NOS. 11-1545 & 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents;

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; CITY OF CARLSBAD, CALIFORNIA; AND CITY OF DUBUQUE, IOWA IN SUPPORT OF PETITIONERS

PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondents in Support of Petitioners

QUESTION PRESENTED

The Telecommunications Act of 1996 preserves state and local zoning authority over "the placement, construction, and modification of personal wireless service facilities," except for a short list of narrow limitations set forth in the text of the Act. 47 U.S.C. § 332(c)(7)(A). With one exception not implicated in this case, Congress granted the federal courts, rather than the Federal Communications Commission, authority to resolve violations of the Act's narrow limitations on state and local authority. Yet, the Commission ruled that it has jurisdiction to promulgate requirements for state and local zoning decisions under the Act. The court below deferred to the Commission's assertion of jurisdiction under *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984), and upheld the agency's ruling. This Court granted certiorari limited to the following question:

Whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners the City of Arlington, Texas, and City of San Antonio, Texas were the petitioners in the court of appeals below. Petitioners Cable and Telecommunications Committee of the New Orleans City Council; City of Los Angeles, California; County of Los Angeles, California; County of San Diego, California; and Texas Coalition of Cities for Utility Issues were intervenors in support of petitioners in the court below.

Respondents International Municipal Lawyers Association; National Association of Telecommunications Officers and Advisors; National League of Cities; United States Conference of Mayors; National Association of Counties; City of Carlsbad, California; and City of Dubuque, Iowa were intervenors in support of petitioners in the court below.

Respondents United States of America and Federal Communications Commission, were the respondents in the court below. Respondents CTIA—The Wireless Association and Cellco Partnership were intervenors in support of respondents in the court below.

RULE 29.6 STATEMENT

Respondents International Municipal Lawyers Association; National Association of Telecommunications Officers and Advisors; National League of Cities; United States Conference of Mayors; National Association of Counties are nongovernmental corporations, with no parent corporations and no stock. Respondents City of Carlsbad, California, and City of City of Dubuque, Iowa, are governmental entities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a–68a) is reported at 668 F.3d 229. The order of the court of appeals denying rehearing (Pet.App.196a–97a) is not reported in the Federal Reporter. The Federal Communications Commission's Declaratory Ruling (Pet.App.69a–171a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (Pet.App.172a–95a).

JURISDICTION

The court of appeals entered its judgment on January 23, 2012, and entered an order denying petitions for rehearing *en banc* on March 29, 2012. A petition for certiorari was timely filed and granted on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

Preservation of local zoning authority.

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

(B) Limitations.

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

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

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

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

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

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

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

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is

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

(C) Definitions. For purposes of this paragraph—

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

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

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [47 U.S.C. § 303(v)].

INTRODUCTION

This Court granted certiorari to consider a question that squarely implicates the horizontal separation of powers at the federal level. But this case also involves the other fundamental structural protection in our Constitution: the vertical separation of powers between the federal government and state and local governments. Both of the Constitution's basic structural protections underscore

that the FCC is not entitled to deference in asserting its own jurisdiction at the expense of state and local governments.

That conclusion follows directly from two lines of this Court's precedents. First, as a matter of the horizontal separation of powers, agencies are not entitled to deference in interpreting the bounds of their statutory authority, which is the only thing that entitles them to deference in the first place. This principle flows directly from this Court's seminal decision in *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984), and the long line of cases applying *Chevron*'s framework. An agency is entitled to *Chevron* deference only when "Congress delegated authority to the agency generally to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The determination of an agency's jurisdiction is thus necessarily antecedent to *Chevron* deference. It is only the conclusion that the agency possesses delegated statutory authority that entitles the agency to *Chevron* deference. Thus, an agency is not entitled to any deference in reaching the conclusion that it possesses jurisdiction. The question whether Congress has, in fact, delegated an agency jurisdiction to act with the force of law has always been reserved to the courts. It should remain so.

Second, the inappropriateness of deference when a federal agency expands its jurisdiction at the expense of state and local governments flows directly from *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991),

and related cases demanding a clear indication of congressional intent to displace state and local authority. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. For that reason, when Congress seeks to alter traditional state or local authority, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Because agencies are entitled to *Chevron* deference only in the event of statutory *ambiguity*, and *Gregory* demands *clarity* before state and local authority is displaced, there is simply no room for deference on questions that implicate state and local power. Agency interpretations of their grants of jurisdiction to displace state and local authority are entitled to their persuasive force, but nothing more.

STATEMENT OF THE CASE

A. The Telecommunications Act of 1996 and the Protection of State and Local Zoning Authority

Section 332(c)(7) of the Telecommunications Act of 1996 broadly preserves local zoning authority over siting applications concerning wireless service facilities, subject to a narrow set of statutory requirements. *See* 47 U.S.C. § 332(c)(7) (entitled "Preservation of local zoning authority"). Subsection (A) of the Act states: "Except as provided in this

paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." § 332(c)(7)(A).

Subsection (B) provides a narrow set of exceptions to subsection (A)'s general rule. Under these "[l]imitations," state and local governments must "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed …, taking into account the nature and scope of such request." § 332(c)(7)(B)(ii). In addition, state and local zoning authorities may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i). And the Act mandates that the denial of any such request must be "in writing and supported by substantial evidence contained in a written record." § 332(c)(7)(B)(iii).

The Act is not silent as to which government body is to "hear and decide" disputes under these provisions. It specifically provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government … that is inconsistent with [47 U.S.C. § 332(c)(7)(B)] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." § 332(c)(7)(B)(v). The Act provides no similar grant of authority to the FCC.

The FCC does, however, possess statutory jurisdiction over a single, narrow issue: the

environmental effects of radio frequency emissions. The Act denies state and local authorities the power to "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." § 332(c)(7)(B)(iv). Any person aggrieved under this provision "may petition the Commission for relief." § 332(c)(7)(B)(v).

The court below acknowledged that the Act "seeks to reconcile two competing interests." Pet.App.4a. The first is "Congress's desire to preserve the traditional role of state and local governments in regulating land use and zoning." *Id.* The second is "Congress's interest in encouraging the rapid development of new telecommunications technologies." *Id.* And the Act's "comprehensive" structure achieves this balance by setting the default rule in subsection (A), that state and local governments generally retain local zoning authority, subject only to the narrow "[l]imitations" on local authority in subsection (B) and subject to expedited judicial review of any disputes. *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens, J., concurring); *id.* at 129 (Breyer, J., concurring).

The Act's legislative evolution also reflects this careful balance of local and national interests. The first iteration of section 332(c)(7) adopted by the House of Representatives would have granted the FCC broad jurisdiction to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or

operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Among other things, the House version would have given the FCC power to "ensure that … a State or local government … shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.*

But Congress did not adopt this broad grant of regulatory power. The conference committee "rejected the national approach" proposed in the House bill and "substituted a system based on cooperative federalism." *Rancho Palos*, 544 U.S. at 128 (Breyer, J., concurring).[1] Thus, rather than granting the FCC jurisdiction to "prescribe and make effective a policy regarding State and local regulation of … facilities for the provision of commercial mobile services," H.R. Rep. No. 104-204, at 25, the final Act expressly preserves state and local authority over zoning matters, *see* 47 U.S.C. § 332(c)(7)(A). The conference report explained that, aside from the single, narrow issue of radio frequency emissions, which was delegated to the FCC, "the courts shall have exclusive jurisdiction over all other disputes

---

[1] *See also* H.R. Conf. Rep. No. 104-458, at 207–08, 1996 U.S.C.C.A.N. 10 (1995) ("The conference agreement creates a new Section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.").

arising under" section 332(c)(7). Further, the report instructed that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile radio service] facilities should be terminated." H.R. Conf. Rep. No. 104-458 at 208, 1996 U.S.C.C.A.N. 10 (1995).

B. The FCC's Jurisdictional Ruling

For over a decade, the FCC asserted no regulatory jurisdiction under section 332(c)(7), other than to regulate radio frequency emissions. Disputes about timing and related matters were decided by the courts, "taking into account the nature and scope of [each] request." 47 U.S.C. § 332(c)(7)(B)(ii). As Judge Boudin aptly summarized the landscape: "Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law." *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

Eventually, though, telecommunications carriers sought relief, and not from Congress. Instead, in 2008, Respondents CTIA–The Wireless Association filed a petition with the FCC requesting, among other things, "that the Commission issue a Declaratory Ruling" setting "timeframes in which zoning authorities must act on siting requests for wireless towers and antenna sites." Pet.App.71a. CTIA specifically asked the FCC to mandate a 45-day time limit for applications "proposing to collocate on

an existing facility"[2] and a 75-day limit for "non-collocation wireless siting application[s]." *Id.* at 77a. CTIA further proposed that, when a local zoning authority does not act within these deadlines, the siting request should be "deemed granted" or, alternatively, the application should be presumptively entitled to "a court-ordered injunction granting the application unless the zoning authority can justify the delay." *Id.* CTIA also asked the FCC to rule that the Act prohibits local authorities from denying a siting application "based on one or more carriers already serving the geographic area." *Id.* at 78a. A number of wireless providers supported CTIA's petition, while state and local governments opposed it.

Before reaching the merits of the industry's requests, the FCC separately addressed the scope of its own jurisdiction. CTIA and the wireless providers argued that the Commission possessed jurisdiction to issue the requested rules. State and local governments, including some of respondents here, argued "that the statutory text and the legislative history [of section 332(c)(7)] evince congressional intent to deny the Commission such authority." *Id.* at 85a. The Act "withheld preemptive authority from the Commission," they argued, by "expressly preserving State and local government authority over personal wireless service facility siting decisions" and by providing that "the courts have exclusive jurisdiction over all disputes arising under Section

---

[2] "Collocations involve modifications to already existing wireless facilities." Pet.App.8a, n.9.

332(c)(7) (except for those relating to RF emissions)." *Id.* at 85a–86a. The state and local authorities also highlighted the conference report's instruction that the FCC terminate all pending rulemaking on the topic as further evidence supporting the conclusion that the FCC lacks regulatory jurisdiction under section 332(c)(7).

The FCC determined that it has jurisdiction to issue the requested rules under the Act. It began with the observation that "Congress delegated to the Commission the responsibility for administering the Communications Act." *Id.* at 87a. Then, it cited broad delegations of FCC authority in sections 1, 4(i), 201(b), and 303(r) of the Communications Act. "These [general] grants of authority," the Commission reasoned, "necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular." *Id.* at 88a. The Commission interpreted the Act and its legislative history as prohibiting "a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)." *Id.* at 90a. And it concluded its rules do not constitute "the imposition of new limitations," but "merely interpret[] the limits Congress already imposed on State and local governments." *Id.* at 90a. The Commission also held that "the fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7)." *Id.* at 92a.

Upon reaching the merits, the FCC granted the petition in part. The Commission granted the industry's request for time limits on local zoning authorities' processing of siting applications, but it considered the proposed time limits "insufficiently flexible for general applicability." *Id.* at 114a. Instead, the FCC set a 90-day time limit for collocation applications and a 150-day time limit for non-collocation applications. *Id.* at 115a. Under the FCC's ruling, these time limits, and thus the statutory 30-day deadline for seeking judicial relief following the denial or failure to act on an application, may be tolled "by mutual consent of the personal wireless service provider and the State or local government." *Id.* at 120a. The time limits do not begin running until an application is complete, and if an application is incomplete, zoning authorities must notify the applicant within 30 business days after submission. *Id.* at 124a. The FCC also concluded "that a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation" under section 332(c)(7)(B)(i)(II) of the Act. *Id.* at 127a.

The FCC did not adopt CTIA's suggestion that an application should be "deemed granted" when a zoning authority fails to act within the FCC time limits. Rather, the Commission provided that "State or local authorit[ies] will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* at 112a. Yet, the Commission was clear that its time limits trump any contrary state or

local deadlines, thus allowing suits even where state or local law would grant a zoning authority more than 90 or 150 days to reach a decision. *Id.* at 121a.

The FCC denied a petition for reconsideration, and the City of Arlington timely filed a petition for review in the United States Court of Appeals for the Fifth Circuit. *Id.* at 10a. Respondents in support of petitioners successfully moved to intervene in the court of appeals. *See id.* at 11a; Order Granting Motion to Intervene (Jan. 7, 2011) [CA Doc. No. 00511345715].

C. The Decision Below

The Fifth Circuit upheld the FCC's jurisdictional determination. Critically, the court reached that conclusion by applying circuit precedent holding that agencies are entitled to *Chevron* deference even when deciding questions of their "own statutory jurisdiction." Pet.App.37a.

Without separately addressing whether "Congress delegated authority to the agency generally to make rules carrying the force of law" regarding local zoning applications, *Mead*, 533 U.S. at 226–27, the court proceeded directly to the question of whether section 332(c)(7) is ambiguous as to the FCC's jurisdiction, *see Chevron*, 476 U.S. at 843. Pet.App.40a. The court noted the FCC's general rulemaking authority under the Communications Act, *id.* at 39a–40a, then concluded that section 332(c)(7) is silent on whether the FCC may exercise its general authority to "implement" the specific limitations set forth in section 332(c)(7)(B), *id.* at 41a, 45a. In the court's view, "Congress did not

clearly remove the FCC's ability to implement the limitations set forth in section 332(c)(7)(B)" and thus the Act leaves the scope of the Commission's authority ambiguous—despite the Act's grant of exclusive jurisdiction to the courts. *Id.* at 42a–43a (holding that section 332(c)(7)(b)(v) "does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act").

Having found the Act ambiguous as to the FCC's jurisdiction over local zoning decisions, the court addressed whether the Commission's assertion of jurisdiction was reasonable under step two of the *Chevron* analysis. *First*, the court held that the Act's legislative history does not conclusively foreclose the FCC's jurisdictional assertion. That "legislative history," in the court's view, "is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments." *Id.* at 47a.

Second, the court rejected the suggestion that the FCC's determination conflicts with the "clear statement" rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and related cases. The court acknowledged that, "if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute." Pet.App.48a (internal quotations and citations omitted); *see also Gregory*, 501 U.S. at 460. But the court reasoned that section 332(c)(7)(B) clearly

preempts state zoning laws and the FCC's ruling "only further refines the extent of the preemption that Congress has already specifically provided." Pet.App.49a.

Third, the court held that the FCC had not departed from its prior conclusion that it lacks jurisdiction over local zoning matters. The court read the Commission's prior decisions as disclaiming jurisdiction to resolve specific disputes, a power the statute expressly vests in the courts, not as disclaiming general rulemaking authority under the Act. *See id.* at 51a. The court therefore held that the FCC's interpretation of its own jurisdiction was reasonable and entitled to *Chevron* deference.

The court of appeals denied a request for rehearing *en banc*, *id.* at 196a, and this Court granted review limited to the deference question.

SUMMARY OF ARGUMENT

The two fundamental protections of our constitutional structure preclude *Chevron* deference in this case. The separation of powers at the federal level requires that Congress set the limits of agency jurisdiction and that the courts conclusively interpret and enforce those limits without an agency's thumb on the scale. The basic metes and bounds of the agency's jurisdiction must be ascertained as a straightforward matter of statutory construction. It is not reasonable to conclude that Congress would intend to grant an agency deference to interpret the scope of its own deference. Only once an agency's jurisdiction is established does deference serve, rather than threaten, the separation of powers. And

deference is especially inappropriate when an agency's jurisdictional assertion raises federalism concerns by intruding on state or local authority. Proper respect for our constitutional structure demands that Congress act unambiguously before courts will infer a grant of federal authority to displace state and local law. As deference comes into play only in the context of ambiguous laws, this Court's clear statement rules leave no room for deference when an agency expands its jurisdiction at the expense of state and local governments.

I. Agencies may act only pursuant to statutory delegations of authority. They possess no inherent authority; nor can they grant unto themselves any executive power. Their jurisdiction to exercise the executive power derives solely from—and extends only so far as—Congress' exercise of the legislative power. And it has always been the unique province of the judiciary to police those bounds. The judicial duty to protect against *ultra vires* government action is as old as the Republic. Just as the judiciary is needed to prevent Congress from exceeding its constitutional limits, the courts provide an essential check against agency attempts to breach the bounds of congressionally delegated power. Thus, a proper understanding of separation of powers principles precludes courts from affording *Chevron* deference to an agency's claim of regulatory jurisdiction. Any contrary understanding would encourage agencies to arrogate to themselves virtually unchecked coercive power.

These principles comport with the theory of the *Chevron* doctrine. *Chevron* requires that courts defer

to an agency's reasonable interpretation of ambiguity in a statute the agency is entrusted to administer. But it is the fact of congressional delegation of authority that entitles an agency to deference. In other words, *Chevron* deference is premised on the necessary precondition that Congress has granted the agency authority to administer the statute being construed. It is that premise that makes the assumption of congressional intent to delegate interstitial rulemaking authority reasonable. This Court conclusively affirmed that principle in *Mead*, when it held that an agency interpretation "qualifies for *Chevron* deference" only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" on the statutory subject. 533 U.S. at 226–27. The question of jurisdiction is therefore necessarily anterior to any application of deference.

It would make nonsense of *Chevron*'s logic to grant an agency deference on the very question of whether it is entitled to deference. Without the premise that Congress has, in fact, granted the agency jurisdiction over a particular subject, *Chevron* provides no basis for deference. One cannot simply assume the proverbial can opener or adopt the principle that Congress intends that "close counts" when it comes to granting agencies jurisdiction. Thus, any theory of granting deference to agencies' determinations of their own jurisdiction must be derived from first principles, not from rote citation to *Chevron*, which itself derived its deference principle from the very issue in dispute here, namely whether Congress granted the agency authority in the first place. And a resort to first principles certainly does

not support a rule of deference or a presumption in favor of finding delegation in ambiguous statutes. Rather, first principles suggest that if the courts are to engage in anything other than a straight-up exercise in statutory construction, they should indulge a liberty-preserving presumption that the delegation of power from relatively accountable legislators to relatively unaccountable executive branch administrators is to be disfavored.

Nor do *Chevron*'s twin practical rationales—that the interpretation of substantive provisions in a regulatory statute typically entails the accommodation of competing policy perspectives and that expert agencies are better suited to implement technical and complex regulatory regimes—carry any weight in the context of jurisdictional determinations. Courts are better suited than agencies to probe the bounds of congressional intent when it comes to the agency's own jurisdiction. Courts have the virtue of being disinterested, whereas agencies have a self-serving tendency to view their own jurisdiction favorably, much the way a hammer sees all hardware as nails. Moreover, purely legal questions of jurisdiction lie at the core of judicial expertise and rarely implicate policy judgments or technical expertise.

Indeed, the case against deference when it comes to an agency's conception of its own jurisdiction is so strong, the only real objection could be one of administrability. But this is hardly an impossible line to draw. Jurisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and

under what conditions. Substantive interpretations entitled to *Chevron* deference concern the *how* of regulatory power: in what fashion may an agency implement an administrative scheme. Indeed, the FCC had no trouble drawing the line in this case. It separately addressed the threshold question of whether it could regulate local zoning decisions, *before* turning to the merits of its regulations. The agency clearly indicated when it was defining the limits of its own jurisdiction and when it was applying its (claimed) authority to implement the Act. *Chevron* just as clearly concerned a substantive application of the Clean Air Act, not an examination of the Environmental Protection Agency's unquestioned authority to regulate state permitting processes for new "stationary sources" of air pollution.

II. *Chevron* deference is particularly unwarranted when an agency claims power over matters of traditional state and local concern. Just as the horizontal separation of powers protects against the accumulation of all federal authority in the hands of a single branch, federalism ensures a vertical division of power among separate sovereigns. Both principles safeguard individual liberty and due process. For that reason, this Court requires an unmistakably clear statement from Congress before interpreting federal law to displace state and local power. *See, e.g.*, *Gregory*, 501 U.S. at 458. And that rule applies to an agency's assertion of preemptive power to displace state or local regulatory authority. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

The clear statement rule of *Gregory* and related cases forecloses *Chevron* deference on matters of agency jurisdiction vis-à-vis state and local governments. The two doctrines are fundamentally at odds. The clear statement rule requires congressional *clarity* to authorize federal encroachment, while *Chevron* turns on *ambiguity*. There is thus no room for deference to an agency's claim to derive preemptive regulatory power from an ambiguous statute. The courts must resolve the question whether Congress has acted with sufficient clarity to disrupt the federal-state balance. If not, the agency is not authorized to fill the gap or augment its own authority at the expense of state and local governments.

None of this is to say that an agency's view of its statutory power is irrelevant. When *Chevron* deference does not apply, the courts afford an agency's interpretation respect according to its power to persuade. That is as it should be. An agency's familiarity and experience with a statutory scheme warrant due consideration. But an unpersuasive agency view as to its own jurisdiction should not carry the day. When it comes to the fundamental jurisdictional question that justifies a doctrine of administrative deference in the first place, it is only the courts that may discern the legislative intent to confer executive authority or disrupt the federal-state balance—as our Constitution requires.

ARGUMENT

I. An Agency's Assertion of Jurisdiction Is Not Entitled to *Chevron* Deference.

The *Chevron* doctrine provides no basis for deferring to an agency's assertion of jurisdiction. An agency's actual, not asserted, statutory jurisdiction is the doctrinal basis for *Chevron* deference in the first place. Deference makes sense precisely and only because Congress granted authority to the agency. Thus, assessment of the metes and bounds of that jurisdiction necessarily precedes any deference, and agencies cannot logically receive deference on the question of whether they have a statutory basis to receive deference. If there is to be any presumption about whether grants of regulatory authority are to be construed broadly or narrowly or with or without deference, it must come from first principles rather than from *Chevron* itself. And if courts are going to apply any presumption, it should be the liberty-preserving presumption that delegations of authority from relatively accountable legislators to relatively unaccountable executive agencies are to be disfavored. The contrary presumption that ambiguous grants of authority should be construed to delegate authority, at least when the agency wants that authority, has little to recommend it. Agencies possess no comparative policy or technical advantage over courts when assessing regulatory jurisdiction. To the contrary, the disinterested courts are far better suited to determine the reach of congressional delegation.

A. The *Chevron* Doctrine Does Not Permit Judicial Deference to an Agency's Assertion of Jurisdiction.

1. The question of an agency's statutory jurisdiction is antecedent to *Chevron* deference. Indeed, the presumed fact of agency jurisdiction is the *raison d'etre* of deference. For over a decade, this Court has held that an agency is not entitled to *Chevron* deference unless "Congress delegated authority to the agency generally to make rules carrying the force of law." *Mead*, 533 U.S. at 226–27; *see also Gonzalez v. Oregon*, 546 U.S. 243, 258–68 (2006) (refusing to grant *Chevron* deference where the Attorney General lacked statutory authority to prohibit doctors from prescribing controlled substances for assisted suicide). The rule could hardly be otherwise. The rationale for *Chevron* deference depends on the fact of congressional delegation of jurisdiction to the agency to regulate the relevant subject matter. Thus, applying *Chevron* deference to the question whether an agency has the jurisdiction that justifies *Chevron* deference is the jurisprudential equivalent of assuming the can opener.

This Court has long recognized as much. Well before *Mead*, this Court squarely held that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). Indeed, this Court was clear in *Chevron* that deference applies only "[w]hen a court reviews an agency's construction of [a] statute *which it administers*." *Chevron*, 467 U.S. at 842 (emphasis

added); *see also id.* at 844. Thus, ever since *Chevron* courts have "defer[red] to the 'executive department's construction of a statutory scheme it is *entrusted to administer*,'" but not to the construction of statutory schemes *not* entrusted to an agency's administration. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (quoting *Chevron*, 467 U.S. at 844) (emphasis added); *see also* Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.") (cited approvingly in *Mead*, 533 U.S. at n.11).

The courts have always been the branch to resolve the threshold question of which agency administers which questions. Take *Mead* as an example. This Court did not defer to the Customs Service on whether "Congress meant to delegate authority to [the agency] to issue classification rulings with the force of law." 533 U.S. at 231–32. Rather, it tackled the question as it would any other matter of statutory construction. That *judicial* inquiry probed for statutory indications of whether "*Congress* would expect the agency to be able to speak with the force of law" on tariff classifications. *Id.* at 229 (emphasis added); *see also id.* (explaining that "a very good indicator of delegation meriting *Chevron* treatment i[s] *express congressional authorizations* to engage in the process of rulemaking or adjudication" (emphasis added)). The judicial answer was no, and so this Court held that *Chevron* did not apply.

Thus, as a basic matter of doctrinal coherence, *Chevron* does not apply to an agency's assertion of regulatory jurisdiction in the first place. Before employing *Chevron* deference, the courts must answer the statutory question whether Congress intended an agency to receive *Chevron* deference as a matter of straight-up statutory construction. Under *Mead*, the inquiry turns on whether Congress granted an agency authority to act with the force of law over the subject matter at issue. And that question essentially reduces to whether the agency has regulatory jurisdiction in the first place. *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1528 (2009) ("In determining the nature of the delegation to an agency, courts are essentially determining the scope of an agency's power—i.e., the scope of agency jurisdiction.").

2. Neither do *Chevron*'s subsidiary rationales support deference on jurisdictional matters. Deference under *Chevron* rests on the view that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843 (internal quotation marks and alterations omitted).

This Court has identified two subsidiary reasons that Congress would want to delegate discretion to an agency to fill interstitial gaps in statutes within the agency's jurisdiction. First, these interpretive choices typically implicate important regulatory

policies. *See Chevron*, 467 U.S. at 844, 865. And "accommodation of conflicting policies" is a task that is better left to politically accountable agencies than the courts. *See id.* at 845; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2372–74 (2001). Second, implementation of a regulatory scheme often requires expertise beyond "ordinary knowledge." *Chevron*, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)). Agencies, by definition, possess the insight and experience to resolve interpretive questions in "a detailed and reasoned fashion," while generalist courts are ill-equipped to administer "technical and complex" regulatory regimes. *Id.* at 865.[3]

Chevron's two practical justifications have no application to questions of regulatory jurisdiction. As *Mead* illustrates, courts discern an agency's jurisdiction based on legislative text and the traditional tools of statutory construction. 533 U.S. at 227–31. The need to mark the limits of congressional delegation trumps the need to reconcile policies or bring expertise to bear on technical,

[3] The differences among the multitude of local planning and zoning laws argue forcefully that the FCC acted outside its area of expertise when defining the time frame for local decision-making. Variances, special exceptions, and conditional uses can varyingly be granted by zoning administrators, zoning boards, and local legislative bodies, sometimes seriatim. In addition, most jurisdictions require transparency through public notice and public hearing all subject to state-court review and differing requirements under state law and procedure. For these reasons, Congress removed from FCC jurisdiction the multitude of issues associated with a multitude of distinctly state and local planning and zoning laws.

substantive regulations. If the ideal reconciliation of competing policy considerations requires an agency to act *ultra vires*, the balance of competing policy goals is beside the point. The critical question of legislative authorization is one for the courts, both as a matter of constitutional competence and institutional capability. *See Chevron*, 467 U.S. at n.9 ("The judiciary is the final authority on issues of statutory construction…."). This is especially so when, as here, Congress' clear intent is to *limit* an agency's power (and preserve other regulators' authority), a purpose that conflicts with the agency's natural tendency toward expansion. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 388 (1988) (Brennan, J., dissenting). And even more especially so when the text, structure, and history of the Act make it clear that Congress struck a fine jurisdictional balance between various regulatory players. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 18 (2001) ("[D]eparting from a precise statutory text may do no more than disturb a carefully wrought legislative compromise.").[4]

---

[4] While the Fifth Circuit's deference rule finds no support in *Chevron*, a no-deference rule does find support in the Administrative Procedure Act (APA). The APA textually commits to the courts the power to resolve "all relevant questions of law." 5 U.S.C. § 706 (2006). Thus, beyond the guiding lights of the *Chevron* doctrine, there is hard statutory evidence that Congress affirmatively intended for courts to

B. Separation of Powers Principles Foreclose Judicial Deference to an Agency's Assertion of Jurisdiction.

None of the foregoing demonstrates that a judicial rule of deference to agencies in construing the bounds of their jurisdictional grants could not be justified. But it must be justified by reference to first principles, because *Chevron*—which derives a rule of deference from the assumption of congressional delegation of jurisdiction—simply cannot accomplish the task. And if the Court resorts to first principles, a rule of deference on ambiguous jurisdictional questions has almost nothing to recommend it. If the Court adopts a rule for construing the scope of congressional delegations of rulemaking jurisdiction, it has four basic options: it can adopt a rule disfavoring such delegations, a rule of strict neutrality, a rule favoring such delegations generally, or a rule favoring delegations when the agency affirmatively indicates an interest in exercising regulatory jurisdiction. The rule applied by the Fifth Circuit granting deference to an agency's view of its own jurisdiction is best understood as the fourth option. But in reality, there is little practical difference between the third and fourth options: human nature, political choice theory, and centuries-old figures of speech all suggest that few agencies will construe borderline cases as falling outside their

---

decide legal, jurisdictional questions even while deferring to agencies' accommodation of competing and complex policy matters.

jurisdictions. *See* THE FEDERALIST NO. 51 (James Madison) (C. Rossiter ed. 1961); *but see Massachusetts v. EPA*, 549 U.S. 497 (2007).

There is no justification for adopting a rule that effectively allows agencies to broadly construe ambiguous statutes in favor of agency jurisdiction. As noted, *Chevron* does not support the result. Nor do first principles. If the Court is to adopt any presumption, it ought to be the opposite, liberty-preserving presumption that delegations from relatively accountable legislators to relatively unaccountable administrative agencies should be disfavored. *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338 (2000). At a bare minimum, the Court should simply construe the jurisdictional grants as a matter of straight-up, presumption-free statutory construction. But under no circumstances should the Court adopt a rule favoring the broad construction of ambiguous delegations where agencies eagerly accept them. Such a theory certainly has nothing to recommend it as a matter of discerning likely congressional intent. *See* Merrill & Hickman, Chevron*'s Domain*, 89 Geo. L.J. at 910 ("[I]t has never been maintained that Congress would want to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference.").

Further, separation of powers principles strongly counsel against broad constructions of regulatory jurisdiction. Administrative agencies possess no inherent powers; any authority they have is derived from statute. *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency

literally has no power to act … unless and until Congress confers power upon it."); Sales & Adler, *The Rest is Silence*, 2009 U. Ill. L. Rev. at 1534 ("That is why they are called 'administrative agencies'—they are created to administer programs established by Congress, and in so doing they act as Congress's agents."). It is therefore "axiomatic 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). "An agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

This is because Congress possesses all the legislative power granted by the Constitution. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). The executive branch's "take care" power is limited to implementing the laws enacted by the legislature. U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 3, cl. 5 ("[The President] shall take Care that the Laws be faithfully executed."). And the judiciary is tasked with conclusively interpreting and enforcing the limits of Congress' commands—including against the executive branch. U.S. Const. art III, § 1; *see, e.g.*, *New Process Steel LP v. NLRB*, 130 S. Ct. 2635 (2010).

Importantly, the Constitution's structural separation of powers does not consist of merely dividing power among the three branches. The genius of the Framers was not just a system of

separation of powers, but a system of checks and balances as well. As this Court has repeatedly remarked, the three branches are not "hermetically sealed" from one another, *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011), but one branch is often granted "partial agency" to check the self-aggrandizing instincts of the other branches, THE FEDERALIST NO. 47 (James Madison) (C. Rossiter ed. 1961). *See also Mistretta v. United States*, 488 U.S. 361, 380–82 (1989). Thus, while the veto is an executive power and not a legislative power—since all the legislative power resides in Article I—it nonetheless places a check on Congress' legislative authority. Impeachment is neither an executive nor judicial function, but it places a legislative check on both. And, most important here, judicial review provides the primary check on both legislative and executive authority. Generally speaking, the Constitution disfavors the exercise of completely unreviewed or unchecked authority by any branch, and the relatively few counterexamples are either inherently liberty-protecting (*e.g.*, the pardon power) or extremely unlikely to interfere directly with individual rights (*e.g.*, the legislative authority to promulgate internal rules).

All of this is elementary, and all of it strongly counsels against granting agencies deference in interpreting the metes and bounds of their own authority. Doing so would collapse the Constitution's separation of powers, and its checks and balances, by placing in the hands of one bureaucratic body the power to set, exercise, and enforce the limits of its own authority without significant review from another branch. *See Soc. Sec. Bd. v. Nierotko*, 327

U.S. 358, 369 (1946); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("[D]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). And it would do so in a context that very much threatens individual liberty because administrative agencies enjoy substantial discretion within the boundaries of their delegated authority. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001); *Mistretta*, 488 U.S. at 378–79; *id.* at 417 (Scalia, J., dissenting). This is a dynamic that courts generally seek to avoid, even when it is the judiciary that would exercise such concentrated power. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808–09 (1987); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring) ("That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers.").

This structural breakdown would, in turn, within the bounds of ambiguity, "encourage[] the agency to" adopt a broad view of its jurisdictional limits, "which [would] give it the power, in future [rulemaking and] adjudications, to do what it pleases." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."). Preventing this accumulation of administrative authority is no mere matter of

constitutional formalism. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) (quoting Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949)).[5] Just as Congress cannot expand its enumerated powers under the Constitution, agencies cannot expand the regulatory jurisdiction granted in their organic statutes. And the courts have the final say in both instances. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In sum, the argument for granting agencies deference in interpreting the scope of their own authority cannot flow from *Chevron* because the *Chevron* Court derived its argument for deference from the undisputed assumption that the agency was exercising its delegated authority. The argument for deference must come instead from a consideration of first principles. And all of those first principles point away from making an agency the primary judge of its own jurisdiction.

---

[5] At the same time, this rule also preserves the Constitution's due process protections by "ensur[ing] that power exercised by the executive is genuinely pursuant to law, meaning legislation properly enacted by Congress." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1787–88 (2012).

C. Courts Are Capable of Differentiating Between Assertions of Jurisdiction and Applications of Administrative Authority.

The theoretical case for granting agencies deference in construing their own authority is so weak, the only justification would be the practical difficulty of differentiating jurisdictional and non-jurisdictional questions. *See Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). But the line between the two is neither illusory nor incapable of judicial administration. At the most basic level, agency jurisdiction is a question of *who*, *what*, *where*, or *when* an agency has authority to regulate. It is concerned with whether an agency has been delegated power over certain persons, activities, or subject matters—or in some cases whether the necessary conditions exist for an agency to exercise regulatory power. Application of administrative authority concerns *how* an agency exercises its authority over those subjects within its regulatory realm. Comparing this case to *Chevron* illuminates the distinction.

Quite obviously, *Chevron* posed a question about the *application* of regulatory power. No one questioned that the Environmental Protection Agency (EPA) had jurisdiction to issue regulations governing the permitting process for "stationary sources" of air pollution in States that had not met earlier air quality standards. Rather, the question confronting the Court was whether the EPA had adopted a definition of "stationary sources" that *substantively* fit with the Clean Air Act. The Court

had no problem drawing that line, and no one suggested that the question at hand was anything beyond the implementation of an ambiguous statutory term.

The crucial question here, though, is whether the FCC has regulatory power over local zoning decisions concerning wireless siting requests. The inquiry is not one of whether a rule comports with the meaning of a statutory term, or whether some factual scenario violates the terms of the Act. It is a more fundamental question of whether the agency can promulgate its rules at all, or apply the Act in the first instance—whether Congress has delegated authority for the FCC to act with the force of law on the matters addressed in section 332(c)(7).

Indeed, one need to look no further than the FCC's declaratory ruling to understand the distinction. Recognizing that it had to assure itself of the jurisdiction to regulate local zoning decisions before addressing the substance of any rule governing those transactions, the FCC devoted an entire section of its ruling to the jurisdictional question. *See* Pet.App.84a–92a ("Authority to Interpret Section 332(c)(7)"). There was no suggestion that the jurisdictional question collapsed into a policy question, or an assessment of substantive implementation. In fact, in a completely separate section of the ruling, after the agency decided it had authority to implement the Act, the FCC set forth its view of the optimal rules "on the merits." It mandated local zoning time limits, defined when a zoning decision "prohibits or has the effect of prohibiting the provision of personal wireless

service," and explained the statutory and evidentiary bases for those decisions. *See id.* at 92a–135a. Thus, the agency itself had no problem distinguishing between the question of *what* actions it can regulate and *how* it would regulate those actions.

The logic of *Chevron* dictates that courts defer to an agency's substantive interpretations of the statute it has jurisdiction to administer. But the courts must decide whether an agency has jurisdiction in the first place. That line can and should be drawn here.

II. *Chevron* Deference Is Especially Inappropriate When An Agency Asserts Jurisdiction Over Matters of Traditional State And Local Concern.

The horizontal separation of powers at the federal level is only one of the great structural protections in our Constitution. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. Respect for that dual sovereignty and the "integrity, dignity, and residual sovereignty of the States" takes many forms. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Chief among them are rules that demand a clear statement before a federal statute will be construed to interfere with traditional state functions, *see Gregory*, 501 U.S. at 460–61, or upset the balance between the national authority and state and local governments, *see Jones v. United States*, 529 U.S. 848, 858 (2000). Thus, wholly independent of the separation of powers concerns set forth above, the protections inherent in our Constitution's federalist structure foreclose *Chevron* deference in this case.

This Court has long required that Congress act with unmistakable clarity when affecting state and local power. *See Gregory*, 501 U.S. at 460–61. An administrative agency may therefore assert jurisdiction to regulate local decisionmaking only when Congress has clearly granted the agency jurisdiction to do so. In the face of ambiguity, which is a necessary precondition for *Chevron* deference, an agency simply lacks authority to expand its jurisdiction into traditional state and local terrain. There is thus no room for *Chevron* deference where, as here, an agency claims jurisdiction over local governmental procedures.

1. Just like the separation of powers, "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458 (internal quotation marks omitted); *see also Bond*, 131 S. Ct. at 2364 ("Federalism secures the freedom of the individual."); *Printz v. United States*, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); THE FEDERALIST NO. 51 at 323 ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.").

Because the Supremacy Clause grants the federal government "a decided advantage" in the federal-state balance when Congress affirmatively

acts, *Gregory*, 501 U.S. at 460, courts will not lightly infer that Congress actually intends to displace state and local authority. Instead, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Jones*, 529 U.S. at 858 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *see also, e.g., Atascadero*, 473 U.S. at 242; *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543–44 (2002); *Gregory*, 501 U.S. at 460; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). By presuming that "Congress does not readily interfere" with state and local matters, this clear statement rule ensures that "the States retain substantial sovereign powers under our constitutional scheme." *Gregory*, 501 U.S. at 461. Thus, "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

Granting *Chevron* deference when an agency asserts jurisdiction over state or local affairs based on an ambiguous statute is simply incompatible with that clear statement rule. The first step of the *Chevron* framework, "always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Deference thus empowers the agency

only in cases of ambiguity. The clear statement rule, however, *requires* an "unambiguously expressed intent of Congress" before a statute may be interpreted to supplant state or local authority. Thus, *Chevron* deference is possible only when federal preemption of traditional state and local functions is not.

Simple doctrinal logic therefore dictates that an agency can *never* receive deference when construing its jurisdiction to displace or regulate state or local functions. A contrary rule would unnecessarily place *Chevron* and the clear statement rule on a collision course. If Congress has unmistakably granted an agency power to affect state or local actions, as required by the clear statement rule, then *Chevron* deference is unwarranted (and unnecessary). But if a statute is silent or ambiguous regarding an agency's authority to regulate state or local functions, as required for *Chevron* deference, then the requisite clear statement is missing.[6] The two bedrock doctrines thus foreclose any possibility that an agency's intrusion on local power, like the FCC's here, could be entitled to *Chevron* deference.[7]

---

[6] In most cases, the clear statement rule will also prove inconsistent with *Chevron* step two. If an agency asserts jurisdiction over state or local matters, without unmistakable statutory authority for its preemptive actions, its interpretation is *per se* unreasonable. *See, e.g.*, *American Bar Ass'n v. FTC*, 430 F.3d 457, 471–72 (D.C. Cir. 2005).

[7] This Court has adopted essentially the same view regarding legislative history and the clear statement rule: "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress'

This is for good reason. Any act of Congress that "significantly change[s] the federal-state balance," *Jones*, 529 U.S. at 858 (quoting *Bass,* 404 U.S. at 349), is itself quite a remarkable event—one that requires unambiguous action by both houses of the legislature and approval by the President. Indeed, the constitutionally prescribed legislative procedures themselves function as an important safeguard against such incursions on state sovereignty. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1339–42 (2001). Regulation by an administrative agency, by contrast, involves considerably fewer procedural hurdles: Notice and comment is hardly bicameralism and presentment. Thus, to demand unmistakable congressional intent when Congress acts alone, but permit the combination of an ambiguous statute and a self-aggrandizing agency acting clearly to displace state and local authority is fundamentally incompatible with the structure of our Constitution. It would allow unelected bureaucracies to achieve what Congress cannot—and to do so with the courts' cooperation, rather than oversight.

On this point, it is important to acknowledge that the clear statement rule conceptually ties the Constitution's twin structural protections together. *Congress* must clearly manifest its intent to displace

---

intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). In *Dellmuth*, as here, the ultimate loadstar can only be *clear* statutory text. Legislative history and *Chevron* deference will not do when disrupting local power.

state or local power in a bill that complies with the various checks and balances on legislative authority. *See* U.S. Const. Art. I, § 7, cl. 2; *Chadha*, 462 U.S. at 945–46; *see also Wyeth v. Levine*, 555 U.S. 555, 585–86 (2009) (Thomas, J., concurring in the judgment) (identifying bicameralism-and-presentment as one of "two key structural limitations in the Constitution that ensure that the Federal Government does not amass too much power at the expense of the States"). Then, the *President* must approve Congress' clear statement by signing it into law. U.S. Const. art. I, § 7, cl. 2. And the federal *courts* will insist on a clear congressional command before presuming that Congress intended to encroach on local authority. The clear statement rule thus ensures that all three branches confirm a clear and politically accountable intent to displace state and local law. *Cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1991) ("Federalism serves to assign political responsibility, not to obscure it."). An ambiguous statute fails to put the other branches, and the public, on notice of the potential threat to federalism. In other words, an ambiguous statute that is later interpreted by an agency to displace state and local authority evades a separation of powers check designed to preserve the federalist structure of our Constitution. Deferring to such an agency interpretation thus simultaneously undermines both strands of the Constitution's structural protections.

In keeping with the fundamental incompatibility between *Chevron* deference and the foregoing federalism principles, this Court has applied the clear statement rule to reject agency assertions of jurisdiction over borderline cases that involve

infringement on matters of traditional state and local concern. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, this Court refused to apply *Chevron* deference to the Army Corps of Engineers' interpretation of the Clean Water Act defining "navigable waters" to include intrastate waters that serve as habitats for migratory birds. 531 U.S. at 172. As the Court explained, constitutional avoidance concerns are "heightened where the administrative interpretation alters the federal state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173 (citing *Bass*, 404 U.S. at 349). Accordingly, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court "expect[s] a clear indication that Congress intended that result." *Id.* (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

2. The decision below ignores these constitutional concerns. The Fifth Circuit offered two primary justifications for deferring to the FCC's jurisdictional ruling: Congress did not clearly *deny* the FCC jurisdiction to regulate local zoning procedures and *other* sections of the Federal Communications Act grant the FCC general

authority to implement the Act. *See* Pet.App.39a–45a. But this gets things backwards. The clear statement rule requires affirmative statutory evidence that Congress unambiguously *granted* the FCC jurisdiction to regulate local zoning decisions. Neither statutory silence nor general jurisdiction is enough. *See Raygor*, 534 U.S. at 541 ("[W]e cannot read [the statute] to authorize district courts to exercise jurisdiction over claims against nonconsenting States, even though nothing in the statute expressly excludes such claims."); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991) (holding that the clear statement rule requires language more specific than a general grant of jurisdiction); *Atascadero*, 473 U.S. at 246 (same).

When the Fifth Circuit addressed the clear statement rule, it focused on the wrong question. In the court's view, the FCC's rules "only further refine[] the extent of the preemption that Congress has already explicitly provided." Pet.App.49a. To be sure, section 332(c)(7)(B)(ii) expresses clear congressional intent to ensure that state and local zoning authorities act on siting applications "within a reasonable period of time." But the critical question here is whether the statute clearly grants the FCC jurisdiction to do what it did—preempt local zoning procedures by setting specific time limits. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996) (explaining that courts must "identify the domain expressly pre-empted" by the statutory language (internal quotation marks omitted)); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." (internal quotation marks

omitted)). If not, then *Chevron* deference is irrelevant. If so, then *Chevron* deference is unnecessary.

The decision below does not square with this Court's separation of powers or federalism jurisprudence, or the *Chevron* doctrine itself. It should be reversed.

* * *

None of this is to suggest that an agency's views are irrelevant or entitled to no weight in the judicial analysis. When *Chevron* deference does not apply, *Skidmore* deference does. *See Mead*, 533 U.S. at 234–35. Thus, when an agency determines the scope of its own jurisdiction, a reviewing court should afford that determination "a respect proportional to its 'power to persuade.'" *Id.* at 235 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That is to say, the agency's "ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* But it may not *bind* the courts to accept any reasonable interpretation of the statutory text. This is as it should be. Both the separation of powers and federalism are too important for the courts to defer to an unpersuasive agency effort to expand its own jurisdiction. The proper separation of powers requires that Congress set an agency's jurisdictional limits and that the courts interpret and enforce those limits—especially when an agency seeks to preempt the sovereign powers of state and local governments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, NW, Ste. 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

November 19, 2012

Counsel for Respondents in Support of Petitioners