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

REPLY BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

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REPLY BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

In 47 U.S.C. § 332(c)(7), Congress enacted outer boundaries on "regulation of the placement, construction, and modification of personal wireless facilities," but otherwise left state and local governments the flexibility to apply their ordinary rules governing zoning and construction. The FCC claims that Congress delegated to it the power to authoritatively interpret Section 332(c)(7). On that basis, the FCC claims the power to require that local zoning processes facilitate national telecommunications policy.

Petitioners challenge the FCC's threshold assertion that it possesses this "interpretive jurisdiction" over Section 332(c)(7) – *i.e.*, the final authority to resolve ambiguities in the statute's meaning. This Court granted certiorari to decide *how* a court should evaluate such a dispute. The government argues, and the Fifth Circuit held, that courts must defer to an administrative agency with respect to every assertion of authority that implicates the agency's "jurisdiction." On that view, the agency has the power to interpret the statute unless Congress enacts an express, jurisdiction-stripping provision. U.S. Br. 18-19, 31-32.

By contrast, petitioners argue that mere ambiguity (much less silence) cannot grant an agency this sweeping interpretive power. Rather, a court determines *de novo*, using ordinary tools of statutory construction, whether Congress intended to grant the agency interpretive authority over the

provision in question. The agency's view remains relevant, but only to the extent of its power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The government and certain other parties and *amici* urge this Court to apply a uniform rule to govern the review of all agency assertions of any type of "jurisdiction." By contrast, we suggest that the Court proceed incrementally and address only the distinct form of "jurisdiction" actually presented by the case: an agency's power to interpret a statutory provision authoritatively. Because that power is a "precondition" to the two-stage *Chevron* framework, *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990), the academic literature often labels its determination "*Chevron* Step 0," *e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 912-13 (2001).

The Court can address other forms of agency "jurisdiction" in cases in which they are actually implicated. The Court should not let itself be drawn into such disputes unnecessarily by the government's broader regulatory agenda, and it is unclear that those cases will all be resolved through an invariable rule in which the label "jurisdiction" *ipso facto* determines the outcome. This case instead involves the long-established and easily identified question of an agency's "interpretive jurisdiction" – here, whether Congress gave the FCC the power to interpret Section 332(c)(7) authoritatively. That question plainly is decided *de novo*. The judgment of

the court of appeals can and should be reversed on that basis.[1]

I. The Fifth Circuit Erred In Holding That Courts Defer To Agencies' Assertion Of Interpretive Jurisdiction.

The government defends the Fifth Circuit's categorical holding that courts defer to an administrative agency's interpretation of any statutory provisions that "define the agenc[y's] authority to act." U.S. Br. 18. But the government's theory is unclear and inconsistent. Most of its arguments sweepingly assert as an absolute principle of administrative law that Congress always intends every agency to decide any matter that can be called "jurisdictional," including even an agency's claim that it possesses interpretive authority over a statute. *E.g.*, *id.* 32 ("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."); *see also id.* 11, 12, 14, 20, 22, 29

[1] Petitioners do not "disclaim[] the circuit split" described by the petition for certiorari. U.S. Br. 26 n.6. Acknowledging the circuit split, the Fifth Circuit resolved this case by applying an across-the-board rule that all agency determinations of "jurisdiction" receive *Chevron* deference. Pet. App. 36a-37a. In deciding the case, this Court could itself adopt a categorical rule. But for the reasons given in the text, petitioners believe that the case can and should be decided more narrowly.

(similar). But at other times – and particularly in the headings of its brief – the government suggests that its position is limited to cases in which "an agency interprets a statute that has been generally entrusted to its administration." *Id.* 15; *see also id.* 29. Broadly or narrowly drawn, the argument reduces to the erroneous claim that an agency may decide its own authority to implement a statute.

A. The Government Errs In Asserting That Agency Assertions Of Interpretive Jurisdiction Trigger *Chevron* Deference.

1. The government's first, broad theory is that every agency is entitled to deference with respect to every assertion of jurisdiction, including the agency's assertion that Congress granted it interpretive authority. That claim is obviously irreconcilable with this Court's precedents. It is settled that a court determines an agency's interpretive jurisdiction *de novo*. *See* Pet. Br. 19-23 (collecting cases). An agency receives deference only when exercising authority delegated by Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The Fifth Circuit's contrary holding puts the cart before the horse: it assumes the conclusion that Congress intended courts to defer to the agency's views. In many cases, it will be obvious that Congress did give the agency that authority, but the question must first be asked.

The government's contrary claim that the Court's "consistent practice" has been to apply *Chevron* deference to all questions of agency "jurisdiction," U.S. Br. 11, is inexplicable. In at least

seventeen cases, this Court has determined an agency's interpretive jurisdiction *de novo*. *See* Pet. Br. 19-23. Faced with our unequivocal representation that "this Court has *never* deferred to the agency's view that Congress intended to delegate it authority," *id.* 19, the government persists that it is "settled" that the Court always defers to every agency interpretation of any ambiguous jurisdictional provision, U.S. Br. 18. But it cites no majority opinion of this Court. Instead, it invokes a concurrence and a dissent, both more than twenty years old. *Id.* (citing *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting)). That imbalance in authority speaks for itself, and the reason for it is obvious: the government has no answer to petitioners' showing that those separate opinions address only other forms of agency power, not the antecedent determination of the agency's interpretive jurisdiction. *See* Pet. Br. 24-25 & nn.1 & 2.

2. Much of the government's brief is devoted to the proposition that *Chevron* deference attaches to those other, distinct "jurisdictional" assertions by agencies. But the only reason it gives that those arguments are relevant to this case is that it would be "inadministrable" and "unworkable" to distinguish between assertions of agency authority. U.S. Br. 11, 22. That claim is not only mistaken, *see, e.g.*, IMLA Open. Br. 33-35, but also depends on lumping together very different issues related to agencies' authority under the heading "jurisdiction," which is a word with "many, too many, meanings."

Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen, 130 S. Ct. 584, 596 (2009).

In fact, there is an obvious distinction between the threshold question of interpretive jurisdiction and other issues relating to an agency's "authority to act." U.S. Br. 18. Take this case. Neither the FCC's declaratory ruling, nor the Fifth Circuit's decision, nor the government's brief had the slightest trouble identifying the agency's power to interpret Section 332(c)(7) as a distinct inquiry. *See* U.S. Br. 5 ("As a threshold matter, the Commission determined that it had 'the authority to interpret Section 332(c)(7).'" (quoting Pet. App. 87a)); *id.* 9 ("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." (citing Pet. App. 45a-51a)); *id.* 11, 12, 23, 29, 31-32, 33-34, 36, 38, 39 (all recognizing the question of an agency's power to interpret a statute as a distinct issue).

B. The Government Errs In Claiming That An Agency's General Regulatory Authority Empowers It To Determine Its Interpretive Jurisdiction Over A Statutory Provision Such As Section 332(C)(7).

1. This Court's precedent equally precludes the government's contention that an agency with general regulatory authority over a statute is automatically entitled to *Chevron* deference when it asserts interpretive jurisdiction over an individual provision of that statute. This Court has decided several cases

that fit that precise fact pattern; each addressed the agency's authority *de novo*. The government is unable to identify any decision supporting its contrary view.

In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Court considered two distinct challenges to FCC regulations implementing the local-competition provisions of the 1996 Telecommunications Act: (i) that Congress did not authorize the FCC to interpret those provisions (*i.e.*, that the agency lacked interpretive jurisdiction); and (ii) that if the FCC did have that interpretive authority, its regulations nonetheless conflicted with the statute. The government argued that the agency's general regulatory authority under the Act entitled it to *Chevron* deference with respect to both claims, including the FCC's threshold determination that it had interpretive authority over the provisions of the 1996 statute. *See* U.S. Br. 42 (arguing that agency's assertion of interpretive jurisdiction should be sustained because, "[e]ven if there were some ambiguity in those provisions, the Commission's interpretation of them would be entitled to substantial deference, for 'it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.'" (quoting *Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment)); *id.* 48.

But this Court did not accept that argument. Instead, every member of the Court addressed the agency's authority to implement the local-competition provisions – which the majority (per Scalia, J.) described as "underlying FCC jurisdiction"

– *de novo*. *See* 525 U.S. at 377-85; *id.* at 407-12 (opinion of Thomas, J., dissenting). So the government's quotation (Br. 15) of this Court's statement in *Iowa Utilities* that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," 525 U.S. at 397, is misleading. That quotation actually refers to the Court's resolution of the substantive challenge to the FCC's regulations, which the Court reached only after its antecedent, *de novo* determination that Congress delegated to the FCC the power to interpret the provisions added by the 1996 Act. *See, e.g.*, *id.* at 387, 392, 395, 396 (after addressing agency's interpretive jurisdiction *de novo*, finding that FCC's reading of definition of "network element" was "eminently reasonable"; that rule on separation of network elements was "well within the bounds of the reasonable"; and that "pick and choose" rule was "not only reasonable, it is the most readily apparent"; but FCC had not interpreted the statute "in a reasonable fashion" in adopting rules on "necessary and impair" standards).

Likewise, in *United States v. Mead,* 533 U.S. 218 (2001), the Court recognized the "general delegation to [the Treasury] Secretary to issue rules and regulations for the admission of goods." *Id.* at 222 (citing 19 U.S.C. § 1624). But notwithstanding that "general rulemaking power," the Court considered *de novo* whether the specific statutory provisions relating to classification rulings indicated that "Congress meant to delegate authority to Customs" to act with the force of law. *Id*. at 231-32.

And in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), the statute at issue (the Migrant and Seasonal Agricultural Worker Protection Act) gave the Secretary of Labor broad authority to "issue such rules and regulations as are necessary to carry out" the Act. 29 U.S.C. § 1861. The Court nevertheless considered *de novo* the agency's authority to interpret the scope of the statute's private right of action and held that the agency lacked the power "to regulate the scope of the judicial power vested by the statute." *Adams Fruit*, 494 U.S. at 650.

The government's position cannot be reconciled with *Iowa Utilities*, *Mead*, or *Adams Fruit*. It nonetheless argues (Br. 30-31) that its theory is supported by *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). But *American Hospital* is a *Chevron* Step 1, not Step 0, case. No one disputed that the agency (the National Labor Relations Board) had the authority to interpret the relevant statutory provision, which addressed bargaining units. Instead, the petitioner maintained that the Board's regulation specifying the number of bargaining units in acute care hospitals substantively conflicted with a provision of the statute requiring that the Board make a bargaining unit determination "in each case." 29 U.S.C. § 159(b). The question was thus not the Board's interpretive jurisdiction (*i.e.*, whether its regulatory authority reached the statutory provision addressing the number of bargaining units), but whether the substance of its regulation was compatible with Section 159(b).

The government also quotes two statements by this Court that a "general" delegation of rulemaking authority triggers *Chevron* deference with respect to rules validly promulgated pursuant to that authority. U.S. Br. 29, 33. That is both uncontroversial and irrelevant: the delegation may be general or specific, but its meaning is always determined *de novo*. Neither statement suggests, and this Court has never held, that such general authority entitles the agency to deference regarding whether Congress intended that general authority to extend to a particular statutory provision such as Section 332(c)(7). To the contrary, in one of the two cases, the Court determined *de novo* that the challenged regulation did not fall within the agency's rulemaking authority. *Mead*, 533 U.S. at 231-34.

2. The FCC's argument that its general power to interpret the Communications Act implies the further authority to decide whether it may authoritatively interpret Section 332(c)(7) violates the cardinal rule that an agency cannot "bootstrap" itself into its own jurisdiction. *Adams Fruit*, 494 U.S. at 650 (citation omitted). Put another way, the FCC's argument begs the question presented by this case: is Section 332(c)(7) subject to the agency's general interpretive authority?

The government's argument also makes no sense as a presumption of congressional intent. *Chevron* rests on the sensible understanding that when Congress decides to delegate interpretive authority to an agency, it then expects the agency to apply its expertise to fill in gaps in the relevant statutory provisions. But the government's

argument would erect a radically different presumption: that Congress intends agencies to decide whether they or instead the courts have final interpretive authority to resolve ambiguities in statutes, with the consequence that the agency has interpretive authority unless Congress expressly withdraws it. That is an unsound assumption, because it does not reflect Congress's actual practice. Indeed, we are unaware of *any* statute in which Congress has expressly given an agency the power to determine whether it has interpretive authority over a statute. So there is no reason to believe that Congress would do so impliedly, as the government's reliance on the ambiguity of Section 332(c)(7) necessarily presumes.

Nor is this the type of technical question that Congress would expect to be decided by an agency rather than a court. To the contrary, as the seventeen precedents set forth in our opening brief illustrate, reading a statute to determine whether Congress delegated interpretive jurisdiction to an agency is a quintessential judicial task, calling for an ordinary exercise of statutory construction.

The government's claim that this case proves the opposite is very misleading. According to the government, after receiving hundreds of 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.'" U.S. Br. 21 (Pet. App. 78a-79a, 96a-97a). But the quoted analysis is *not* in the relevant part of the FCC's ruling – its parsing of its own "[a]uthority to

[i]nterpret [s]ection 332(c)(7)" (*see* Pet. App. 84a-87a) – in which the agency addressed the statute and precedents of the agency and courts. Instead, the agency made the policy judgments quoted by the Solicitor General only *after* finding that it had interpretive authority over Section 332(c)(7), then turned to establishing the substantive "[t]ime for [a]cting on [f]acility [s]iting [a]pplications." *See* Pet. App. 92a-124a.

Further, the determination of interpretive jurisdiction amounts to the allocation of power between the branches of government. It determines whether ambiguities in the statute's meaning will be resolved by courts or by the Executive Branch. Our constitutional structure entrusts those allocative decisions to the neutral judiciary, not agencies burdened by the self-interest of the opportunity to expand their own power. The government's startling argument that instead permitting the Executive Branch to make those decisions "promotes separation-of-powers principles by leaving permissible policy choices to policy-making bodies," U.S. Br. 32, is nothing less than an assault on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Indeed, it is not clear that Congress *could* delegate this authority to an administrative agency, consistent with the nondelegation principle that only Congress may exercise the Article I legislative powers. *See* Pet. Br. 29. The government's position permits the Executive Branch to make the quintessentially legislative judgment that the Executive rather than the courts will be the final arbiters of the meaning of ambiguous statutory

terms. But the Solicitor General has not identified any historical precedent for such a practice. Whatever the ultimate outcome of that constitutional question if Congress were ever to delegate interpretive authority expressly, here the Court should follow its "settled policy" of construing statutes to avoid potential constitutional invalidation by finding no delegation implicit in Section 332(c)(7). *Gomez v. United States*, 490 U.S. 858, 864 (1989).

The Solicitor General also significantly understates the prospect that his fellow members of the Executive Branch will use this claimed authority to aggrandize power to themselves. Given the choice, an agency would rarely disclaim the authority to finally resolve ambiguities in a statute. The agency might choose not to exercise that power in a particular case, but it rarely would deny its existence outright. In fact, the government does not identify any decision of this Court in which an agency ever did so. Its citation to one twenty-year-old decision, which involved a 1969 ruling of the long-since-disbanded Interstate Commerce Commission, is inapt. Br. 26 (citing *Reiter v. Cooper*, 507 U.S. 258, 269 (1993)). In even that one case, the Commission did not decide it lacked authority to interpret the provision; that issue was not before the Court. Rather, the issue was whether under the relevant statute the courts or the ICC had the "power to decree reparations relief." *Reiter*, 507 U.S. at 269.

The government finally says that for Congress to prevent an agency from seizing the final interpretive

authority over a statute, "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 grant of regulatory authority." U.S. Br. 31-32. That is all: just perfect clarity in every instance. In addition to its other flaws, the government's position certainly does not reflect how Congress actually writes laws. And in turn, the government's theory squarely conflicts with this Court's holding that the determination of whether an agency's position is consistent with a statute is made on the basis of "traditional tools of statutory construction," U.S. Br. 17 (quoting *Chevron*, 467 U.S. at 843 n.9), not *per se* rules. *See Mead*, 533 U.S. at 229-31; *see also, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000) (FDA lacked the authority to regulate cigarettes despite the absence of any express limitation); *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (Attorney General had limited authority to implement the Controlled Substances Act even absent express congressional limitation); *Rapanos v. United States*, 547 U.S. 715, 751-52 (2006) (although Congress had refused to limit the Army Corps of Engineers' authority under the Clean Water Act, a limitation nevertheless existed in the terms of the statute).

The Fifth Circuit accordingly erred in deferring to the FCC's assertion that it possesses the final interpretive authority to resolve ambiguities in Section 332(c)(7), rather than deciding that question *de novo*.

II. This Case Illustrates That Interpretive Jurisdiction Is Properly Determined *De Novo*.

The government asserts that the FCC has interpretive jurisdiction over Section 332(c)(7) because Congress did not expressly bar the agency from invoking its general authority to implement the Communications Act. On that view, the role of Section 332(c)(7) is not to grant state and local governments the flexibility to account for local conditions within the outer bounds specified by Congress, but rather to grant the FCC the sweeping power to use Section 332(c)(7) as a tool to implement the broader policies it believes are embodied throughout the Act. Thus, although the FCC characterizes its existing ruling as modest, the agency could presumably go much further and provide for a mandatory fifteen-day review period for wireless siting requests. Telecommunications companies have also urged the FCC to conclude that it has jurisdiction to rule that an application will be deemed granted if not timely acted upon. Pet. App. 108a-09a.

The FCC's arguments fail on the merits and illustrate why courts must determine the scope of agencies' interpretive jurisdiction *de novo*, rather than deferring to the agencies' self-interested judgments expanding their own power. Manifestly, none of the government's arguments – which are based on the statute, its legislative history, and this Court's decisions – relate to technical matters that Congress would expect to be resolved by the FCC, not a court. Although the government's reading of

the statute survived the Fifth Circuit's deferential review because it was not "impermissible," Pet. App. 51a, the FCC's broad assertion of interpretive authority is not the statute's best reading.

1. The government asserts that its interpretation follows from the holding of *Iowa Utilities* that the FCC's general regulatory authority applies to two provisions added by the 1996 Telecommunications Act. But as discussed in Part I, *supra*, the government's argument fails to acknowledge that this Court determined the FCC's authority to implement those provisions *de novo*, not deferentially. This Court did not accept – and it makes no sense to conclude – that Congress left to the FCC the decision whether the FCC had that interpretive authority.

Furthermore, *Iowa Utilities* did not adopt a categorical rule that every provision added to the Communications Act is subject to the FCC's general regulatory authority absent an express contrary statement by Congress. As the majority acknowledged, the FCC's interpretive jurisdiction "assuredly" turns (525 U.S. at 378 n.5) on "what th[e] later enacted statute contemplates" (*id.* at 420 (Breyer, J., concurring in part and dissenting in part)). The provisions at issue in *Iowa Utilities* – 47 U.S.C. §§ 251 and 252 – created a uniform federal regulatory regime in which the states could participate or not at their discretion. Recognizing that "a federal program administered by 50 independent state agencies is surpassing strange" (525 U.S. at 378 n.6), the Court found no reason to "speculat[e]" (*id.* at 378 n.5) that Congress intended

those provisions to not be subject to the FCC's general regulatory authority.

Section 332(c)(7) is very different. It preserves local authority rather than enacting a federal regulatory program. Section 332(c)(7) provides in its very first sentence that "nothing" else in the Communications Act "shall limit or affect" state and local zoning authority. That is not a "savings clause" that "merely provides that other provisions of the Communications Act should not be construed to impose separate limitations on local zoning authority." U.S. Br. 14 (emphasis omitted). By its terms, the exclusion in Section 332(c)(7) reaches the FCC's general regulatory authority – which is set forth in Sections 1, 4(i), 201(b), and 303(r) of the Act – as well as the agency's policy in favor of speeding the deployment of wireless facilities. Thus, the FCC's adoption in this proceeding of its "shot clock" rule – which mandates expedited decisions on wireless siting applications – certainly "affect[s]" local authority, as would of course the many other rules the agency could presumably enact pursuant to its claimed interpretive authority. *See* Black's Law Dictionary 92 (8th ed. 2004) (to "affect" is "to produce an effect on; to influence in some way").

The FCC's contrary interpretation effectively nullifies Section 332(c)(7)'s prohibition on invoking other provisions of the act that "affect" state and local rulemaking. That provision must be read "to preserve the primary operation of" the exclusion. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). The government fails to explain how it reads the exclusion, but presumably interprets it

merely as a formal prohibition on a court expressly invoking other provisions of the Communications Act to limit state and local wireless siting authority. In practice, however, the government would render the exclusion a dead letter by permitting the FCC by rule or order to pursue all the "policies" embodied in those otherwise-excluded provisions of the Act. *See, e.g.*, Pet. App. 103a-106a (FCC ruling explaining that deadlines were intended to further build-out requirements for 700 MHz spectrum, advance wireless 911 services, and promote advanced services under another statute entirely, the Recovery Act).

The statute's structure reflects, however, that when Congress wanted to subject this area of traditional state and local authority to FCC rulemaking, it said so expressly. In the 1996 Act, Congress both authorized the FCC to undertake a rulemaking on the effects of "radio frequency emissions" (110 Stat. 56 § 704(b)) and provided in Section 332(c)(7)(B)(iv) that "the Commission's regulations" take precedence over contrary state and local regulation.

The statutory history is equally instructive. Congress considered an earlier House alternative that would have provided for an FCC rulemaking to establish a "policy" to ensure that state and local governments acted "within a reasonable period of time after the request is fully filed." Pet. App. 213a. But Congress instead enacted the very different provisions of Section 332(c)(7), which forbids the FCC from resorting to other provisions of the Communications Act. Yet the FCC reads the statute

to impose the mandate from the House bill that Congress determined not to adopt.

The essence of Section 332(c)(7) is thus to recognize and embrace a principally state and local regulatory regime for wireless siting decisions, in contrast to the broader national regime contemplated by provisions of the Communications Act like those considered in *Iowa Utilities*. Congress did not intend to allow the FCC to require Arlington, Texas to follow the same timetables for zoning decisions as Arlington, Virginia. Rather, the statute requires each state and local government to honor *its own* zoning policies, without targeting cell tower applications for unique, hostile treatment in the form of bans, discrimination, and delays. *Town of Amherst v. Omnipoint Comm'ns Enters.*, 173 F.3d 9, 17 (1st Cir. 1999) (Congress conceived that this "experiment in federalism" would produce "at some cost and delay for the carriers" individual solutions "best adapted to the needs and desires of particular communities"); Pet. App. 210a (Conference Report) ("It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision."). But the government's reading turns the statute on its head, converting it into a tool for national policymaking by the FCC.

The relevant precedent is accordingly not *Iowa Utilities*, but instead *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which our opening brief cited seven times yet the government

completely ignores. Just as Section 332(c)(7)(A) provides that "nothing in this Act shall limit or affect" state and local wireless siting authority, the provision in that case (Section 152(b)) stated that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" interstate communications services. Addressing the question *de novo*, this Court held that "this provision fences off from FCC reach or regulation intrastate matters," and takes precedence over any other "provision declaring a general statutory purpose." 476 U.S. at 370. Congress notably enacted Section 332(c)(7)'s exclusionary "nothing in this chapter" provision against the backdrop of this Court's ruling in *Louisiana Public Service Commission*.

The government's reliance on *Iowa Utilities* is also flawed because Section 332(c)(7)'s judicial review provision makes this case better analogized to *Adams Fruit*. As discussed, the statute in that case gave the Secretary of Labor sweeping authority to "issue such rules and regulations as are necessary to carry out" the Act. 29 U.S.C. § 1861. But this Court held that power did not include the authority to interpret the private right of action under the statute, because Congress had not authorized the Secretary to "regulate the scope of the judicial power vested by the statute." *Adams Fruit*, 494 U.S. at 650. Section 332(c)(7) has a parallel structure. Congress gave enforcement authority over Section 332(c)(7) to the courts, and specifically withheld that authority from the FCC. 47 U.S.C. § 332(c)(7)(B)(v).

Nor can it be seriously argued that the statute requires FCC implementation. For the thirteen years prior to the FCC's assertion of interpretive jurisdiction in this ruling, the judiciary applied the statute without difficulty. The courts read Section 332(c)(7) to preserve state and local zoning requirements rather than to require a national zoning regime. *See, e.g.*, *Aegerter v. City of Delafield*, 174 F.3d 886, 892 (7th Cir. 1999) ("Some may disagree with Congress's decision to leave so much authority in the hands of state and local governments to affect the placement of the physical infrastructure of an important part of the nation's evolving telecommunications network. But that is what it did when it passed the Telecommunications Act of 1996, and it is not our job to second-guess that political decision."). No court read the statute to impose national administrative standards, much less "attempt[ed] to replicate the inquiry that the FCC conducted" of calculating national averages. U.S. Br. 43; *see, e.g.*, *N.Y. SMSA Ltd. P'shp v. Town of Riverhead Town Bd.*, 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000); *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198 (D.R.I. 2000). The FCC's ruling in this case thus unavoidably overturns many prior court decisions. *See, e.g.*, U.S. Br. 40 n.10.

2. The government's claim that its interpretation nonetheless represents the best reading of Section 332(c)(7) is unconvincing. And again, none of its arguments addresses a matter within the special technical competence of the FCC, as opposed to a question of statutory construction for which courts rather than agencies are better suited.

Principally, the government invokes the FCC's general regulatory authority over the Communications Act. But Congress would not have thought those provisions would override Section 332(c)(7)'s express provision that "*nothing*" else in the Communications Act may "affect the authority of a State or local government." 47 U.S.C. § 332(c)(7)(A) (emphasis added). Contrary to the government's submission, no principle of statutory construction imposes on Congress the burden to separately identify and negate each source of regulatory authority and policy that the agency might someday invoke.

The government next argues that the FCC's ruling "does not subject state and local officials to obligations going beyond those imposed by the 1996 Act itself." U.S. Br. 40 n.10. But Section 332(c)(7)'s express exclusionary language is not limited to additional "obligations." In broad terms, it forbids the FCC from invoking other provisions of the Act that would "affect" state and local decisionmaking. Unquestionably, the ruling in this case does so, and thereby "affects" local governments' ability to decide wireless siting applications in a manner and on a schedule that reflect local conditions. That was the very point.

Section 332(c)(7) thus provides that state and local governments must act on applications "within a *reasonable* period of time." 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). As discussed, courts interpreted the phrase "reasonable" to give state and local governments the flexibility to account for local circumstances. By contrast, the FCC reads

the same term to give *the agency* the flexibility to impose a uniform national zoning standard that conforms to its overall policy goals under the Communications Act. Never before was a state following its own law presumed to have violated federal law. Several states – and municipalities within those states – now are. Pet. App. 118a (¶ 48); Pet. 9. Never before was a local government presumed to have acted unreasonably when it followed its own standard zoning public hearing procedures. Now some are. Pet. App. 115a (¶ 44) (noting that new timelines "accommodate reasonable processes *in most instances*") (emphasis added). The agency recognized that the risks created by new federal requirements would in some instances force local governments to approve applications that they otherwise would not. Pet. 188a. There is accordingly no serious argument that the FCC's assertion of authority does not "affect" state and local decisionmaking.

For essentially the same reason, the government has matters backwards in asserting that the FCC has interpretive jurisdiction unless Congress expressly revokes it. The FCC's ruling represents a substantial intrusion on a sphere of classically state and local regulation, *see, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), and communities across the country enact these powers through local political processes. This case accordingly directly implicates the presumption that statutes do not change the balance of federal and state authority. *See New York v. United States*, 505 U.S. 144, 166 (1992) ("the Framers explicitly chose a Constitution that confers upon Congress the power

to regulate individuals, not States"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (citations omitted)).

Accordingly, the better reading is that Congress concluded that its decision in Section 332(c)(7) to protect local interests would be better effectuated if the statute were interpreted by the neutral judiciary – which is attentive to concerns of federalism – rather than interpreted by the FCC as a means to effectuate national telecommunications policy. Indeed, at the time Congress enacted the statute, the FCC had itself just expressed the view that zoning matters are "within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12,631, 12,633 (1995).

The government's remaining argument is that its position is supported by the House Report on the legislation. U.S. Br. 2-3 (H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 94 (1995)). But that Report addresses the House legislation – *rejected* in conference – calling for a rulemaking to establish policy on wireless siting decisions; it does not address Section 332(c)(7) as enacted. By contrast, the Conference Report on the *enacted* legislation – which the government does not cite – does not include the language cited by the government, including regarding a desire for "uniform, consistent" requirements. H.R. Rep. No. 204 at 94-95.

To the contrary, the Conference Report directs the Commission to *terminate* any rulemaking related to wireless citing, and explains that the statute imposes "limitations on the role and powers of the Commission . . . relate[d] to land use regulations." Pet. App. 209a, 211a. *See* Pet. Br. 32-33. It explains that local governments have "flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." Pet. App. 209a. It adds that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Id.* 210a. And it specifies that "the courts shall have exclusive jurisdiction over all . . . disputes arising under this section." *Id.* 209a.

In sum, Section 332(c)(7) illustrates that an agency's interpretive jurisdiction is properly determined *de novo*.

CONCLUSION

The Court should reverse the judgment, or vacate that judgment and remand the case.

Respectfully submitted,

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