

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[13] In recently enacted legislation, Congress again imposed limitations on local zoning authority related to wireless infrastructure. In the Middle Class Tax Relief and Job Creation Act of 2012, Congress provided that "[n]otwithstanding" Section 704 of the 1996 Act (which added Section 332(c)(7)) or "any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." Pub. L. No. 112-96, § 6409(a)(1), 126

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Stat. 232; see *id.* § 6409(a)(2), 126 Stat. 232-233 (defining "eligible facilities request" as "any request for modification of an existing wireless tower or base station that involves," among other things, "collocation of new transmission equipment" or "replacement of transmission equipment"). Although Congress did not insert that 2012 provision into the Communications Act, it nonetheless provided that, with exceptions not relevant here, "[t]he Commission shall implement and enforce [the title of the 2012 statute in which the new zoning provision appears] as if [that] title is a part of the Communications Act of 1934." *Id.* § 6003(a), 126 Stat. 204. There is no reason to think that Congress would have provided the FCC with authority to implement this new zoning restriction if it had previously divested the agency of authority to implement the obviously related restrictions in Section 332(c)(7). It is also telling that the mechanism Congress chose to give the FCC implementation authority was not a section-specific provision, but instead treatment of the new provision "as if" it was in the Communications Act, thus triggering Section 201(b) and the other sources of the agency's general administrative authority.

APPENDIX

1. 47 U.S.C. 151 provides:

Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

2. 47 U.S.C. 154(i) provides:

Federal Communications Commission

* * * * *

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

* * * * *

3. 47 U.S.C. 201(b) provides:

Service and charges

* * * * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such con-

tract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

4. 47 U.S.C. 303(r) provides:

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

5. 47 U.S.C. 332 provides:

Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by

reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commis-

sion shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking re-

quired to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of

telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including

any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter 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.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll

services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.