Nos. 11-1545 & 11-1547

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,
Petitioners,

AND

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

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS CTIA—THE WIRELESS ASSOCIATION® AND CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS IN OPPOSITION

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QUESTION PRESENTED

The question presented by these petitions is whether, through the general authorizing provisions of the Communications Act of 1934, such as 47 U.S.C. §§ 201(b) and 303(r), Congress conveyed jurisdiction to the Federal Communications Commission to interpret the substantive limitations on local authority imposed by Section 332(c)(7)(B) of that Act, 47 U.S.C. § 332(c)(7)(B).

The primary question urged by petitioners is whether the Commission's determination that it had such jurisdiction is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That question, however, is presented here only if the Court were to conclude that Congress did not speak clearly as to the Commission's jurisdiction.

For the reasons set forth in this Brief in Opposition, the Commission's jurisdiction in this case was in fact clear under the statute. Therefore, no *Chevron* issue is presented.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents CTIA—The Wireless Association® and Cellco Partnership d/b/a Verizon Wireless state the following:

CTIA—The Wireless Association® ("CTIA") is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

Cellco Partnership d/b/a Verizon Wireless ("Cellco") has four partners. Two of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Mobile Systems, Inc. and GTE Wireless Incorporated (collectively, the "Verizon Partners"). Neither of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). Neither of the Vodafone Partners is publicly held. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

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INTRODUCTION

The petitions challenge a declaratory ruling (the "Ruling") by respondent Federal Communications Commission ("FCC" or "Commission") in which the agency interpreted a unique provision of the Communications Act of 1934 that both preserves and restricts local zoning authority over approvals for wireless facility construction. The provision at issue, 47 U.S.C. § 332(c)(7)(B), prohibits local governments from unreasonably delaying action on wireless facility siting requests and authorizes expedited federal judicial review of local actions or failures to act. Based on evidence provided by respondents CTIA—The Wireless Association® ("CTIA") and Cellco Partnership ("Verizon Wireless"; collectively with CTIA, "wireless respondents"), the Commission concluded that unreasonable delays (ranging from many months to several years) were occurring in a substantial number of cases, in violation of the Communications Act. It then issued the Ruling, which (among other things) establishes presumptively reasonable 90- and 150-day periods within which the Commission found local governments should be able to act in the majority of cases.

Petitioners (the "Cities" and "CTC") are local governments that wish to delay wireless facility siting requests for longer than the Commission's 90- and 150-day timetables permit. They argue that the Commission lacked jurisdiction to issue the Ruling. The Commission rejected this argument, relying on its general authority to interpret the Communications Act and rejecting petitioners' arguments that Congress had withdrawn that authority as to § 332(c)(7)(B). The Fifth Circuit stated that it deferred to that ruling under *Chevron U.S.A. Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Petitioners now urge the Court to grant certiorari to answer the question whether *Chevron* deference applies to an agency's statutory construction when the agency is determining the extent of its own statutory authority.

These petitions are poor vehicles to answer that question because the Commission's jurisdiction to issue the Ruling is clear. Both the plain text of the Communications Act and this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), compel the conclusion that Congress has spoken directly to the question whether the Commission had authority to construe § 332(c)(7)(B). Petitioners' attempts to argue that Congress withdrew that authority in other parts of § 332(c)(7)(B) are too flawed even to demonstrate ambiguity, much less to establish Congress's intent. Neither of the provisions to which they point restricts the Commission's jurisdiction either expressly or by any reasonable implication. If the Court were to grant certiorari, it would likely affirm without any need to apply *Chevron* and would not advance the law in any meaningful way. Accordingly, certiorari should be denied.

STATEMENT

1. Americans' use of wireless communications services has grown enormously over the past two decades, and it continues to grow at a rapid pace. As of December 2011, there were 331.6 million U.S. wireless subscriber connections – reflecting an increase of nearly 100 million during the previous five years alone.[1] The market to serve those subscribers is fiercely competitive: as of February 2011, more than 91% of Americans can choose from four or more facilities-based wireless providers; and, in 2009, about 66 million wireless consumers took advantage of such competitive choices and changed wireless carriers.[2]

Everyone benefits from the nationwide growth of competitive wireless services. Consumers use wireless services for enhanced productivity, for greater personal convenience, and for a wide array of entertainment and leisure options. The availability of ubiquitous, seamless wireless coverage also protects public safety by ensuring quick, reliable access to emergency services. And the wireless industry is also a major driver of capital investment and creator of jobs.[3]

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[1] *See* CTIA, *Wireless Quick Facts*, *at* http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Aug. 24, 2012). This brief cites up-to-date statistics and background information on the wireless industry. Citations to similar but older information from the record before the Commission are available in the wireless respondents' court of appeals brief at pages 5 to 7.

[2] *See* CTIA, *Innovation and Competition*, *at* http://files.ctia.org/pdf/020411_-_Innovation_Competition.pdf (last updated Feb. 2011).

[3] *See generally* CTIA, *The U.S. Wireless Industry Overview*, *at* http://files.ctia.org/pdf/042412_-_Wireless_Industry_Overview.pdf (last updated Apr. 25, 2012).

Wireless carriers' ability to deliver the benefits of seamless nationwide coverage, however, depends on their ability to build wireless facilities. Though wireless service is widely acknowledged to be popular and beneficial, the facilities on which it depends can sometimes be unpopular with nearby property owners. As courts faced with wireless tower siting controversies have noted, people tend to "find wireless facilities unsightly" and to "worry [that they] lower property values." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009). Local residents sometimes respond to these concerns by exerting "pressure" on their local government representatives "to tighten and strictly enforce zoning restrictions on wireless facilities, creating numerous pockets of resistance for wireless carriers." *Id.*

2. Recognizing this "'not in my backyard' . . . problem," *Omnipoint Holdings*, 586 F.3d at 51 n.9,[4] and the threat it poses to a truly national wireless network, Congress acted in 1996 "to encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] . . . the impediments imposed by local governments upon the installation of [wireless] facilities." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted). Congress's chosen means for doing

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[4] *See also*, *e.g.*, *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 717 n.4 (S.D.N.Y. 2009) ("There is a NIMBY (not in my backyard) problem with regard to [wireless] towers. While everyone wants good cell service, homeowners are concerned about the effect of the unsightly structures on property values."), *aff'd*, 612 F.3d 97 (2d Cir. 2010) (per curiam); Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 455-57 (2005) (discussing this problem generally with regard to wireless facilities).

so was to "impose[] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Those limitations are embodied in 47 U.S.C. § 332(c)(7), one of the many procompetitive reforms and additions to the Communications Act that were made as part of the Telecommunications Act of 1996 ("1996 Act").

Section 332(c)(7) forbids any state or local government from "unreasonably discriminat[ing] among providers of functionally equivalent [personal wireless] services" and from "prohibit[ing] or . . . effect[ively] . . . prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). A state or local government must also respond to a wireless facility siting or modification request "within a reasonable period of time . . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). If it denies the request, it must do so "in writing," and its action must be "supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii). In addition, it may not deny a request "on the basis of the environmental effects of radio frequency emissions" so long as the provider involved has complied with FCC regulations on that subject. *Id.* § 332(c)(7)(B)(iv).

Congress further provided that, other than the limitations set forth in § 332(c)(7), "nothing in [the Communications Act] shall limit or affect [state and local] authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Congress created a judicial cause of action for "[a]ny 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 [§ 332(c)(7)]" and directed that any such action be "hear[d] and decide[d] . . . on an expedited basis." *Id.* § 332(c)(7)(B)(v). Separately, it authorized anyone aggrieved by a violation of § 332(c)(7)(B)(iv), the radio frequency provision, to seek relief from the Commission. *See id.*

3. On July 11, 2008, respondent CTIA filed a petition for a declaratory ruling from the Commission. *See* FCC C.A. E.R. Tab 1. CTIA explained that a significant and unacceptable number of wireless tower siting requests were being delayed past any reasonable period of time, contrary to the mandate of § 332(c)(7)(B)(ii). CTIA presented evidence, which the Commission later found credible, to support these contentions. As the Commission later explained in the Ruling:

> [B]ased on data [CTIA] compiled from its members, there were [in 2008] more than 3,300 pending personal wireless service facility siting applications before local jurisdictions. "Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*." Moreover, almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.

Pet. App. 98a (fourth and fifth alterations in original; footnotes omitted).[5] CTIA also submitted examples of

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[5] The delays in collocation applications were particularly probative evidence of unreasonable local conduct because collocation involves simply sharing an existing facility rather than building a new one. *See* Pet. App. 116a-117a (adopting an

situations in which particular localities had delayed proceedings for multiple years, held dozens of hearings, and ultimately forced a wireless carrier to go to court before construction could begin. *See* FCC C.A. E.R. Tab 1, at 14-15.

Wireless carriers with direct experience of drawn-out controversies over tower siting submitted additional evidence in support of CTIA's position. For example, Verizon Wireless reported that it had more than 350 new site applications pending, of which more than half had been pending for more than six months, and "nearly 100" for more than a year. Pet. App. 65a-66a. In addition, "in Northern California, 27 of 30 [Verizon Wireless] applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved"; and, "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months." *Id.* at 98a-99a (internal quotation marks omitted).[6]

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industry definition of collocation that covers applications that "do[] not involve a 'substantial increase in the size of a tower'"). There is no legitimate local interest in taking a year – much less three – to decide a collocation application.

[6] The Commission also had before it comments from T-Mobile, reporting that just under a third of its then-pending applications (both for new facility applications and for collocations) had been delayed for more than a year, *see* Pet. App. 65a; Sprint Nextel, reporting delays of 28 to 36 months in certain California communities, *see id.* at 98a; the California Wireless Association, reporting delays of 16 months to 2 years in California, *see id.* at 98a n.103; and NextG Networks, reporting delays of 10 to 25 months, *see id.* at 99a. *See also id.* at 66a, 98a-100a (additional data for T-Mobile and Alltel).

CTIA further explained that, although these lengthy delays unquestionably at some point became unreasonable "failure[s] to act" for which district courts could grant a remedy under § 332(c)(7)(B)(v), the 1996 Act was silent as to exactly when a locality's delay became an actionable failure to act. To solve this problem, CTIA asked the Commission to declare specific periods beyond which any delay would be a failure to act within "a reasonable period of time," and therefore would violate § 332(c)(7)(B)(ii). CTIA initially sought a 45-day period for collocation applications and a 90-day period for new facility applications. CTIA also sought a declaration that, in light of the 1996 Act's strong policy preference for competition among different service providers, it is an unlawful "prohibit[ion] . . . [on] the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II), for a locality to deny one wireless provider permission to serve a particular area solely because another provider was already serving the same area.[7]

A number of local governments, including the Cities and CTC, filed comments in opposition to CTIA's petition for declaratory ruling. Among other things, they argued that the Commission lacked jurisdiction to interpret § 332(c)(7)(B).

4. On November 18, 2009, the Commission issued a declaratory ruling ("Ruling"), granting some (but not all) of the relief requested in the petition.

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[7] CTIA further requested that the Commission declare that local ordinances that automatically required a wireless provider to seek a zoning variance in order to build a wireless tower or facility were preempted by 47 U.S.C. § 253(a). The Commission did not act on this request because it found that any such ruling should occur in the case of a specific challenge to a specific ordinance.

It concluded that it had authority to interpret § 332(c)(7)(B), relying on 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r), the statutory provisions that give the FCC general authority to execute, interpret, and enforce the Communications Act, and otherwise to perform its functions. *See* Pet. App. 87a-88a. It rejected contentions by opponents of the petition that either § 332(c)(7)(A) or § 332(c)(7)(B)(v) should be construed to make exceptions to the Commission's general rulemaking authority. In reaching this consideration, the Commission relied on the plain text granting it rulemaking authority and also on this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Sixth Circuit's decision in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). *See* Pet. App. 87a-90a. It also concluded that its rulings were consistent with § 332(c)(7)(A) because it was not "imposing *new* limitations on State and local governments," but was "merely interpret[ing] the limits Congress already imposed on State and local governments." *Id.* at 90a-91a.

On the merits, the Commission determined that CTIA and individual providers had provided "extensive statistical evidence" to support a finding of "unreasonable delays" and "obstruct[ion]," while the state and local governments that had attempted to rebut that evidence had produced no more than "isolated anecdotes." *Id.* at 100a-102a. It further found that local governments should generally be reasonably able to review applications for collocations within 90 days and for new wireless facilities within 150 days. *See id.* at 115a-116a. Although CTIA, Verizon Wireless, and other industry participants had presented evidence suggesting that it

would be reasonable to process applications in half that time, the Commission reasoned that it should allow more time for "explor[ing] collaborative solutions," for localities "to prepare a written explanation of their decisions," and for "reasonable, generally applicable procedural requirements in some communities." *Id.* at 114a-115a. It also gave weight to the processing times described by local-government commenters, almost all of which were consistent with its 90- and 150-day findings. *See id.* at 117a-118a.

Based on its findings, the Commission declared that a local government presumptively fails to act on a collocation application within a reasonable period of time if it does not act within 90 days for a collocation or 150 days for a new facility. *See id.* at 96a-97a. At that time, a "failure to act" has occurred within the meaning of § 332(c)(7)(B)(v), and the provider may seek judicial review – though the local government remains free to show in court that the circumstances of a particular application made the time it took reasonable. *See id.* at 97a, 114a-115a. The Commission declined to adopt any presumption about the remedy for unreasonable delay, finding it more consistent with congressional intent for the courts to determine such questions on a case-by-case basis. *See id.* at 108a-109a.

In a separate section of the Ruling, the Commission also agreed with CTIA "that a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers [already] serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services.'" *Id.* at 127a (quoting CTIA's petition and 47 U.S.C. § 332(c)(7)(B)(i)(II))

(second alteration in original; footnote omitted). "[A]ny other interpretation of [§ 332(c)(7)(B)(i)(II)]," it concluded, "would be inconsistent with the [1996] Act's pro-competitive purpose." *Id.* at 128a.[8]

5. Petitioners City of Arlington and City of San Antonio filed petitions for review in the Fifth Circuit, again arguing that the Commission lacked jurisdiction to interpret § 332(c)(7)(B) and also raising various other arguments that the Commission's decisions were arbitrary, capricious, and otherwise contrary to statute. On January 23, 2012, the court of appeals denied Arlington's petition on the merits and dismissed San Antonio's for lack of jurisdiction. *See* Pet. App. 1a-2a.[9]

The court of appeals held that the Commission had statutory authority to issue the Ruling. *See id.* at 34a-51a. It began by considering whether *Chevron* deference applied. It acknowledged that the circuits disagree over whether to "apply *Chevron* deference to disputes over the scope of an agency's jurisdiction," but concluded that Fifth Circuit precedent required it to apply *Chevron* to such disputes. *Id.* at 37a. It accordingly first considered whether the statute "unambiguously indicate[d] Congress's intent to preclude

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[8] A group of local government organizations sought reconsideration of the Ruling, which the agency denied on August 4, 2010. *See* Pet. App. 172a-195a. None of the petitioners in this Court was in that group, and neither petition for certiorari appears to raise the issues addressed in the order denying reconsideration.

[9] The court of appeals held that it lacked jurisdiction over San Antonio's petition because that petition had not been filed within the 60-day time limit imposed by 28 U.S.C. § 2344. *See* Pet. App. 12a-17a. San Antonio does not challenge that ruling before this Court.

the FCC from implementing § 332(c)(7)(B)(ii) and (v)," *id.* at 40a, and held that it did not.

As to § 332(c)(7)(A), the court of appeals reasoned that the provision "certainly prohibits the FCC from imposing restrictions or limitations [on state or local zoning authority] that cannot be tied to the language of § 332(c)(7)(B)," but does not speak to the question "[w]hether the FCC retains the power of *implementing* those limitations." *Id.* at 41a (emphasis added). It further held that § 332(c)(7)(B)(v), although establishing judicial jurisdiction over "*specific* dispute[s] between a state or local government and persons affected by the government's failure to act," does "not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those" specific disputes. *Id.* at 42a-43a (emphasis added). Accordingly, it proceeded to *Chevron* step two, where it found the FCC's interpretation reasonable despite petitioners' invocation of legislative history and the presumption against preemption. *See id.* at 45a-51a.

The court of appeals also rejected Arlington's additional arguments that the Ruling was issued without proper notice and comment, *see id.* at 17a-31a; that the Ruling violated certain state and local governments' due process rights, *see id.* at 31a-34a; that the 90- and 150-day presumptive time periods were inconsistent with the Communications Act, *see id.* at 51a-63a; and that the Commission had acted arbitrarily and capriciously, *see id.* at 63a-67a.

Petitioners sought rehearing en banc, which the court of appeals denied. *See id.* at 196a-197a.

REASONS FOR DENYING THE PETITIONS

I. THIS CASE IS A POOR VEHICLE TO DECIDE WHETHER *CHEVRON* DEFERENCE APPLIES TO AN AGENCY'S DETERMINATION OF ITS JURISDICTION

The question whether *Chevron* deference can apply to an agency's determination of its statutory jurisdiction may well warrant this Court's review. These petitions, however, are unsuitable vehicles for answering that question. That is because, if this Court were to grant certiorari, it would likely conclude that the Commission clearly did have jurisdiction to issue the Ruling in dispute. Under *Chevron* or any other standard of statutory construction, "[i]f the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. The Court would accordingly have no need to resolve the degree of judicial deference due to the agency, and the resulting affirmance would not resolve any unsettled question or advance the law in any meaningful way.

In several previous cases, the Court has not decided whether *Chevron* applies to issues concerning an agency's jurisdiction after finding it clear either that the agency *had* jurisdiction or that the agency *lacked* jurisdiction. For one example, in *California Dental Association v. FTC*, 526 U.S. 756 (1999), the Court "ha[d] no occasion to review the [Federal Trade Commission's ("FTC")] call for deference" on a question of the agency's own jurisdiction because the FTC's interpretation of the statute was "clearly the better reading of the statute under ordinary principles of construction." *Id.* at 766. For another, in *Dole v. United Steelworkers*, 494 U.S. 26 (1990), the Court declined to apply *Chevron* to a jurisdictional question because the statute "clearly expresse[d] Congress' intention" to withhold authority. *Id.* at 42;

cf. id. at 54-55 (White, J., dissenting) (arguing that *Chevron* should apply even though the question was jurisdictional). Other examples are not difficult to find.[10]

The Court's history of declining to reach the *Chevron* issue in other cases suggests that, before committing the resources necessary for plenary review of this case, it is prudent to take an initial look at the underlying statutory question and to consider whether that question appears sufficiently close that this Court would likely find *Chevron* relevant. As explained in Part II.B, the statutory question is not close. Accordingly, further review is not warranted.[11]

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[10] *See*, *e.g.*, *Rapanos v. United States*, 547 U.S. 715, 739, 758, 788 (2006) (containing a plurality opinion, a concurrence, and a dissent discussing *Chevron* as applied to a jurisdictional statute, but no holding of the Court); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citing *Chevron* before resolving a dispute over agency jurisdiction to regulate tobacco products, but concluding that "Congress ha[d] directly spoken to the issue").

[11] The Fifth Circuit's statement that the Communications Act was "ambiguous with respect to the FCC's authority" is not to the contrary when read in context. Pet. App. 44a-45a. From the court of appeals' perspective, the *Chevron* question was already settled as a matter of circuit precedent. *See id.* at 37a & n.94. Accordingly, the only question before that court was "whether the[] provisions [cited by petitioners] unambiguously indicate[d] Congress's intent to *preclude* the FCC from implementing" the limits that the Communications Act undisputedly places on local authority. *Id.* at 40a (emphasis added). Because it did not face any uncertainty about whether *Chevron* applied, the court of appeals had no reason to linger on the question whether to end the case on *Chevron* step one or step two. This Court, by contrast, would be confronted with a significant *unresolved* question about *Chevron*'s scope and would accordingly look harder at whether the underlying statutory question required resort to *Chevron*.

In addition, this case is a flawed vehicle for developing the *Chevron* doctrine because the Fifth Circuit's opinion leaves open an alternate ground for affirmance that does not implicate *Chevron* at all. The Commission defended its order below in part on the theory that "[a]ny rules that the Commission adopted in the [Ruling] were interpretative," rather than substantive. FCC C.A. Br. 54. The Commission made this argument in the context of rebutting an alleged failure to provide proper notice and comment, and the court of appeals did not reach the question because it found that any such error was harmless. *See* Pet. App. 26a. But if the Ruling was interpretative, then the question whether it was within the agency's general *substantive* rulemaking authority is no longer presented, because "any agency has the inherent power to issue interpretative rules." I Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 433 (5th ed. 2010). Accordingly, the judgment of the court of appeals can stand on that basis without any need to consider the extent of the agency's general authority at all, much less the precise scope of *Chevron* deference.

II. THE QUESTION WHETHER THE FCC HAD JURISDICTION TO ISSUE THIS PARTICULAR DECLARATORY RULING DOES NOT WARRANT REVIEW

1. Neither the Cities nor CTC argue that there is any circuit split relevant to the underlying statutory question whether the Commission had jurisdiction to interpret and implement § 332(c)(7). The closest circuit authority is *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), in which the Sixth Circuit rejected a challenge to FCC rulemaking authority based on arguments very similar to those that petitioners advance in this case. *See id.* at

773-74; Pet. App. 43a-44a (discussing *Alliance for Community Media*); *id.* at 88a-90a (same). Petitioners attempt (unpersuasively) to distinguish *Alliance for Community Media*,[12] but make no claim that it or any other authority creates a conflict that would warrant review.

2. As for the merits, the FCC's jurisdiction to issue the Ruling in this case is clear under § 201(b) of the Communications Act as interpreted by this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). By its plain terms, § 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Act. 47 U.S.C. § 201(b). Relying on that general grant of rulemaking authority, *Iowa Utilities Board* held that, as a general matter, the FCC has jurisdiction over matters that are within the "substantive reach" of the Communications Act – including parts of the 1996 Act that extended that reach. 525 U.S. at 380. Both the agency and the court of appeals correctly relied upon that general principle. *See* Pet. App. 39a, 87a.

Section 332(c)(7)(B) extends the substantive reach of the Communications Act to impose limitations on state and local decisionmaking concerning wireless tower siting, including the requirement that local

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[12] The Cities' sole ground for distinguishing *Alliance for Community Media* is that the Cable Television Consumer Protection and Competition Act of 1992, which the Sixth Circuit construed in that case, did not include language comparable to § 332(c)(7)(A), on which they principally rely. Because their arguments based on § 332(c)(7)(A) lack merit, *see infra* pp. 18-20, their attempted distinction does as well. CTC does not cite *Alliance for Community Media* in its petition at all.

review of a wireless facility siting application be limited to a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). Similarly, § 332(c)(7)(B) forbids 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). Congress imposed those "specific limitations on the traditional authority of state and local governments" in order "to encourage the rapid deployment of new telecommunications technologies." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted).

Thus, § 332(c)(7)(B) "unquestionably" conveys Congress's intent to "take[] . . . away from the States," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, exclusive control of the timing and content of local decisions about wireless tower siting. As a result, this is *not* a case in which state law, rather than federal law, governs the subject matter in dispute. *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*") (holding that 47 U.S.C. § 152(b) "fences off from FCC reach or regulation" certain subjects of intrastate rate regulation, which are regulated by state commissions). Nor is it a case in which an area is left to unregulated private action, to be shaped by market competition rather than by either federal or state law. *Cf. Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the FCC had failed to justify its attempt to regulate an internet service provider). Rather, it is a case in which the Communications Act undisputedly imposes substantive restrictions on local government entities as a matter of federal law.

Accordingly, the court of appeals could and should have resolved this question based on this Court's

holding that an "expansion of the substantive scope of the [Communications] Act" means a "*pari passu* expansion of Commission jurisdiction." *Iowa Utils. Bd.*, 525 U.S. at 380. To be sure, that is a statutory holding: Congress *could* change it either expressly or by implication. But petitioners have offered no persuasive reason to think that Congress has done so here – and certainly none that could overcome the plain language of § 201(b).

3. Despite these clear grants of authority to the agency, petitioners rely on two provisions of § 332(c)(7) to argue that Congress affirmatively withheld from the FCC jurisdiction to interpret the substantive provisions of § 332(c)(7)(B)(i)(II) and (B)(ii). Neither provision creates any ambiguity that would require resort to *Chevron* or warrant this Court's review.

a. The Cities rely on § 332(c)(7)(A). *See* Cities Pet. 24. 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). This is a savings clause; it says nothing about the Commission's jurisdiction to implement or interpret other parts of § 332, and it certainly does not withdraw the enabling power conferred by § 201(b). Further, its reference to restrictions of local authority "provided in this paragraph" reemphasizes that the substantive provisions of § 332(c)(7)(B) *do* "limit" state and local "authority."

A comparison to § 2(b) of the Act is instructive. Section 2(b) provides that, with certain exceptions, "nothing in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to"

certain matters that are reserved to the states. *Id.* § 152(b) (emphasis added). This language, on which the Court relied in *Louisiana PSC*, is a clear restriction on FCC jurisdiction of just the kind that petitioners contend is found in § 332(c)(7)(A). But the contrast between the language that Congress used in § 2(b) to restrict jurisdiction and the omission of any comparable language from § 332(c)(7)(A) is fatal to the Cities' argument. *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); Pet. App. 42a & n.104.[13]

The Cities argue that "it is hard to imagine [§ 332(c)(7)(A)'s] purpose" if it does not restrict the Commission's jurisdiction. Cities Pet. 26. On the contrary, the natural reading of § 332(c)(7)(A) still provides protection for local zoning authority. When Congress enacted § 332(c)(7), the FCC was considering a petition by CTIA for an order broadly preempting local zoning processes as applied to wireless facilities, using its authority under *§ 332(c)(3)*, which prevents states from "regulat[ing] the entry of . . . any commercial mobile service or any private mobile

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[13] Recognizing this problem, the Cities assert in a footnote that "the logical reading of Section 332(c)(7) is that it is broader, not narrower[,] than" § 2(b). Cities Pet. 26 n.11. The assertion is unpersuasive. Section 2(b) explicitly limits *both* the "substantive reach" of the Communications Act, *Iowa Utils. Bd.*, 525 U.S. at 380, *and* the FCC's jurisdiction to enforce the Act. Section 332(c)(7)(A) limits the substantive reach of the Act (though not the provisions that the FCC actually construed here) and does not mention agency jurisdiction.

service." 47 U.S.C. § 332(c)(3)(A).[14] The FCC later cited § 332(c)(7)(A) in dismissing that petition.[15] Thus, the provision has meaningful effect when read as a savings clause that preserves some local zoning authority from preemption, subject to the restrictions in § 332(c)(7)(B) – but leaving intact the Commission's jurisdiction to interpret those restrictions, just as it can interpret any other provision of the Act.[16]

The Cities also argue that, if the FCC's general rulemaking authority applies to § 332(c)(7)(B), then § 332(c)(7)(B)(iv),[17] which gives specific preemptive

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[14] *See* CTIA's Petition for Rulemaking, *Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Services Providers*, RM-8577 (FCC filed Dec. 22, 1994).

[15] *See* Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, ¶ 116 & n.137 (1997).

[16] The same dispute – whether the FCC should preempt local zoning authority *entirely* – accounts for the conference committee's statement that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities should be terminated." H.R. Conf. Rep. No. 104-458, at 208 (1996) ("Conf. Rep."), *reprinted in* 1996 U.S.C.C.A.N. 124, 222, *cited in* Cities Pet. 6, 28. Congress's desire to save local zoning authority as applied to wireless towers from total oblivion does not support petitioners' argument that Congress meant to prevent the FCC from issuing guidance concerning the restrictions that the 1996 Act itself put in place.

[17] Subsection (iv) states that "[n]o 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

effect to FCC regulations concerning "the environmental effects of radio frequency emissions," is "surplusage." Cities Pet. 28. It is quite likely that the FCC *could* have, in its discretion, exercised such preemptive power without the specific language in § 332(c)(7)(B)(iv). But that does not render subsection (iv) surplusage: instead, the language expresses Congress's specific intent that the FCC's radio frequency emission regulations *would* have preemptive effect, taking the preemption decision away from the agency and making it a matter of statutory law.

b. CTC relies on § 332(c)(7)(B)(v). *See* CTC Pet. 19. 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 instrumentality thereof that is inconsistent with" § 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v). It also specifically authorizes 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.*

CTC argues that § 332(c)(7)(B)(v) reflects Congress's alleged intent to divide authority between the courts and the FCC, leaving the FCC jurisdiction only over claims that stem from a violation of subsection (iv). Section 332(c)(7)(B)(v), however, contains no language restricting the FCC's authority, which Congress could easily have inserted had it meant to do so.[18] More-

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Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

[18] Thus, the legislative history that CTC quotes in which a conference committee expressed "'the intent of the conferees that,'" with certain exceptions, "'the courts shall have exclusive jurisdiction over all . . . disputes arising under this section,'"

over, even if § 332(c)(7)(B)(v) is interpreted as a grant of exclusive judicial jurisdiction where it applies, it does not (and could not) convey to the courts the jurisdiction to issue general guidance in the form of a declaratory ruling. Instead, § 332(c)(7)(B)(v) deals only with procedures for resolving 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 FCC's declaratory ruling was not addressed to any such particular dispute.

In addition, CTC's argument closely parallels one that this Court rejected in *Iowa Utilities Board*. There, 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). Just so here: Congress's decision to give the courts the job of hearing complaints against local authorities does not logically preclude the FCC from providing guidance to the courts and to parties whose disputes have not yet ripened for judicial decision. *See also Alliance for Cmty. Media*, 529 F.3d at 775 (holding that "the availability of a judicial remedy" for "unreasonable" actions by state and local governments "does not foreclose the [FCC's] rulemaking authority").

c. Finally, both the Cities and CTC – as well as their *amici* – contend that principles of federalism

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CTC Pet. 26 (quoting Conf. Rep. 208), is not entitled to weight. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (explaining that "the authoritative statement is the statutory text, not the legislative history").

support restricting the FCC's jurisdiction here. *See* Cities Pet. 22-23, 31; CTC Pet. 26-28; NWRA et al. *Amici* Br. 25-26. These arguments fail because, as we have shown, the exercise of *federal* authority here is supported by the unambiguous (and uncontested) language of the Communications Act. The question of the extent to which that federal authority is to be exercised by an administrative, as opposed to a judicial, actor does not implicate any significant federalism concern.

Once again, petitioners' argument is contrary to *Iowa Utilities Board*, in which Justice Scalia's opinion for this Court rejected the notion that principles of federalism deserved weight in this Court's reasoning about the allocation of authority between the federal courts and the FCC:

> The appeals by [two partial dissents] to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. 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.

525 U.S. at 378 n.6. So too here. This is not a case about federalism. It is also not ultimately a case about *Chevron*, which at most gave the court of appeals added comfort about affirming the FCC's correct construction of the Communications Act. It

presents only a straightforward question of statutory interpretation that can and should be resolved in the FCC's favor without any deference being required. Nothing about that question warrants review by this Court.[19]

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[19] The third question presented in CTC's petition asks whether the FCC "usurp[ed] the jurisdiction and authority reserved for State and local governments by Congress . . . by creating additional limitations on state and local governments beyond those provided for in the statute." CTC Pet. i. Although CTC thus initially frames this question as jurisdictional, the corresponding arguments in the body of its petition appear to contend that the FCC's actions were contrary to statute or otherwise arbitrary and capricious. *See*, *e.g.*, *id.* at 24-37. To the extent that CTC intends to raise such questions, they clearly do not warrant review. No division of the circuits is alleged, the question is specific to the facts of this case, and the court of appeals' decision is correct for the reasons expressed in that court's opinion.

Respectfully submitted,

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