Nos. 11-1545 & 11-1547

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,

AND

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

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

BRIEF OF AT&T SERVICES INC. AND UNITED STATES TELECOM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

D. WAYNE WATTS
PEGGY GARBER
GARY L. PHILLIPS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3053

JONATHAN B. BANKS
UNITED STATES TELECOM ASSOCIATION
607 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 326-7300

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(grapawy@khhte.com)

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INTEREST OF *AMICI CURIAE*[1]

AT&T has an interest in this case for two reasons. First, AT&T's subsidiaries provide a broad range of telecommunications and information services, including voice, Internet, and video programming services. Accordingly, the extent to which particular services are within the regulatory jurisdiction of the Federal Communications Commission ("FCC" or "Commission") is an important issue to AT&T, as it is to the industry generally. AT&T believes that independent judicial review of the Commission's attempts to assert jurisdiction over new technologies and new services is vital, and therefore urges this Court to hold that *Chevron* deference does not apply to statutory interpretations that the Commission adopts in determining the extent of its own jurisdiction.

Second, because some of AT&T's subsidiaries provide wireless service, AT&T also has a particular interest in the FCC order under review. AT&T participated in the proceedings before the FCC and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that (except as follows) none of the parties or their counsel, nor any other person or entity other than *amici*, their counsel, or their members, made a monetary contribution intended to fund the preparation or submission of this brief. Certain counsel for *amici* also serve as counsel for respondent CTIA—The Wireless Association and participated in (among other work for CTIA on this case) the preparation of the joint brief in opposition to certiorari of CTIA and respondent Cellco Partnership d/b/a Verizon Wireless ("Verizon"). CTIA has not filed a brief at the merits stage of this case. After CTIA determined that it would not file a merits brief, counsel were retained to prepare this *amicus* brief for AT&T and the United States Telecom Association. Petitioners and respondents have consented to the filing of this brief, and letters granting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

submitted information showing that local zoning authorities around the country were unreasonably delaying action on wireless facility siting requests. However the Court may rule on the question presented, AT&T urges the Court to uphold the Commission's order on the ground that the Commission clearly did have jurisdiction to interpret and enforce the local zoning provisions of the Telecommunications Act of 1996.

The United States Telecom Association ("USTelecom") is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom's member companies offer a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable. They range from large, publicly traded companies to small rural cooperatives, spanning all seven continents and more than 225 countries. Collectively, they represent hundreds of billions of dollars in investment, have annual revenues in the tens of billions of dollars, and employ millions of workers.

INTRODUCTION AND SUMMARY

AT&T and USTelecom support the position of respondent Verizon: this Court should hold that *Chevron*[2] deference does not apply to an agency's interpretation of its own statutory jurisdiction, but should nevertheless affirm the judgment of the court of appeals on the alternative ground that the Federal Communications Commission ("FCC" or "Commission") had clear, unambiguous jurisdiction to issue the order under review based on the text of the Communica-

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[2] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

tions Act of 1934 ("Communications Act" or "Act") and on this Court's decision interpreting that Act in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Verizon and other parties and *amici* in this case have ably set forth reasons that the structure of the *Chevron* doctrine and underlying principles of the separation of powers require independent judicial review when agencies interpret statutes to resolve questions about their own jurisdiction – and, in particular, whether Congress has authorized them to speak with the force of law on particular topics.

Thus, for example, Verizon and others persuasively rely on the rule of *United States v. Mead Corp.*, 533 U.S. 218 (2001), under which the question whether an agency can speak with the force of law precedes (rather than follows) the question whether its pronouncements should receive *Chevron* deference. *See* Verizon Br. 12-14; *see also* Arlington Br. 18-24; Int'l Municipal Lawyers Ass'n et al. Br. 22-26 ("IMLA Br."). As Verizon points out, agencies have no authority except that which Congress grants them. Thus, while agencies enjoy some judicial deference when filling in the details of a statutory scheme that Congress has charged them with administering, the *Chevron* doctrine necessarily "rests on the fundamental assumption that Congress has delegated to the agency policymaking authority over the particular matter at issue." Verizon Br. 12.

Further, Verizon and others argue forcefully that independent judicial review of agencies' jurisdictional determinations is necessary to protect important separation-of-powers principles by ensuring that those unelected agencies exercise only jurisdiction that Congress actually meant to grant them – as

opposed to jurisdiction that Congress *might* have intended to grant and did not clearly withhold. *See id.* at 17-24; *see also* IMLA Br. 27-32. Independent review is also necessary to provide an adequate check on agencies that attempt to expand their jurisdiction beyond the boundaries that Congress intended. *See*, *e.g.*, American Farm Bureau et al. Br. 10-26 ("AFB Br.") (collecting examples of "agency aggrandizement"). AT&T and USTelecom fully endorse these arguments.

I. This brief primarily addresses a countervailing argument that is based not on core principle, but on a more practical concern – specifically, the concern that it is impossible to draw a workable line between questions about agency jurisdiction and other questions about whether an agency's actions are consistent with nonjurisdictional statutory mandates. This argument is usually traced to Justice Scalia's concurrence in the judgment in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), which contended that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Id.* at 381 (Scalia, J., concurring in the judgment). AT&T and USTelecom respectfully contend that this line can be drawn: this Court has frequently distinguished between jurisdictional and nonjurisdictional questions in administrative law generally and in telecommunications law specifically.

A. In administrative law generally, the question whether an agency is authorized to speak with the force of law on a particular subject matter has become very important in this Court's *Chevron* cases since *Mead*. Nothing in the Court's experience since that time suggests that an agency's jurisdiction

(or lack thereof) is inextricably entangled with the substantive merits of its pronouncements. On the contrary, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), and other cases, this Court has distinguished between these different issues without difficulty.

B. In telecommunications law specifically, this Court has frequently distinguished questions that relate to the scope of the Commission's jurisdiction under the Communications Act from those that relate to how the Commission exercises that jurisdiction. Further, the Commission itself has maintained the distinction between jurisdictional and non-jurisdictional issues in its own decisionmaking, showing that this distinction is useful analytically even apart from its significance for judicial review.

This case is a further illustration. Petitioners have contended that the Commission lacks jurisdiction to interpret and enforce the federal restrictions on local zoning authority contained in 47 U.S.C. § 332(c)(7)(B)(i) and (ii), which prevent local authorities from using that authority to impede the site-by-site construction of a nationwide, seamless, competitive wireless network. In their view, the Commission has nothing (or at least nothing binding) to say about these provisions, because Congress instead intended them to be interpreted exclusively by the courts. Congress certainly *could* have limited the Commission's authority as petitioners suggest – though their evidence that it actually did so is lacking. Such a limitation (if it existed) would be a jurisdictional one, so petitioners are entitled to independent judicial review of their contentions.

C. Although some hard cases will raise jurisdictional issues that are more difficult to distinguish from the merits of agency action, that is not a reason

to abandon the distinction entirely. The need for an effective judicial check on expansions of administrative jurisdiction is too great. Instead, this Court should give the lower courts guidance for resolving close cases based on the principles underlying *Chevron* deference. Of these, the most important is whether the agency is seeking a major expansion of its mandate that Congress would not likely have conferred through ambiguity or silence; or, on the other hand, whether the issue at stake is a smaller, interstitial one that Congress might so have delegated.

II. Regardless of this Court's answer to the question presented, it should affirm the judgment below on the alternative ground that the Commission clearly had jurisdiction to interpret and enforce § 332(c)(7)(B)(i) and (ii). This alternative ground for affirmance was properly preserved by private respondents CTIA—The Wireless Association ("CTIA") and Verizon in opposing certiorari; it follows clearly from the text of the Communications Act and from *Iowa Utilities Board*; and it is important enough to warrant this Court's attention in a case that has already received plenary briefing and argument.

ARGUMENT

I. THERE IS A FEASIBLE DISTINCTION BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL QUESTIONS FOR *CHEVRON* PURPOSES

Petitioners and respondent Verizon have made a strong case in favor of denying *Chevron* deference to questions of statutory construction concerning the scope of an agency's jurisdiction. This brief addresses a particular counter-argument: the idea that, whether or not it might be desirable in principle to distinguish between those jurisdictional and non-

jurisdictional issues for *Chevron* purposes, it is not feasible to do so in practice. The leading authority for this argument is Justice Scalia's concurrence in the judgment in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), which contended that "giving deference to an administrative interpretation of [agency] statutory jurisdiction or authority is . . . necessary" because

> there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. 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."

Id. at 381 (Scalia, J., concurring in the judgment). AT&T and USTelecom respectfully contend that, on the contrary, a line can be drawn that separates jurisdictional questions from nonjurisdictional ones.

In drawing that line it is important to recognize that "[j]urisdiction," here as elsewhere, "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). Although the word "jurisdiction" can be and often has been used by this Court and others to refer to many types of limits on an agency's ability to act,[3] this case presents a particu-

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[3] For example, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court deferred to the CFTC on the question whether that agency could "exercise jurisdiction over counterclaims arising out of the same transaction as [a] . . . reparations dispute" under the CFTC's statute. *Id.* at 845-46; *see Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment) (citing *Schor* as a case in which the Court

lar *type* of question about an agency's jurisdiction: whether Congress has authorized an agency to speak (by rule or by order) with the force of law as to a particular statutory provision or subject matter. In this case, that question manifests concretely as a dispute over whether the FCC can issue a declaratory ruling that becomes binding in subsequent litigation under 47 U.S.C. § 332(c)(7) in the district courts. *See*, *e.g.*, Arlington Br. 13 (identifying this case as a "challenge [to] the validity of rules promulgated by the FCC that purport to adopt binding interpretations of Section 332(c)(7)").

Practice and precedent show that this Court can and does distinguish at least this type of jurisdictional dispute (that is, a dispute about agency authority to speak with the force of law on a given subject matter) from disputes about the merits of a particular action that the agency has taken. Similarly, in telecommunications law (including many cases that precede *Chevron* and *United States v. Mead Corp.*, 533 U.S. 218 (2001)), both this Court and the FCC itself have long analyzed the existence and extent of the Commission's jurisdiction separately from the merits of its actions. This case itself is an example: petitioners' arguments that the Commission lacks authority to interpret and enforce § 332(c)(7)(B) are unmistakably *jurisdictional* arguments (though not in our view strong ones). There will of course be harder cases than this one. But the mere possibility of hard cases should not persuade this Court to

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deferred to "an agency's interpretation of its own statutory authority or jurisdiction"). The counterclaims in *Schor* arose under state common law. *See* 478 U.S. at 837-39. The adjudicatory jurisdiction that the CFTC sought to exercise over them was thus far removed from the jurisdiction that the FCC has asserted here to interpret and enforce the Communications Act.

abandon the distinction between jurisdictional and nonjurisdictional issues, because – as Verizon and others have persuasively argued – that distinction is grounded in the separation of powers and other important concerns.

A. This Court Has Distinguished Jurisdictional from Nonjurisdictional Questions in *Mead* and Other Cases

This Court has drawn the necessary distinction between jurisdictional and substantive review of administrative action in cases applying *Mead*. Under that case, the question whether a statutory interpretation put forward in the course of agency action warrants deference under *Chevron* itself turns on whether Congress has "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap," or whether it is otherwise "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229-30.[4] As several parties have observed, *Mead* implies that a reviewing court must determine without deference whether Congress has given an agency the authority to speak with the force of law on a particular subject, because the court must make that initial determination before it knows

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[4] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007) (listing whether an agency "rule falls within the statutory grant of authority" as one of the factors to be considered in determining whether "Congress intended [a court] to defer to the agency's determination").

whether deference is due. *See* Verizon Br. 12-14; *see also* Arlington Br. 18-24; IMLA Br. 22-26.[5]

The Court has applied this standard in later cases without apparent difficulty – including in one case, *Gonzales v. Oregon*, 546 U.S. 243 (2006), that called for fine distinctions about the scope of administrative jurisdiction. In *Gonzales*, this Court confronted the question whether the Attorney General should receive *Chevron* deference for an interpretive rule that had found that prescriptions of medications for assisted suicide were not for a "'legitimate medical purpose'" within the meaning of the Controlled Substances Act ("CSA"). *Id.* at 258 (quoting 21 U.S.C. § 830(b)(3)(A)(ii)). The Court opened the section of its opinion dealing with *Chevron* by observing that the phrase "legitimate medical purpose" itself is "susceptible to more precise definition and open to varying constructions," *id.*; thus, it is the kind of ambiguous provision to which *Chevron* deference *could* have applied if the Attorney General had been acting "pursuant to authority Congress has delegated." *Id.*

But the Court nevertheless did not defer, because it found that "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law." *Id.* at 268. In reaching this conclusion, it employed the traditional tools of statutory construction, considering matters

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[5] *See also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1130 (2008) ("Eskridge & Baer") (observing that, in light of "*Mead*'s holding that *Chevron* rests upon Congress's delegation of lawmaking authority to the agency[,] . . . one would expect the Court to take care that there actually has been such a delegation") (emphasis omitted).

including the "language of the delegation provision itself," which granted the Attorney General only "limited powers," *id.* at 258-59; the "anomalous" nature of the Attorney General's assertion that the statute gave him the power to "criminalize . . . the actions of registered physicians, whenever they engage in conduct he deems illegitimate," *id.* at 262; and the "design of the statute" as a whole and its "allocat[ion] [of] decisionmaking powers among statutory actors," including the Secretary of Health and Human Services, *id.* at 265. As Arlington notes (at 22-23), nothing in *Gonzales* suggests that the Court deferred to the Attorney General concerning the limits of his authority under the CSA. Nor is there any suggestion that the *Gonzales* Court had difficulty drawing a line between the question whether "the CSA . . . g[a]ve the Attorney General authority to issue the Interpretive Rule as a statement with the force of law" and the question whether "his substantive interpretation is correct." 546 U.S. at 268; *see id.* (stating that the latter question "remain[ed]" to be answered after the former was resolved).

In other post-*Mead* cases, the Court likewise considered whether the agency was authorized to speak with the force of law as to the meaning of the statutory provision at issue *before* applying *Chevron* deference to the agency's interpretation of that statute. Thus, in *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), the Court applied *Chevron* deference to a Treasury Department rule but only after finding clear jurisdiction from the "explicit authorization" given the Treasury Department "to 'prescribe all needful rules and regulations for the enforcement' of the Internal Revenue Code." *Id.* at 714 (quoting 26 U.S.C. § 7805(a)).

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Court treated the FCC's authority under § 201(b), the same provision at issue in this case, as a necessary predicate for applying *Chevron* deference to the FCC's regulation in that case. *See id.* at 980-81. And in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), the Court applied *Chevron* deference after finding clear jurisdiction of the Federal Reserve Board to promulgate certain regulations as (among other things) "'necessary or proper to effectuate the purposes of'" the Truth in Lending Act. *Id.* at 238 (quoting 15 U.S.C. § 1604(a)).

To be sure, the agency-jurisdictional questions in *Mayo Foundation*, *Brand X*, and *Household Credit* were not difficult ones: unlike *Gonzales*, those cases did not feature dissents on the jurisdictional issues, and indeed this Court noted in two instances that the jurisdiction of the relevant agency was not even in dispute. *See Brand X*, 545 U.S. at 981; *Household Credit*, 541 U.S. at 238. But that does not undermine the ability of those cases to show that a workable distinction between jurisdictional and nonjurisdictional arguments can be drawn for purposes of *Chevron* deference. On the contrary, the fact that there were no contested questions of agency jurisdiction in those cases – where there were parties with an obvious interest in raising any such arguments that were available – only strengthens the inference that the line was a clear one.

B. Telecommunications Law Has Long Recognized the Distinction Between Jurisdictional and Nonjurisdictional Questions

1. This Court Has Treated the Commission's Jurisdiction as a Distinct Legal Issue

In telecommunications law in particular, this Court has spent much time and effort on determining the extent of the FCC's jurisdiction over particular types of communications and other activities, in cases that distinguished the agency's jurisdiction from the substance of any particular action that the agency might take. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), was one of this Court's first major cases interpreting the Communications Act, and it concerns almost entirely whether the Commission's "authority to make special regulations applicable to radio stations engaged in chain broadcasting," 47 U.S.C. § 303(i), among other provisions, applied merely to "technical and engineering impediments" that might arise from chain broadcasting, or whether it also had "power to deal with network practices found inimical to the public interest." 319 U.S. at 217-19. The Court addressed this basic question of authority separately from "the claim that the Commission's exercise of such authority was unlawful." *Id.* at 224.

Later cases have continued to treat the extent of the Commission's jurisdiction as a threshold question to be addressed separately – often in separate cases – from the substantive merits of a particular action within that jurisdiction. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court considered whether the Commission had jurisdiction

to regulate cable television[6] and concluded that it did. In reaching that conclusion, the Court distinguished the question "whether the Commission has authority under the Communications Act to regulate [cable] systems" from any "questions as to the validity of the specific rules promulgated by the Commission for the regulation of [cable]." *Id.* at 167; *see id.* ("emphasiz[ing]" that the latter questions were "not . . . before the Court").[7] It held that the Commission had authority to regulate cable so long as its regulations were "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *id.* at 178, and left elaboration of that standard to later cases.[8]

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[6] Congress later granted the Commission express regulatory jurisdiction over certain aspects of cable television in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *Southwestern Cable* concerned the Commission's jurisdiction prior to those amendments.

[7] *Southwestern Cable* also considered a separate question of the Commission's "authority under the Communications Act," namely, whether the Commission could "issue the particular prohibitory order in question." 392 U.S. at 178. Although it called this a question of "authority," the Court was not addressing the type of jurisdiction at issue in this case. All that was at stake was whether the Commission had been required to hold a hearing. *See id.* at 179-80; *see also supra* pp. 7-8 & n.3.

[8] The Court returned to the question of the FCC's pre-1984 authority to regulate cable television in the Midwest Video cases. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 670 (1972) (plurality opinion) (upholding as "within the Commission's authority recognized in *Southwestern [Cable]*" FCC regulations requiring cable companies to originate their own programming); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707-08 (1979) (striking down rules requiring cable companies to carry public access programming as outside that authority).

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("*Louisiana PSC*"), the Court held that the Commission lacked jurisdiction to regulate the way in which telecommunications carriers depreciated telephone plant and equipment insofar as it was used to provide intrastate services. The *Louisiana PSC* Court observed that this jurisdictional decision had nothing to do with "the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry," or even "whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose." *Id.* at 359. Instead, the Court focused exclusively on determining "where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service." *Id.* After concluding that this responsibility belonged to the states, the Court went no further.

Perhaps more than any other case, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (which also controls the particular issue of jurisdiction at stake in this case, *see infra* Part II), illustrates the feasibility of distinguishing the Commission's jurisdiction to regulate a particular area and other questions about its compliance with substantive statutory restrictions and mandates. In that case, the Court upheld against a "jurisdictional" challenge, 525 U.S. at 374, the FCC's rules requiring that prices for the interconnection and unbundling that incumbent carriers must offer to their competitors under the Telecommunications Act of 1996 ("1996 Act") be set according to "Total Element Long Run Incremental Cost," or "TELRIC." *See id.* at 377-86. The Court made clear that it was deciding only the question whether the

Commission had the authority to set some pricing methodology and that "the merits of TELRIC [were] not before" the Court at the time. *Id.* at 374 n.3. The Court indeed did not reach those merits until several years later. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 493 (2002) ("In [*Iowa Utilities Board*], this Court upheld the FCC's jurisdiction to impose a new methodology on the States when setting [1996 Act] rates. The attack today is on the legality and logic of the particular methodology the Commission chose.").

In sum, judicial review of FCC actions has routinely required this Court to distinguish between questions concerning the subjects over which the Commission may properly exercise jurisdiction and questions concerning the "legality and logic," *id.*, of such an exercise. These questions can be and are appealed separately, analyzed separately, and decided differently with respect to an individual rule or order. There is no reason to think that this existing distinction will cease to be workable if this Court holds that the Commission should not receive *Chevron* deference in cases of the former kind.

2. The Commission Also Treats Its Own Jurisdiction as a Distinct Legal Issue

The Commission's own decisions frequently draw the same distinction between the agency's jurisdiction and the statutory viability of decisions it makes in exercising that jurisdiction.[9] Often, the Commis-

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[9] Indeed, the Commission has expressly distinguished "a challenge to the Commission's ultimate 'jurisdiction' or authority over [certain] traffic under section 2 of the [Communications] Act" from "a challenge to the *manner* in which the Commission exercised its jurisdiction over [that] traffic in the circumstances presented." Memorandum Opinion and Order, *General Commu-*

sion has framed the jurisdictional inquiry in the specific language of whether its "subject matter jurisdiction" extends to a particular area of conduct, such as services that use Internet Protocol to carry voice messages and are interconnected with the public switched telephone network;[10] voicemail and interactive phone menu services;[11] and the practice by incumbent cable operators of entering into exclusive arrangements with the owners of large residential buildings to provide video programming to the residents of those buildings.[12] Nor is this approach new:

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nication, Inc. v. Alaska Communications Sys. Holdings, Inc., 16 FCC Rcd 2834, ¶ 28 (2001) (correcting a party for failing to observe this distinction in its arguments), *petition for review granted in part and denied in part, vacated and remanded in part on other grounds, ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

[10] *See* First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services*, 20 FCC Rcd 10245, ¶ 28 (2005) (finding that "these services come within the scope of the Commission's subject matter jurisdiction granted in section 2(a) of the [Communications] Act"), *petition for review denied, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

[11] *See* Report and Order and Further Notice of Inquiry, *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, ¶ 95 (1999) (asserting "subject matter jurisdiction over . . . voicemail and interactive menus").

[12] *See* Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶¶ 53-54 (2007) (asserting the "subject matter jurisdiction granted in Title I" of the Communications Act as an alternative basis for regulating such practices), *petitions for review denied*, *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

similar cases can be found going back decades.[13] More recently, the extent of the Commission's jurisdiction over wireless and wireline Internet services has been hotly contested in proceedings before the D.C. Circuit.[14]

Further, even in cases where the Commission has not used explicitly jurisdictional language, it has nevertheless observed the distinction between its authority to issue binding rules or orders on a particular subject and the substantive justification for its use of that authority. Thus, the Commission has a well-established practice of breaking out issues of jurisdiction and rulemaking authority from the merits of particular regulatory endeavors.[15] That

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[13] *See* Memorandum Opinion and Order, *AT&T Co.*, 23 FCC 689, ¶ 3 (1957) (noting, with regard to a proposed tariff filed by AT&T, that "[o]nly if the question of our jurisdiction . . . is resolved in the affirmative will it be necessary or proper for the Commission to consider the merits of the tariff under the standard of justness and reasonableness which is the statutory test").

[14] *See Cellco P'ship v. FCC*, Nos. 11-1135 & 11-1136, 2012 WL 6013416, at *1, *4-7 (D.C. Cir. Dec. 4, 2012) (designated for publication) (upholding the FCC's jurisdiction to regulate the terms of "roaming agreements" between providers of mobile wireless Internet services); *Comcast Corp. v. FCC*, 600 F.3d 642, 644, 651-61 (D.C. Cir. 2010) (vacating for lack of sufficient explanation the FCC's attempt to exercise jurisdiction of the network management practices of Internet service providers).

[15] *See*, *e.g.*, First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 18 (2010) (addressing the FCC's "statutory authority . . . to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated [video] programming" before considering the rules it would apply in resolving such complaints), *petitions for review granted in part and denied in part, vacated and remanded in part on other grounds*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir.

practice helps to show that it would be unwarranted for this Court to accord *Chevron* deference to the Commission's conclusions about the extent of its own jurisdiction out of a concern that no distinction between jurisdictional and nonjurisdictional questions can be maintained. In all likelihood, the agency itself would continue to draw the same distinctions in its own cases, but the courts' ability to review its reasoning and check it when it overreaches would be needlessly impaired.

3. This Case Illustrates the Feasibility of Distinguishing Jurisdictional from Nonjurisdictional Questions

Another illustration of the viable distinction between jurisdictional and substantive questions in review of agency action can be found in this very case. Petitioners and their supporters have argued persistently throughout these proceedings that Congress intended the courts, and not the Commission, to decide what types of local-government conduct "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services" within the meaning of § 332(c)(7)(B)(i)(II), and what is a "reasonable period of time" for a locality to consider a tower siting application under § 332(c)(7)(B)(ii). *See*, *e.g.*, Arlington Br. 31; CTTC Br. 21-22, 24, 35, 37. AT&T and USTelecom agree with the Commission and with Verizon that these statutory arguments lack force.

2011); Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 53 (2007) (finding "that the Commission has the authority to adopt rules to implement Title VI" of the Communications Act), *petitions for review denied, Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

See infra Part II. But, whether strong or weak, they are jurisdictional arguments. They concern whether the Commission has the ability to issue a rule or order that (after judicial review under the Administrative Procedure Act is complete) will affect the rights of carriers and localities in future proceedings in the district courts.

By contrast, the other arguments that petitioners have raised about the same statutory provisions (of which this Court did not grant review) concern matters that are clearly not jurisdictional. For example, in opposing the Commission's construction of § 332(c)(7)(B)(ii), petitioners have contended that Congress intended the standard for a "reasonable period of time" to vary in different localities across the country. *See*, *e.g.*, Pet. App. 59a-60a. These arguments could be made to a district court in the first instance just as well as to the Commission. They concern the substantive content of the statute, rather than the identity of the administrative or judicial actor who should interpret and enforce those directives. Once it is determined that the Commission has jurisdiction to interpret and enforce § 332(c)(7)(B), its view about what is a "reasonable period of time" is a proper subject for *Chevron* deference.

C. Any Line-Drawing Difficulty Does Not Justify *Chevron* Deference for Agency Determinations of Jurisdiction

1. To be sure, the clarity of the line between jurisdictional and nonjurisdictional issues in this case does not mean that there may not be other cases in which that line may be harder to find. Such hard cases should be rare, and in any event there is no reason to think that they will leave courts unable to

decide in a principled way whether or not *Chevron* deference is appropriate. As this Court commented in *Mead*, courts will be able to make "reasoned choices between . . . examples" set by precedent, as "courts have always done." 533 U.S. at 237 n.18. In any event, as Verizon and other parties have shown in detail, and we reprise only briefly here, the reasons for denying *Chevron* deference to agency determinations of jurisdiction are sufficiently weighty to overcome any remaining concerns about workability.

First, the "axiom[] that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), is well worth preserving and would be undermined by a notion of deference that would grant agencies powers that (in a court's own best judgment) Congress intended to withhold. Such deference would leave little of the principle "that an agency may not bootstrap itself into an area in which it has no jurisdiction," which this Court unanimously called "fundamental" in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks omitted), six years after *Chevron* was decided.

Second, deference to an agency's assertion of expanded jurisdiction lacks any basis in the theory underlying *Chevron* itself. That theory is that courts lack the institutional competence to decide "a challenge to an agency construction of a statutory provision [that], fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866; *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2379 (2001) (suggesting that *Chevron*

"rests (in part or in whole) on notions of comparative institutional competence and legitimacy"). An argument that an agency lacks jurisdiction over particular subject matter does not suffer from this flaw: it amounts instead to a claim that, however wise the policy the agency is attempting to implement, Congress did not intend the agency to fill *this* gap.

Third, if agencies can freely establish jurisdiction over new subject matter based on merely reasonable constructions of ambiguous jurisdictional language, they will inevitably over time seize more and more territory for themselves. As *amici* American Farm Bureau et al. have shown with numerous examples, this is a real and not a theoretical phenomenon. *See* AFB Br. 10-26.

2. In any event, this Court can and should provide guidance that will help the lower courts to resolve hard cases based on principles that it has already recognized. Where a question is arguably jurisdictional (but also arguably not), the courts should look to other characteristics of the case before them to determine whether applying deference would be consistent with Congress's (actual or presumed) intention. The most important such characteristic should be whether the challenged agency action is "interstitial [in] nature," *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), or whether it is instead a matter of "economic and political significance" that Congress would not likely delegate to an agency in a "cryptic" fashion, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see Gonzales*, 546 U.S. at 267-68 ("The importance of the issue of

physician-assisted suicide . . . makes the oblique form of the claimed delegation all the more suspect.").[16]

Other factors that might counsel for or against deference in close cases may include whether the agency possesses "related expertise," *Barnhart*, 535 U.S. at 222; whether on the other hand the dispute "concern[s] common law or constitutional law" issues, as to which agencies lack special competence, Breyer, 38 Admin. L. Rev. at 370; and whether under the circumstances the court is satisfied that the agency "can be trusted to give a properly balanced answer," rather than "seek[ing] to expand [its] power," *id.* at 371. By relying on these considerations, courts will still be able to make appropriate choices between deferential and independent review even in cases (which will be few) where the line between jurisdictional and nonjurisdictional issues is hard to find.

II. THE COMMISSION HAS CLEAR JURISDICTION TO INTERPRET AND ENFORCE § 332(c)(7)(B)(i) AND (ii)

Regardless of the degree of deference due the Commission on jurisdictional questions, the Court should affirm the judgment of the court of appeals because the Commission had clear jurisdiction to issue the order under review. The Commission is authorized to "prescribe such rules and regulations

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[16] *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("Breyer") ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); Eskridge & Baer, 96 Geo. L.J. at 1130 (arguing that courts are "capable of distinguishing between wholesale and retail applications of a statute," where wholesale applications involve "new categor[ies] of applications" and retail ones involve "matter[s] of detail").

as may be necessary in the public interest to carry out the provisions of" the Communications Act. 47 U.S.C. § 201(b). Section 332(c)(7)(B) is such a "provision[]," *id.*, because Congress added it to the Communications Act as one of the amendments made by the 1996 Act. Section 332(c)(7)(B), moreover, contains federal mandates that take certain aspects of zoning decisions out of the hands of local authorities. This Court confirmed in *Iowa Utilities Board* that, when Congress thus "expan[ds] . . . the substantive scope of the [Communications] Act," it also "expan[ds] . . . Commission jurisdiction" to interpret and enforce the Act. 525 U.S. at 380. Accordingly, the Commission had jurisdiction to make a rule (or, in the present case, issue an order) setting forth a binding interpretation of § 332(c)(7)(B)(i) and (ii). The merits of that interpretation are subject to judicial review under *Chevron*'s deferential standard.

This Court can always affirm a judgment below on an alternative ground. *See*, *e.g.*, *United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011). It should do so here for four reasons. *First*, as set forth below, the question whether the FCC had jurisdiction here is a straightforward matter of statutory construction that this Court can resolve on the face of the Communications Act and in light of the controlling precedent supplied by *Iowa Utilities Board*. *Second*, the alternative ground was called to the attention of the Court and the parties in the brief in opposition filed by CTIA and Verizon at the certiorari stage of this proceeding. *See* CTIA/Verizon Br. in Opp. 13, 16-24. *Third*, the alternative ground has been addressed in the briefs of the parties. *See* Arlington Br. 34-44; CTTC Br. 47-53; Verizon Br. 30-33. *Fourth*, the alternative ground would permit the Court – regard-

less of its views on the Fifth Circuit's reasoning – to uphold the FCC's order without further proceedings and so to promote the national interest in "the deployment of advanced wireless communications services . . . in all geographic areas in a timely fashion," Pet. App. 102a-103a, and in "the promotion of advanced services and competition that Congress [has] deemed critical," *id.* at 105a.

A. Section 201(b) Gives the Commission Jurisdiction To Enforce § 332(c)(7) as Part of the Communications Act

Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Act of May 31, 1938, ch. 296, 52 Stat. 588 (codified at 47 U.S.C. § 201(b)).[17] The "Act" here is the Communications Act of 1934. Accordingly, when Congress enacts a substantive statutory mandate as a part of the Communications Act, § 201(b) gives the Commission jurisdiction – the authority to speak with legal force – in order to interpret and enforce that mandate. As this Court put it in *Iowa Utilities Board*, "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include [provisions] added by the Telecommunications Act of 1996." 525 U.S. at 378.[18]

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[17] The version printed in the U.S. Code (which has not been enacted into positive law) refers to the provisions of "this chapter." 47 U.S.C. § 201(b). The relevant chapter includes the entire Communications Act, as amended.

[18] The order under review also relies on several other provisions of the Communication Act that grant authority to the FCC. *See* Pet. App. 87a-88a (citing §§ 1, 4(i), and 303(r) of the

The provisions at stake in *Iowa Utilities Board* were §§ 251 and 252 of the Act, which concerned the introduction of competition into previously non-competitive local telephone markets. Local telephone service was an area that previously had been reserved to the states under § 2(b) of the Act, 47 U.S.C. § 152(b). *See generally Louisiana PSC*, 476 U.S. at 368-76. But the Court nevertheless found dispositive evidence of Congress's intent to convey jurisdiction to the Commission in the "clear fact" that Congress had made the 1996 Act "not as a freestanding enactment, but as an amendment to, and hence *part of*, [the Communications] Act," and so subject to the general grant of authority in § 201(b). *Id.* at 378 n.5.

That holding controls here. Section 332(c)(7)(B) is as much a part of the 1996 Act, and thus as much a part of the Communications Act, as were the local-competition provisions analyzed in *Iowa Utilities Board*. *See* 47 U.S.C. § 332 note; Pub. L. No. 104-104, § 704(a), 110 Stat. 56, 151-52. That section's substantive requirement that local review of a wireless facility siting application be limited to a "reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and its proscription of any state or local government action that "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II), expand the substantive scope of the Communications Act.[19] Rules interpreting and

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Act, 47 U.S.C. §§ 151, 154(i), 303(r)). This brief, following *Iowa Utilities Board*, focuses on § 201(b).

[19] By contrast, *Iowa Utilities Board* noted that its holding would not apply where "Congress has remained silent" as to a particular subject matter, 525 U.S. at 382 n.8 – and so left it unregulated by federal law. Thus, when the FCC has attempted to assert jurisdiction but has "failed to tie" that asserted

enforcing those specific provisions (and construing their obviously ambiguous provisions, such as the length of a "reasonable period of time") are therefore within the Commission's jurisdiction under § 201(b). The judgment of the court of appeals can accordingly be affirmed using the traditional tools of statutory construction, and on the authority of *Iowa Utilities Board*, without any need for *Chevron*.

B. None of Petitioners' Arguments Creates Ambiguity About the Application of § 201(b)

1. Neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) Withdraws Jurisdiction from the Commission

Petitioners rely on two provisions of § 332(c)(7) to support their argument that the Commission lacks jurisdiction to interpret and enforce the substantive restrictions placed on local authorities by § 332(c)(7)(B)(i) and (ii). Neither of these arguments casts doubt on the Commission's jurisdiction.

a. The City of Arlington relies (at 31, 41) on § 332(c)(7)(A). That subsection provides that, "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Arlington argues that, "like the provision at issue in *Louisiana PSC*, Section 332(c)(7) is an 'express jurisdictional limitation[] on FCC power' that 'fences off' State and local authorities 'from FCC reach or regulation,' except as specifi-

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authority to "any 'statutorily mandated responsibility'" of the agency, courts have properly set its actions aside. *Comcast*, 600 F.3d at 661 (rejecting FCC's attempt to "assert[] . . . ancillary authority over Comcast's Internet service" for this reason).

cally provided in the statute." Arlington Br. 32 (quoting 476 U.S. at 370) (alteration in original). This argument is wrong for four reasons.

First, § 332(c)(7)(A) on its face contemplates that the other provisions of § 332(c)(7) (i.e., other things in "this paragraph") can and will limit or affect local zoning authority. It is thus substantially narrower than § 2(b), the provision discussed in the portion of *Louisiana PSC* that Arlington quotes. Section 2(b) instructs that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service," 47 U.S.C. § 152(b), with certain enumerated exceptions that were not relevant to *Louisiana PSC* or *Iowa Utilities Board*. Here, § 332(c)(7)(A) contains exceptions that are directly relevant to this case. The substantive provisions of § 332(c)(7)(B) are "expansion[s] of the substantive scope," *Iowa Utils. Bd.*, 525 U.S. at 380, of the Communications Act. And *Iowa Utilities Board* teaches that such substantive expansions carry with them corresponding "expansion[s] of Commission jurisdiction." *Id.*

Second, the comparison between § 2(b) and § 332(c)(7)(A) is instructive for another reason: § 2(b) *does* contain a clear limitation on the Commission's jurisdiction of the kind that Arlington claims is found in § 332(c)(7)(A). Thus, § 2(b) shows that, when Congress meant to restrict the Commission's jurisdiction, it was fully capable of explicitly referring to "jurisdiction" when it did so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

(alteration in original; internal quotation marks omitted).

Third, even if § 2(b) and § 332(c)(7)(A) were textually similar (which they are not), Arlington's argument would still be foreclosed by *Iowa Utilities Board*. In that case, the Court rejected an argument virtually identical to the one that Arlington advances here: that § 2(b) prevented the Commission from exercising jurisdiction to interpret and enforce provisions of the 1996 Act concerning matters that before the 1996 Act had been entirely reserved to the states. *See* 525 U.S. at 378-79. The Court concluded that, after Congress had "extend[ed] the Communications Act into local competition," § 2(b) "continue[d] to function" – and to restrain the Commission's jurisdiction – only as to "aspect[s] of intrastate communication *not* governed by the 1996 Act." *Id.* at 382 n.8. Applying the same reasoning here, § 332(c)(7)(A) likewise restrains the substantive scope of the Act, and the Commission's jurisdiction, only as to aspects of local zoning authority not governed by § 332(c)(7)(B).[20]

b. For its part, CTTC relies (at 47-53) on § 332(c)(7)(B)(v). That subsection creates a cause of action in federal or state court for any person "adversely affected by any final action or failure to act by a State or local government or any instrumen-

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[20] Arlington also relies (at 32-34, 43-44) on the legislative history of § 332(c)(7), but that history is irrelevant because the statute is unambiguous on its face. *See Milner v. Department of Navy*, 131 S. Ct. 1259, 1266 (2011) (observing that, although some members of the Court "believe that clear evidence of congressional intent may illuminate ambiguous text," the Court "will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language").

tality thereof that is inconsistent with" § 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v). It also permits a 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) [to] petition the Commission for relief." *Id.* CTTC argues that this language "specifically state[s] what power and jurisdiction was enumerated to the FCC," and by implication excludes the jurisdiction that the FCC exercised to interpret and enforce § 332(c)(7)(B). This argument is wrong for two reasons.

First, § 332(c)(7)(B)(v) contains affirmative grants of jurisdiction to courts and to the FCC. Like § 332(c)(7)(A), it contains no language restricting the FCC's jurisdiction, which Congress could easily have inserted had it meant to achieve that effect. *See supra* p. 28. Moreover, even if § 332(c)(7)(B)(v) could be interpreted to remove jurisdiction from the FCC in order to convey it to the courts, it does not (and could not) convey to the courts the jurisdiction to issue general guidance in the form of a declaratory ruling, like the one under review here. Instead, § 332(c)(7)(B)(v) deals only with procedures for the judicial resolution of disputes about particular "act[s]," "final action[s]," or "failure[s] to act" – the types of disputes that make up concrete Article III cases and controversies. The order under review was not addressed to any such particular dispute, and no Article III court would have had jurisdiction (exclusive or otherwise) to issue a similar ruling.

Second, CTTC's argument, like Arlington's, is foreclosed by *Iowa Utilities Board*. In that case, this Court held that, although "the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to

rural [local exchange carriers]," these assignments did "not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." 525 U.S. at 385 (citation omitted). In this case, Congress's decision to give the courts the job of hearing complaints against local authorities likewise does not logically preclude the FCC from providing guidance to the courts and to parties whose disputes have not yet ripened for judicial decision.

2. Principles of Federalism Do Not Restrict the Commission's Jurisdiction over Substantive Provisions of the Communications Act

Petitioners also contend that principles of federalism support their position that the Commission lacked jurisdiction. *See* Arlington Br. 35-40; *see also* IMLA Br. 35-43. Arlington, for example, argues that "the FCC's jurisdictional claim would displace State and local authority over local land use processes" and that, "[g]iven th[is] intrusion on traditional local authority, FCC jurisdiction cannot be presumed from ambiguous statutory language." Arlington Br. 38. This argument fails at the threshold because it rests on the premise that the statutory grant of jurisdiction to the Commission is ambiguous. For the reasons given in Parts II.A and II.B.1 above, it is not. Even if there were a presumption in favor of the localities, the clear text of the statute would be enough to overcome it.

In any event, *Iowa Utilities Board* expressly rejected the argument that, once Congress has brought formerly local matters within the substantive scope of the Communications Act, there is any federalism-based presumption against Commission jurisdiction. One of the dissents in that case had argued that the

"presumption against the pre-emption of state police power regulations" should lead the Court to conclude that the Commission lacked the jurisdiction that it had sought to exercise. 525 U.S. at 378 n.6 (internal quotation marks omitted). The Court dismissed this concern, responding:

> [T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

Id.[21] The same observations apply with equal force here. In order to promote the faster growth of a competitive national wireless network, Congress has undisputedly imposed federal restrictions on local governments and has limited the traditional authority they had previously exercised over decisions about land use. The means that Congress chose to do so was to subject those local governments to the 1996 Act – and thus, under § 201(b) and *Iowa Utiltiies Board*, to the Commission's general jurisdiction. That is enough to show that "Congress would expect

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[21] *See also Iowa Utils. Bd.*, 525 U.S. at 378 n.6 ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail.").

the [Commission] to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *Mead*, 533 U.S. at 229, with regard to § 332(c)(7)(B).

That the Commission has jurisdiction to interpret and enforce § 332(c)(7)(B) does not mean that concerns of local autonomy become irrelevant. Instead, it means that those concerns are now among the "manifestly competing interests" among which the Commission must make a "reasonable accommodation," subject to deferential judicial review. *Chevron*, 467 U.S. at 865. That balancing of interests goes to the merits of the Commission's decision, rather than to its jurisdiction to make a decision. The Commission did in fact strike such a balance, and the court of appeals held that the balance the Commission struck was reasonable. *See* Pet. App. 63a-67a. This Court has not granted certiorari to review that (manifestly correct) holding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

D. WAYNE WATTS
PEGGY GARBER
GARY L. PHILLIPS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3053

JONATHAN B. BANKS
UNITED STATES TELECOM ASSOCIATION
607 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 326-7300

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(grapawy@khhte.com)

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