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

AMICI CURIAE BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

LISA E. SORONEN
Executive Director
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

THOMAS W. MERRILL
Counsel of Record
435 West 116th Street
Room 725
New York, NY 10027
(212) 854-9764
tmerri@law.columbia.edu

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JAMES BRADFORD RAMSAY
General Counsel
HOLLY RACHEL SMITH
Assistant General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
1101 Vermont Avenue, NW
Suite 200
Washington, DC 20005
(202) 898-2207
jramsay@naruc.org

Counsel for Amici Curiae

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 17,500 members are dedicated to the sound management of government financial resources.

The National Association of Regulatory Utility Commissioners (NARUC), a quasi-governmental nonprofit organization founded in 1889, represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders. The United States Congress, in the Federal Communication Commission's authorizing legislation, assigned specific duties to and included specific reservations of existing authority of NARUC members. Congress has also consistently recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions. *See, e.g.*, 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); *see also* 47 U.S.C. § 254 (1996). Both federal courts and numerous federal administrative agencies have also recognized NARUC's representative role.

All state and local governments have a vital interest in the scope of federal regulatory authority. Often an expansion of federal authority means a restriction of state and local authority. If courts are required to defer to any reasonable federal agency interpretation of its own jurisdiction, the scope of federal authority likely will expand—perhaps quite dramatically—and state and local authority will recede. It has long been understood that courts, exercising independent judgment, play a vital role in ensuring that federal administrative agencies do not overstep the bounds of their delegated authority. *Amici* urge this Court to reaffirm that important judicial role in this case, and in so doing preserve the protections that state and local governments have enjoyed against administrative overreach.

SUMMARY OF ARGUMENT

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), addressed the question of how courts should review "an agency's construction of the statute which it administers." *Id.* at 842. The Court concluded that when a statute is "silent or ambiguous with respect to the specific issue," a reviewing court should defer to the agency's reasonable interpretation, even if it is not the one the court would have reached in the exercise of independent judgment. *Id.* at 843 n.11. The question in this case is whether the rule of deference prescribed by *Chevron* applies to an agency's determination of the scope of its own jurisdiction.

The structure of American government and the traditions that have grown up around it instruct that the answer to this question must be "no." Agencies are creatures of law and can exercise only the powers

delegated to them by law. They have no inherent authority to define the scope of their own authority. Congress has long provided for judicial review of agency action, in significant part to provide a check on agencies that reach beyond the scope of their authority. This function is specifically prescribed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), which directs courts to set aside agency action "in excess of statutory jurisdiction." A practice of deferring to agency interpretations of their own jurisdiction would eviscerate this vital check on agency power, one which is necessary to preserve the basic structure of our government.

The exercise of independent judicial judgment about the scope of agency authority is especially important in cases, such as this one, where an expansion of agency power comes at the expense of state and local governments. The Constitution gives the federal government only enumerated powers, and the Tenth Amendment specifically reserves all other powers to the states and the people. This background understanding is often important in interpreting gaps and silences that inevitably appear in federal statutes delegating power to administrative agencies. If every gap, silence, or ambiguity about the scope of an agency's authority is given over to the agency to resolve through plausible interpretation, the result is likely to be that the agency often will be able to trump state authority, through the preemptive force of the Supremacy Clause, whether or not this was contemplated by Congress when it enacted the statute in question. Judges, because of their diverse experience, training, and independence, are likely to be more sensitive to the broader tradition of American federalism that should properly inform the way

gaps and silences are filled when the question is one of agency jurisdiction.

The question in this case is not a matter of limiting or cutting back on the deference prescribed by *Chevron*. A careful reading of *Chevron* and the many cases that follow reveals that this Court presupposed the review it described would apply only where an agency interprets a statute it is "charged with administering." *See Chevron*, 467 U.S. at 844, 865. In other words, *Chevron*-style deference applies only when the agency has jurisdiction over the issue; to be "charged with administering" a question is to have administrative authority over it. The underlying theory of *Chevron*—that Congress, by delegating authority to an agency, intends the agency to have primary interpretational authority over issues that implicate contested policy questions—also presupposes that the interpretational question is within the agency's jurisdiction. Congress does not give agencies a blank check to make policy wherever they please; it delegates power to particular agencies within prescribed limits. It would make no sense to say Congress delegated power to an agency to determine whether it has delegated power. A court must be satisfied that the agency is acting within the scope of its delegated power before it turns to *Chevron*.

Two counter-arguments have been prominently advanced in favor of using the *Chevron* framework to resolve questions of agency jurisdiction. The first is that it is not possible to maintain a principled distinction between questions that are "jurisdictional" and other questions of statutory interpretation. But courts apply this distinction all the time, for example in determining whether a federal district court has subject matter jurisdiction or in asking whether

Congress has acted within the scope of its enumerated powers. Courts will be assisted by the parties in identifying questions that are jurisdictional, since complaints about an agency exceeding the scope of its jurisdiction likely will arise only when an agency is seeking to expand (or possibly contract) the types of issues it regulates. Certainly the Fifth Circuit, in the decision under review, had no hesitation about characterizing the issue as jurisdictional. Admittedly, the distinction between jurisdictional and other legal questions is susceptible to manipulation, but no more so than the distinctions already present in the *Chevron* doctrine between statutes that are "clear" and those that are "ambiguous," or the distinction between interpretations that are "reasonable" and those that are "unreasonable."

A second counter-argument is that courts have adequate authority to police agency attempts to exceed the scope of their jurisdiction under step one of the *Chevron* doctrine. This Court has used step one of *Chevron* on occasion to resolve questions identified as jurisdictional. *See, e.g.*, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). But there are costs to doing so. One is that gaps, ambiguities, and silences in statutes about the scope of an agency's jurisdiction must often be resolved by adverting to general principles of American government, like federalism, and longstanding traditions about the allocation of governmental power. Courts are more likely to be sensitive to these variables than agencies. Another is that expanding the inquiry under *Chevron* step one to include wide-ranging considerations of constitutional law, statutory structure, and the history of a particular type of regulation threatens to sap *Chevron* of its advantages as a rule-like structure for determining

the respective role of courts and agencies. It is far better for courts to exercise independent judgment assuring that the agencies are acting within the scope of their authority before turning to the two-step *Chevron* inquiry.

ARGUMENT

I. Constitutional Structure and Traditions of American Government Require that Courts Exercise Independent Judgment in Determining the Scope of Agency Jurisdiction

Two propositions about the structure of American government resolve the question presented in this case. First, "[a]n agency may not confer power upon itself." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Whatever power agencies have to regulate is derived solely from delegations of authority from Congress. Second, federal courts have been directed to review agency action, in significant part to ensure that agencies keep within the boundaries of their lawfully delegated authority. Together, these propositions mean that courts must exercise independent judgment to assure that agencies are acting within the jurisdiction assigned to them by Congress. Affording *Chevron* deference to agency interpretations of the scope of their own jurisdiction would effectively allow agencies to confer power on themselves contrary to the constitutional design.

As to the first proposition, the Constitution makes clear that administrative bodies possess no inherent authority to act with the force of law. The first substantive clause of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States…." U.S. CONST. art. I,

§ 1. The President is vested with certain powers in Article II, but the power to create departments or agencies with the power to act with the force of law is not among them. U.S. CONST. art. II. The courts are vested with certain powers in Article III, but again, the power to create tribunals inferior to the Supreme Court, or to vest them with the power to act with the force of law is not among them. U.S. CONST. art. III, § 1. Instead, the Constitution provides, in the Necessary and Proper Clause, that *Congress* is given the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the enumerated legislative powers of Article I, as well as "*all other Powers vested by this Constitution in the Government of the United States*, or in any Department or officer thereof." U.S. CONST. art. I, § 1, cl. 18 (emphasis added).

The Constitution therefore makes clear that the power to create any governmental department or officer, other than the constitutional offices mentioned in the Constitution, is given exclusively to Congress. And it makes clear that the power to give these departments and officers authority to act with the force of law, when this is necessary and proper to carry out the various powers vested in the federal government by the Constitution, is given exclusively to Congress.

The understanding that administrative bodies have no inherent authority to act with the force of law is a bedrock principle of American separation of powers. The principle has never been doubted. *See* THE FEDERALIST NO. 69, at 361 (Alexander Hamilton) (noting that the President, unlike the King of England, has no inherent authority to prescribe "rules concerning the commerce or currency of the

nation"). This was the principle enforced in the Steel Seizure Case, where the Court held that the President had no inherent authority to seize steel mills, even if he or she deemed it necessary to maintain the supply of material for the armed forces in time of war. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 529, 585 (1952).

This principle has been recognized repeatedly in decisions by this Court. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (citations omitted) ("no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations that body imposes."); *Interstate Commerce Commission v. Cincinnati, New Orleans, & Texas Pacific Railway Co.*, 167 U.S. 479, 505 (1897) (Interstate Commerce Commission lacked authority to prescribe rates for the future since this power had not been delegated by Congress); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("The Executive . . . in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art. I, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute….").

If administrative bodies have no power to act outside the scope of the authority delegated to them by Congress, how is this principle to be enforced? Congress may police administrative exercises of authority by conducting oversight hearings, making appropriations decisions, and adopting clarifications of existing agency authority. But it is difficult for Congress, given its limited membership and the many demands on its time, to engage in a systematic review of administrative behavior to ensure compliance with the limits on agency authority. Thus, Congress has long provided, as a further and more efficacious check to assure that administrative action remains within the confines of delegated authority, broad rights allowing judicial review of agency action.

The most notable of such rights of review, of course, is that established by the Administrative Procedure Act (APA). Congress no doubt envisioned the review provisions of the APA as providing a check on agencies that might take action outside the scope of their delegated authority. Section 706 provides expressly that "The reviewing court shall—…(2) hold unlawful and set aside agency action, findings, and conclusions found to be—-…(C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right*…." 5 U.S.C. § 706(2)(C) (emphasis added).

Note the care with which Congress expressed its understanding that courts should enforce limits on delegated agency authority, utilizing a variety of alternative expressions to convey this idea: in excess of jurisdiction, in excess of authority, in excess of limitations, or short of statutory right. Moreover, the directive to courts to review agency action for compliance with the scope of delegated authority is separate

and distinct from the directive to determine whether the agency action is "not in accordance with law." 5 U.S.C. § 706(2)(A). This clearly indicates that Congress recognized a distinction between agency action that is *ultra vires* and agency action that is otherwise inconsistent with the law. A practice of deferring to agency determinations of the scope of their own authority would thus fly in the face of the plain language of the APA.

Judicial review of questions of agency jurisdiction is especially important given the variety of conflicts that arise over the scope of agency authority. Agency jurisdiction can implicate the respective authority of the federal government and the states, the scope of governmental as opposed to private or market ordering, and the respective authority of two or more federal administrative agencies. Congress has the ultimate authority to set the boundaries of agency authority on all these dimensions, and courts have a duty to assure that those boundaries are maintained. As this Court has observed, "[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do." *Louisiana Public Service Commission*, 476 U.S. at 374-75.

II. Independent Judicial Determination is Especially Important When Federal Agencies Seek to Expand their Power at the Expense of State and Local Governments

State and local governments are often regulated by federal agencies and often regulate the same subject matter as federal agencies. As a result, allowing federal agencies to determine the scope of their own jurisdiction, with only deferential review by courts,

would effectively allow federal agencies to trench upon the authority of state and local governments, with little constraint or check. The issue presented by this case vividly illustrates the risk.

47 U.S.C. § 332(c)(7)(B) reflects a limited preemption of state and local authority. Specifically, as relevant to this case, the statute requires state and local governmental authorities to act upon any request for authority to construct a new wireless facility "within a reasonable period of time." That section, however, also contains an anti-preemption or savings clause:

> 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. 47 U.S.C. § 332(c)(7)(A).

The Commission's declaratory order in this case, which the court of appeals recognized was effecttively a rule, expands the preemptive effect of § 332(c)(7)(B)(ii). This not only violates the statute's savings clause, it also means the Commission's "interpretation" cannot be afforded *Chevron* deference.

Before the Commission's order, local courts determined on a case-by-case basis whether the permitting authority acted within a reasonable period of time. *See* 47 U.S.C. § 332(c)(7)(B)(ii) (courts are to determine claims of unreasonable delay "taking into account the nature and scope of such request"). Under the Commission's order, courts must adopt a presumption that any request not acted upon within the Commission's 90- and 150-day time limits is "unreasonable." Whether this presumption changes

the burden of persuasion, or merely the burden of producing evidence (as the court of appeals thought), it necessarily restricts the scope of authority of state and local governmental permitting authorities relative to what it was before the Commission acted. Failure to act within the prescribed time frames will create a presumption of unreasonableness. This presumption will constrain local permitting authorities to comply within the times frames laid down by the Commission. The Commission would not have imposed its time frames if it did not believe they would have a constraining effect on local permitting bodies.

A decision by a federal regulatory agency to preempt—or in this case, to expand the scope of an existing statutory preemption—cannot be taken on the agency's own authority without an express delegation of such authority by Congress. This follows from the more general proposition, discussed in Section I, that agencies have no inherent authority to act with the force of law absent a delegation from Congress. When agencies seek to preempt, this conclusion is reinforced by the text of the Supremacy Clause, which makes "[t]his Constitution, and *the Laws of the United States which shall be made in Pursuance thereof*…the supreme Law of the Land." U.S. CONST. art. VI, cl. 2 (emphasis added). A statute duly enacted by Congress that expressly delegates power to preempt to an agency would fall within the terms of the Supremacy Clause. An agency order adopted under its general regulatory authority does not. This Court has recognized as much. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 384 (1986) (rejecting the FCC's contention that it could preempt a state regulation in order to "effectuate a federal policy" absent congressional authorization).

For similar reasons, agencies should not be given *Chevron*-style deference when they interpret federal statutes (or their own regulations) to have preemptive effect. The decision to displace state law through preemption implicates important questions of federalism. *See, e.g.*, *Medtronic Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (describing preemption of state common law remedies as "a serious intrusion into state sovereignty"). Indeed, from the perspective of the states, there is little difference between a judgment that state law is preempted and a judgment that state law is unconstitutional. Both types of judgments nullify otherwise duly enacted state statutes and common law rules of decision. In so doing, both type of judgments subtract from the power the states otherwise enjoy as sovereign entities.

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional federalism. Thus, for example, this Court has declined to adopt interpretations of statutes that raise serious questions of constitutional federalism, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and has declined to defer to agency decisions that raise serious questions of constitutional federalism. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000). Likewise, the decision to displace state law through preemption should be informed by an understanding of which areas of regulation have been delegated to the federal government, and which have been traditionally committed to the states, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state and local autonomy, the value of allowing policy to vary in accordance with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory v. Ashcroft*, 501 U.S. at 458-59 (summarizing the systemic benefits of federalism).

This Court's most complete discussion of the appropriate standard for reviewing agency actions said to require preemption is found in *Wyeth v. Levine*, 555 U.S. 555 (2009). There, the Court observed that an agency regulation with the force of law can preempt state law. But even in such cases, "the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 576. Where Congress has not authorized the agency "to pre-empt state law directly," and where the agency has not issued a legislative regulation that is claimed to conflict with state law, the question is what weight courts should give the agency's opinion about pre-emption. *Id.* The answer, the Court indicated, is that an agency's views should be given "some weight," *id.* (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000)), given its understanding of the statute and its ability to make "informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.* at 577 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In no case, however, has this Court "deferred to the agency's *conclusion* that state law is pre-empted." *Id.* at 576. Rather, the weight given to the agency's views turned on the agency's "thoroughness, consistency, and persuasiveness." *Id.* at 577.

Clearly, this was not *Chevron* deference. Other recent decisions are to the same or similar effect. *See, e.g.*, *Medtronic*, 518 U.S. at 488; *Geier*, 529 U.S. at 883; *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38-44 (2007) (Stevens, J., joined by Roberts C.J., and Scalia, J. dissenting). In no case has this Court deferred to an agency opinion that preemption is required by finding that this was "reasonable" under step two of *Chevron*. To the contrary, the common assumption has been that "the question of whether a statute is pre-emptive" is one that "must always be decided *de novo* by the courts." *Smiley v. Citicorp (S.D.), N.A.*, 517 U.S. 735, 744 (1996).

Wyeth likewise states the appropriate standard of review when an agency interprets an express preemption clause.[2] As *Chevron* teaches, when a statute is ambiguous or contains a gap, the exercise of interpretation entails a policy choice. When agencies interpret ambiguous statutes that they have been given authority to implement, the policy choice properly belongs to the agency. But when the ambiguity appears in an express preemption clause, the policy

[2] To the extent the dissenting opinion in *Cuomo v. The Clearing House Associates, L.L.C.*, 557 U.S. 519, 555 (2009), assumes that *Chevron* applies to agency interpretations of express preemption clauses, we believe it was in error, for the reasons stated in the balance of this paragraph. In any event, the assumptions of a dissenting opinion are not controlling authority in future cases.

choice entails more far-reaching considerations of federalism.

Preemption entails not only the scope of federal agency authority, but also the displacement of state governmental authority. It eliminates the power of the states to act, often in areas where they have long been understood to exercise exclusive authority. Hence, the interpretation of an express preemption clause has a critical effect on the balance of federal and state authority. Courts are more likely to be sensitive to these larger considerations of federalism than are agencies, which may have a single-minded focus on achieving their narrow regulatory objectives. Agencies may be resentful of implicit competition from state and local governments, or may place an inordinate value on the convenience of not having to deal with different ways to solving a problem. In short, where interpretation entails contested issues of policy *about preemption*, there is every reason to believe that courts, rather than agencies, are the proper institution for resolving the interpretational question.

III. The Theory Underlying *Chevron* Deference Requires that Courts Exercise Independent Judgment in Determining the Scope of Agency Jurisdiction

The *Chevron* doctrine is not in tension with the proposition that reviewing courts must exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority. *Chevron* spoke of the need to defer to reasonable interpretations of statutory provisions rendered by those "entrusted to administer" a statutory scheme. 467 U.S. at 844. This comment clearly presupposes

that the reviewing court must satisfy itself that the statutory provision in question is one that the agency has been "entrusted" or "charged" with administering. *See Smiley*, 517 U.S. at 739. In other words, the court must make an independent determination that the agency has been given delegated statutory authority to administer the provision in controversy. This is essentially an inquiry into agency jurisdiction or scope of authority.

Chevron also justified its rule of deference by observing that "an agency to which Congress has delegated policymaking responsibilities may, *within the limits of that delegation*, properly rely on the incumbent administration's views of wise policy to inform its judgments." 467 U.S. at 865 (emphasis added). This statement expressly acknowledges that any rule of deference is limited to exercises of statutory interpretation that fall within the delegated authority of the agency, and implies that those limits will continue to be independently determined by the reviewing court.

More fundamentally, the underlying rationale of *Chevron* compels independent judicial review of the scope of an agency's delegated authority. *Chevron* indicated that courts should defer to reasonable agency interpretations of statutes because Congress, in delegating authority to an agency, impliedly intends the agency rather than the court to fill any gaps or ambiguities in the statute. 467 U.S. at 843-44. More recent decisions have confirmed that "[a] precondition to deference under *Chevron* is a delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see*, *e.g.*, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("In

Chevron, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). Again, this presupposes that the court must satisfy itself that Congress has delegated policy authority to an agency with respect to the statutory provision in question before the court engages in *Chevron*-type review.

The concept of implied delegation explains why *Chevron* deference is consistent with the APA, which generally instructs reviewing courts to decide "all relevant questions of law." 5 U.S.C. § 706. When Congress delegates policy authority to an agency with respect to a particular statutory provision, this can be seen as an implied instruction to courts to accept reasonable agency interpretations of that provision, at least insofar as those interpretations rest on policy judgments. In effect, the APA's general command instructing courts to exercise independent judgment in deciding questions of law is fully respected. But insofar as the court finds the provision in question is ambiguous or incomplete, it adopts the agency's reasonable interpretation because Congress has given the agency authority to make policy judgments with respect to the provision.

This reconciliation with the APA is not possible, however, when issues arise about whether the agency is acting within the scope of its delegated authority. Here there can be no finding of an "implied delegation" to the agency because the very question at issue is whether such a delegation does or does not exist. Consequently, the language of the APA instructing courts to decide "all relevant questions of law" with respect to whether the agency action is "in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), stands unqualified, and cannot be implemented by drawing on *Chevron*'s insight about implied delegation.

Post-*Chevron* decisions discussing the preconditions for *Chevron* deference also establish that courts must make an independent determination of whether the agency is acting within the scope of its delegated authority. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court held, as a general matter, that *Chevron* applies where Congress has delegated authority to an agency to act with the "force of law" and the agency interpretation has been rendered in an exercise of that authority. *Id.* at 226-27; *see also Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000). The principal circumstances in which these conditions will be satisfied are where an agency has been given legislative rulemaking authority and has interpreted the statute by promulgating a legislative rule, or where an agency has been given authority to render binding adjudications and has interpreted the statute in making such an adjudication. Justice Scalia dissented in *Mead*, and would have held that *Chevron* deference is triggered whenever an agency renders an "authoritative" interpretation of a statute that it administers. *Id.* at 241.

For present purposes, the critical point is that under either conception of the pre-conditions for *Chevron* deference, the court must make an independent determination that the interpretation in question is one that is within the authority of the agency to make. If the question is whether Congress delegated power to the agency to engage in legislative rulemaking, then the existence of such authority must be established before applying *Chevron*. If the

question is whether Congress delegated power to the agency to make binding adjudications, then the existence of such authority must be established before applying *Chevron*. And even if the question were, as Justice Scalia urged in his *Mead* dissent, whether the agency had rendered an authoritative interpretation, it must be established that the agency had authority to speak to the issue. Neither the majority nor dissenting opinions in *Mead* suggested that courts would exercise anything other than independent judgment in establishing whether these preconditions to *Chevron* deference have been satisfied. To this extent, then this Court has already held—unanimously—that courts must exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority before the court engages in *Chevron*-style deference to an agency's interpretational views.

In short, the *Chevron* doctrine is not only consistent with a rule requiring courts to exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority. *Chevron* requires that courts engage in such an inquiry.

IV. The Distinction Between Jurisdictional and Other Legal Issues Is Familiar To Judges, and *Chevron* Step One Is Not Appropriate For Resolving Questions of Agency Jurisdiction

There are two principal counter-arguments to the proposition that reviewing courts should exercise independent judgment in determining whether federal agencies are acting within the scope of their delegated authority before applying the two-step

Chevron doctrine. The first counter-argument is no principled distinction can be drawn between questions of agency jurisdiction and ordinary questions of legality. The second is that courts can adequately assure that agencies stay within the scope of their authority by exercising independent judgment at step-one of the *Chevron* process. Neither of these counter-arguments defeats the powerful reasons for determining questions of agency jurisdiction before turning to *Chevron*.

A.

In a concurring opinion in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988), Justice Scalia wrote:

> [T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority."

With respect, we believe there is a clear conceptual distinction between authority to act and the exercise of authority, between *ultra vires* and *contra legem*. This distinction, like other fundamental legal concepts, may be subject to manipulation. But the dangers of manipulation here are no more pronounced than they are in other areas of the law, where it is necessary to trust the good sense of judges in resisting efforts to collapse one concept into another.

To begin, no claim can be made that the distinction between scope of authority and exercise of authority—between jurisdiction and legality—is one that is

unfamiliar to judges or beyond the capacities of judicial administration. To ask whether a legal entity has "jurisdiction" is to inquire whether it has "[t]he legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter; legal power to interpret and administer the law in the premises." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1347 (2d ed. 1954). To ask whether a legal entity has conformed to the law is to ask whether its exercise of acknowledged authority or "jurisdiction" complies with relevant legal constraints.

Federal judges are routinely asked to make and enforce this distinction. For example, federal courts must determine in nearly every case whether they have subject matter jurisdiction over the controversy. They must determine whether matters fall within federal question jurisdiction, diversity jurisdiction, admiralty jurisdiction, and so forth. *See* 28 U.S.C. § 1331 (federal questions); § 1332 (diversity); § 1333 (admiralty). They exercise independent judgment in resolving these questions, and they understand that the question of federal court jurisdiction is distinct from whether the defendant in the case did or did not comply with the law.

Similarly, federal courts are sometimes asked to determine whether particular exercises of legislative authority by Congress fall within the enumerated powers delegated by the people to the federal government in the Constitution. *E.g.*, *National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566 (2012). Federal courts in these cases readily understand that the question of federal legislative jurisdiction is distinct from other questions of legality. Clearly, therefore, no claim can be made that the

distinction between jurisdiction and legality—between power to decide and the correctness of a decision—is incoherent or beyond the capacities of judges to grasp and enforce.

It is true that Congress frequently delineates the scope of an agency's authority in the same statute in which other legal constraints on the agency's action are prescribed. In contrast, the subject matter jurisdiction of the courts is typically established by discrete statutes collected in title 28 of the U.S. Code. And federal legislative jurisdiction is established primarily in Article I of the Constitution, which is readily identified as a separate instrument from the statutes enacted by Congress. This difference may make the task of distinguishing between jurisdiction and legality marginally more difficult in the context of administrative agency action. But the difference only goes to the relative degree of difficulty in distinguishing questions about the scope of an agency's power from other questions of law implicated by agency action. It does not suggest that the inquiry is different in kind, or that it is less important to maintain jurisdictional boundaries where agency action is concerned than it is where judicial or legislative action is at issue. And it certainly does not establish that identifying the difference between power and legality is beyond the capacity of judges.

It is also important to recognize that the submissions of the parties in identifying questions that are jurisdictional will assist courts. Questions of agency jurisdiction will ordinarily arise when an agency starts to regulate where it has not previously regulated, or announces that it will decline to regulate where it has previously regulated. Parties who are aggrieved by an agency's deviation from its estab-

lished regulatory agenda will challenge the agency's decision on judicial review, and will allege that the agency is departing from the scope of its jurisdiction. This, of course, does not mean the court should set aside all departures by agencies from the scope of their previously-established regulatory activity. Historical practice does not define agency jurisdiction; agency jurisdiction is established by Congress. Nevertheless, challenges to agency action based on its exceeding (or falling short of) its jurisdiction will nearly always arise when an agency announces a shift in the scope of its regulatory activity. This will significantly assist in identifying issues that can fairly be described as jurisdictional.

The court of appeals, in the decision below, had no difficulty identifying the question presented in this case as being "jurisdictional." Pet'r's App. 36a-37a. The court had to decide whether the FCC had authority to interpret 47 U.S.C. § 332(c)(7)(B)(ii) of the Federal Communications Act, which prohibits state and local governments from failing to act "within a reasonable period of time" on a request to place, construct, or modify personal wireless service facilities. The statute expressly authorizes any person adversely affected by a failure to act within a reasonable time "to commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). No mention is made of enforcement of the "reasonable time" restriction by the FCC.[3] Although the court of appeals found the statute "silent" on the issue of the FCC's authority in this matter and hence

[3] In contrast, § 332(c)(7)(B)(v) expressly allows parties adversely affected by a decision to deny permitting authority based on "the environmental effects of radio frequency emissions" to petition the Commission for relief.

ambiguous, it had no doubt the issue was jurisdictional. The identification of the issue as jurisdictional was made easier by the fact that the FCC had never previously asserted authority to define "reasonable time," or to instruct "courts of competent jurisdiction" how to respond to petitions seeking relief.[4] The Commission's declaratory order was thus an unambiguous attempt to expand the scope of the Commission's regulatory authority relative to the baseline that had existed since the provision in question was adopted. The attempt to expand its authority was challenged by petitioners and others, which made it easy for the court to identify the issue as jurisdictional.

As to the danger of manipulation, this is no more serious in distinguishing jurisdiction from legality than in many other areas of the law. Certainly this distinction is not any more susceptible to manipulation than the distinctions between substance and procedure, law and equity, civil and criminal, prospective and retroactive, and a host of other distinctions that critically shape and organize the law. The danger of manipulation in distinguishing jurisdiction and legality is no greater than the danger of manipulation at step one of *Chevron*, which asks whether the relevant statutory provision is "clear" or "ambiguous," or at step two of *Chevron*, which asks whether the agency's interpretation is "reasonable" or "unreasonable." A willful judge will not be more significantly constrained if *Chevron* applies to questions of agency jurisdiction than he or she will be if jurisdiction must be determined by the exercise of independent judgment.

---

[4] *See* Pet'r's App. at 49a-51a, discussing prior decisions by the FCC disclaiming authority to interpret § 332(c)(7)(B).

It is also relevant that questions of jurisdiction require an either-or, yes or no answer. In this sense jurisdiction differs from other concepts, like tallness (or clarity), that admit of answers falling along a continuum, and thus invite greater uncertainty in application. The either-or nature of jurisdictional questions makes it more difficult for courts to distinguish precedents establishing or denying jurisdiction over particular matters, which in turn limits the opportunity for case-by-case manipulation.

The critical point is that constitutional structure and the traditions of American government require that administrative bodies be confined to their jurisdiction, and that courts exercise independent judgment in enforcing this understanding. There is no reason to believe that courts lack the capacity to carry out this function. The danger of manipulation always exists, but can only be counteracted by trusting that federal courts will exercise sound judgment and discretion in performing their appointed role.

B.

The second counter-argument is that courts can adequately ensure that agencies adhere to limits on their jurisdiction by enforcing legislative intent at step one of the *Chevron* process. This Court has on occasion used *Chevron*'s step-one inquiry to limit agency efforts to expand their jurisdiction. Other than framing the discussion in terms of the *Chevron* doctrine, however, the Court's analysis in these cases is identical to what would have been undertaken in rendering an independent judgment about the scope of the agency's jurisdiction *before* turning to the *Chevron* doctrine. In this sense, the use of the *Chevron* framework was unnecessary to the decisions.

Determining the scope of agency jurisdiction in terms of *Chevron*'s step one, however, risks distorting the *Chevron* inquiry in ways that provide inappropriate guidance to lower courts. On the one hand, it carries the risk that lower courts will apply a mechanical understanding of the *Chevron* framework in cases involving agency jurisdiction, and will defer to agency determinations of their own jurisdiction whenever the text of the statute is silent or ambiguous on the issue. This ignores the importance of background principles like federalism and historically-derived conventions about the appropriate functions of different legal institutions—matters that require a more contextual analysis than simply identifying gaps and ambiguities in a statute.

On the other hand, a step-one inquiry carries the risk of diluting the *Chevron* doctrine in circumstances where it properly applies, by expanding the step-one inquiry in jurisdictional cases into a wide-ranging exercise in independent judgment that goes far beyond asking whether the statute speaks directly "to the precise question at issue," *Chevron*, 467 U.S. at 842, or whether the "intent of Congress is clear." *Id.* at 842-43. Rather than distort the *Chevron* process in this fashion, we believe it would be better to confront the question of agency jurisdiction directly, through the exercise of independent judicial judgment at what has come to be called "step zero" of *Chevron*.[5] Two decisions, in particular, illustrate these concerns.

---

[5] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207-11 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L. J. 833, 836-37 (2001).

In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, this Court was confronted with the question of whether the Food and Drug Administration (FDA) had authority to regulate tobacco products as customarily marketed. All parties in the case, including the FDA, described the question as "jurisdictional." Both the majority opinion and the dissenting opinion did the same. Rather than treat agency jurisdiction as a threshold question to be resolved before applying the two-step *Chevron* inquiry, however, the Court framed its inquiry in terms of *Chevron*'s step one, asking whether Congress had spoken to the precise question at issue. 529 U.S. at 132. After 28 pages of analysis, the Court concluded that Congress *had* spoken to the question of agency jurisdiction over tobacco. But the Court did not find this directive in the words of the Food Drug and Cosmetic Act (FDCA). Instead, the Court uncovered Congress's intention by considering contradictions between the agency's preferred tobacco policy and other provisions of the FDCA, the lengthy history of FDA disclaimers of regulatory authority communicated to Congress, and a variety of tobacco-specific statutes other than the FDCA that revealed a congressional purpose to reserve tobacco policy for itself. *Id.* at 133-61.

We do not suggest the jurisdictional analysis in *Brown & Williamson* was mistaken, or that the extensive analysis of the history of tobacco regulation was misguided. To the contrary, it was entirely appropriate given the importance of the jurisdictional question presented. Our points are simply, first, that the Court's independent analysis of the history of tobacco regulation would not have changed one iota if presented as an independent inquiry into the scope of the agency's jurisdiction rather than an application of

step one of *Chevron*. And second, the idea that Congress had spoken to the precise question at issue—over the course of dozens of hearings spread out over multiple decades and through seven separate statutes and amendments to statutes—was at the very least an unorthodox application of step one of *Chevron*, and one that seemingly obscures any distinction between *Chevron*-style deference and independent judicial review.

Similarly, in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990), the question was whether the Paperwork Reduction Act authorized the Office of Management and Budget (OMB) to review regulations mandating that employers disclose warnings about chemicals in the workplace to employees. After meticulously reviewing "the language, structure, and purpose of the Paperwork Reduction Act," 494 U.S. at 35, the Court concluded that Congress intended the Act to apply only to regulations requiring the disclosure of information to agencies. The analysis was indistinguishable from what the Court would do in deciding the issue *de novo*. Only at the very end of the opinion did the Court allude to the *Chevron* doctrine, suggesting that the case could be decided at step one because the intent of Congress was "clear." *Id.* at 42. Justice White, in dissent, thought that the decision departed from *Chevron* principles because the Court could not say "its interpretation is the *only* one Congress could possibly have intended." *Id.* at 45 (White J., dissenting). He also pointedly observed that the respondent had argued "*Chevron* should not apply in this case because OMB's regulations actually determine the scope of its jurisdiction under the Act," *id.* at 54, and noted that the majority did not address this argument.

Again, we do not suggest the jurisdictional analysis in *Dole* was incorrect or inappropriate. Our point is that framing the analysis in terms of *Chevron* was unnecessary to the decision, and the proposition that the jurisdictional question was "clear" was strained, since the ambiguity was eliminated only after an elaborate and independent inquiry into statutory structure, purpose, and history. In *Dole*, as in *Brown & Williamson*, the question of agency jurisdiction should have been addressed as a precondition of *Chevron* deference, not as an element in the application of *Chevron* deference.

Brown & Williamson and *Dole* suggest that this Court is entirely cognizant of the importance of questions about the scope of agency jurisdiction, and is prepared to engage in an appropriately contextual analysis of jurisdictional questions when they are presented. If the only thing at stake were how this Court writes its opinions, little would turn on whether jurisdictional questions are tackled at step one or step zero. But for every case in which this Court confronts a *Chevron* question, thousands are decided by the lower courts. Those courts need appropriate guidance on how to resolve those questions. Given the vital importance of judicial review in preserving the proper place of agencies in American government, the threshold question of agency jurisdiction should be highlighted for consideration by the lower courts, not obscured. The proper way to do this is to clarify that courts must exercise independent judgment in determining that agencies are acting within the scope of their authority before they turn to *Chevron*'s two-step framework.

CONCLUSION

The decision of the court of appeals should be reversed and remanded with instructions to the court to exercise independent judgment in determining whether the Commission has jurisdiction to interpret 47 U.S.C. § 332 (c)(7)(B)(ii).

Respectfully submitted,

LISA E. SORONEN
Executive Director
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JAMES BRADFORD RAMSAY
General Counsel
HOLLY RACHEL SMITH
Assistant General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
1101 Vermont Avenue, NW
Suite 200
Washington, DC 20005
(202) 898-2207
jramsay@naruc.org

THOMAS W. MERRILL
Counsel of Record
435 West 116th Street
Room 725
New York, NY 10027
(212) 854-9764
tmerri@law.columbia.edu

Counsel for Amici Curiae

November 2012