Nos. 11-1545 & 11-1547

In The
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

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

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICI CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITIONERS

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Amicus Natural Water Resources Association ("NWRA") is a nonprofit, voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states. NWRA has member associations in California, Colorado, Idaho, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oregon, South Dakota, Texas, Utah, Washington, and Arizona.

Amicus Association of California Water Agencies ("ACWA") represents approximately 90% of the public water agencies in California. These public water agencies provide water supplies to their agricultural, urban and industrial customers, who are located in all parts of California. Many ACWA member agencies obtain water supplies by diverting water through their own facilities from various rivers, lakes and tributaries in California. Other ACWA member agencies obtain their water supplies pursuant to contracts with the U.S. Bureau of Reclamation ("USBR") or the California Department of Water Resources ("CDWR"), which operate the federal Central Valley Project

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[1] The parties have consented to the filing of this *amici* brief (Rule 37.3). This brief was not authored wholly or in part by counsel for any party, and no party, or parties' counsel, made a monetary contribution to fund preparation or submission of the brief (Rule 37.6).

and the State Water Project, respectively. These federal and state water projects divert water from the Sacramento-San Joaquin Delta, or from rivers feeding into the Delta, in order to provide water supplies for ACWA members and others.

Amicus Westlands Water District ("Westlands"), which is located in Fresno and King Counties in California, is the nation's largest agricultural water district in terms of irrigated acreage. Westlands supplies irrigation water to many of the farmlands of California's Central Valley – which produce a substantial portion of the fruits and vegetables grown in the nation – and also supplies water for domestic use in parts of the Central Valley. Westlands obtains its water supplies from the Central Valley Project pursuant to its contract with the USBR.

The *amici* have a significant interest in the question presented in this case. The question is whether the *Chevron* doctrine, as developed by this Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984), applies to an agency's interpretation of a statute defining its jurisdiction. The *Chevron* doctrine holds that the courts should defer to an agency's permissible interpretation of an ambiguous statute.

The *amici* or their members obtain all or a substantial portion of their water supplies from major water projects operated by federal or state agencies in the western states. Federal regulatory agencies have in many instances interpreted federal statutes as

authorizing such agencies to exercise substantial jurisdiction and control over the water projects, and as precluding the operating agencies from providing water deliveries pursuant to their contracts with their customers, including the *amici*. For example, the U.S. Fish and Wildlife Service has interpreted the federal Endangered Species Act as requiring the operators of the federal and state water projects in California to reduce water deliveries to their customers in order to provide more water supplies for the benefit of federally-listed endangered species, notwithstanding that the project operators have entered into contracts with their customers that do not authorize such reduction of water deliveries. Similarly, the U.S. Environmental Protection Agency has interpreted the federal Clean Water Act as authorizing it to control the regulation, diversion and use of water from the Sacramento-San Joaquin Delta in California, notwithstanding that the regulation, diversion and use of the water has been traditionally and historically controlled by the State of California through its water rights agency. The *amici* believe that these federal statutes do not authorize these federal agencies to exercise the full extent of jurisdiction and authority that they claim, and that the agencies' interpretation of their jurisdiction and authority is not entitled to deference under the *Chevron* doctrine. Therefore, the *amici* have a significant interest in the question whether the *Chevron* doctrine

applies to an agency's interpretation of its jurisdiction.

SUMMARY OF ARGUMENT

The petitions present the question whether the *Chevron* doctrine applies to an agency's interpretation of a statute defining its jurisdiction. The *Chevron* doctrine requires deference to an agency's interpretation of a statute, if the statute is "ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-843 (1984). The Fifth Circuit applied the *Chevron* doctrine in upholding the Federal Communications Commission's ("FCC") interpretation of its authority under the Telecommunications Act of 1996. Under the FCC's interpretation, the FCC is authorized to adopt regulations governing the authority of local governments to regulate the authorization, construction and placement of personal wireless communication facilities, by, for example, requiring local governments to process applications for such facilities within specified timeframes. To that extent, the FCC's interpretation authorizes the FCC to preempt local land use and zoning regulations applicable to personal wireless service facilities.

The *amici* argue in this brief that the *Chevron* deference doctrine does not apply to an agency's interpretation of a statute defining its jurisdiction, if the agency's interpretation authorizes it to regulate a

subject traditionally and primarily regulated by state and local governments and thus limits the authority of state and local governments to regulate the subject. This Court has declined to apply *Chevron* deference where an agency interprets a statute as authorizing it to regulate subjects traditionally regulated by state and local governments, such as water use and land use. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"),* 531 U.S. 159, 172-174 (2001); *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (plurality opinion). The Court declined to apply *Chevron* in these cases because the agency interpretation would result in a "significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *Rapanos,* 547 U.S. at 738. If an agency interprets an admittedly ambiguous statute as authorizing it to regulate subjects of traditional state and local regulation, the agency interpretation potentially conflicts with principles of federalism that this Court has fashioned in interpreting the Constitution, federal statutes and federal common law. These principles of federalism – which are themselves a canon of statutory construction – trump the *Chevron* doctrine, because the former rests on a constitutional foundation and the latter on the lesser principle of judicial prudence.

In this case, the FCC's interpretation of its authority under the Telecommunications Act potentially impinges on the traditional authority of local governments to regulate zoning and land use, by

requiring that local governments comply with FCC-established procedural and substantive requirements relating to the authorization, construction and placement of personal wireless communication facilities. As this Court has said, "regulation of land use [is] a function traditionally performed by local governments." *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 44 (1994). Indeed, regulation of land use is a "quintessential" local function. *Rapanos*, 547 U.S. at 738; *FERC v. Mississippi*, 456 U.S. 742, 767 (1982). The Telecommunications Act specifically provides for the "[p]reservation of local zoning authority," and provides that state and local governments have "general authority" to regulate the "construction" and "placement" of wireless communications facilities. 47 U.S.C. § 332(c)(7)(A). Although the Act authorizes the FCC to adopt general regulations to carry out the Act, *id*. at § 201(b), the Act does not establish specific procedural or substantive requirements that preempt local requirements, or directly authorize the FCC to adopt procedural or substantive requirements that preempt local requirements.

Therefore, the FCC's interpretation of the Telecommunications Act authorizes it to regulate a subject – land use – that is traditionally and primarily regulated by local governments, and the FCC's interpretation preempts local land use regulation to that extent. For this reason, the *Chevron* doctrine does not properly apply in this case. Regardless of whether the Fifth Circuit reached the right result in construing the Telecommunications Act, the court employed the

wrong methodology by invoking the *Chevron* doctrine in reaching its result.

ARGUMENT

I. THE *CHEVRON* DOCTRINE DOES NOT APPLY TO AN AGENCY'S INTERPRETATION OF ITS JURISDICTION, IF THE AGENCY'S INTERPRETATION AUTHORIZES IT TO REGULATE SUBJECTS TRADITIONALLY AND PRIMARILY REGULATED BY STATE AND LOCAL GOVERNMENTS.

A. The Applicability of the *Chevron* Doctrine Must Take into Consideration Whether the Agency Interpretation Allows Federal Intrusion into Areas Traditionally Regulated by State and Local Governments.

Under the *Chevron* doctrine, an agency's interpretation of a statute that it administers is entitled to deference, if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-844 (1984); *see Mayo Foundation v. United States*, 131 S. Ct. 704, 711 (2011); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980 (2005); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). The *Chevron* doctrine does not apply, however, unless "it appears that Congress delegated authority to the agency

generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *see Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("[T]he [agency] rule must be promulgated pursuant to authority Congress has delegated to the official."). Under the *Chevron* doctrine, the reviewing court must undertake a two-step analysis in determining whether *Chevron* applies: first, the court must determine whether Congress has directly addressed the subject matter or instead whether the statute is ambiguous; and, second, if the statute is ambiguous, the court must defer to the agency interpretation if it is permissible. *Chevron*, 467 U.S. at 842-843. Even if *Chevron* does not apply, a court may still defer to an agency's statutory interpretation if the interpretation is "persuasive." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present – if the statute is ambiguous and the agency's interpretation permissible – this Court has held that *Chevron*'s applicability is not strictly based on these objective factors. Rather, *Chevron*'s applicability may "vary with circumstances," such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead Corp.,* 533 U.S. at 228. Thus, for example, *Chevron*

deference is more likely to apply to an agency's adoption of a regulation through the formal rulemaking process, in which notice-and-comment procedures apply, than to an agency's adoption of a less formal guidance, in which these procedures do not apply. *Mead Corp.*, 533 U.S. at 229-230; *Reno v. Koray*, 515 U.S. 50, 61 (1995).

This Court has, on occasion, declined to apply *Chevron* deference where it conflicts with other canons of statutory construction. For example, this Court has construed federal statutes in order to avoid constitutional conflicts, rather than deferring to agency interpretations that created such conflicts. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172-173 (2001) (interpreting Clean Water Act); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (interpreting National Labor Relations Act). In addition, this Court has adopted other canons of construction – such as the canon that Congress presumptively does not repeal statutes by implication, *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936), and the canon that statutes must be construed harmoniously to avoid conflicts, *Morton v. Mancari*, 417 U.S. 535, 549 (1974) – and these canons presumably also limit deference to agency interpretations under *Chevron*.

This Court has considered an additional, and indeed virtually dispositive, factor in determining whether the *Chevron* deference doctrine applies. This

factor is whether an agency's statutory interpretation expands the agency's authority to regulate a subject traditionally and primarily regulated by state and local governments under their police power or other authority, and thereby limits state and local authority to regulate the subject. This factor commonly arises where, as in this case, an agency interprets a statute defining its jurisdiction, because an agency's expansive interpretation of its jurisdiction may have the effect of limiting, and thus preempting, state and local authority to regulate the subject. In cases where this factor is present, countervailing principles of federalism come into play that necessarily limit judicial deference to the agency's interpretation. Under these principles of federalism, Congress presumptively does not authorize federal intrusion into areas traditionally regulated by state and local governments unless it clearly says so. *E.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994). And, if Congress speaks with a clear voice, the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms.

These principles of federalism comprise a separate canon for construing statutes, one that stands on a higher footing than the *Chevron* doctrine, because the former rests on a constitutional foundation and the latter on the lesser principle of judicial prudence. This federalism canon of construction is similar in many ways to the constitutional avoidance doctrine,

because both preclude deference to agency statutory interpretations that limit the states' sovereign authority under the Constitution, such as under the Tenth Amendment and the Commerce Clause. *Compare Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (applying constitutional avoidance doctrine in construing statute), *with Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (applying principles of federalism in construing statute). The federalism canon of construction also applies, however, even where the agency interpretation does not invite a constitutional conflict; Congress may, and often does, defer to state and local authority in carrying out a federal statutory scheme, even though not constitutionally bound to do so, simply because it believes that the states in their collective capacity are better able to effectuate the federal statutory scheme than a federal agency. *E.g.*, Clean Water Act, 33 U.S.C. §§ 1251(b) (recognizing "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"), 1342(b) (authorizing states to administer National Pollutant Discharge Elimination System permit programs).

In the amici's view, the Court in this case should expressly establish two fundamental principles relating to the applicability of the Chevron doctrine that this Court has not previously specifically articulated: first, the Chevron doctrine, assuming that its objective criteria are otherwise met, categorically does not apply

to an agency interpretation that expands federal authority to regulate subjects traditionally and primarily regulated by state and local governments; and, second, the reviewing court must necessarily consider whether the agency interpretation has this effect in determining whether the Chevron doctrine applies. If the reviewing court fails to undertake this inquiry in applying *Chevron*, the court may blindly defer to an agency interpretation because of the presence of certain objective criteria, without taking into account the principles of federalism that are at the heart of the constitutional order.

B. This Court Has Fashioned and Applied Principles of Federalism in Many Contexts.

The principles of federalism fashioned by this Court are, of course, based on the Constitution itself, which provides for a diffusion of national sovereign power between the federal government and the states rather than the concentration of national power in a single national government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government."). This Court has fashioned and applied these principles of federalism in many contexts – not only in interpreting the Constitution, but also in interpreting federal statutes and federal common law.

In interpreting the Constitution, this Court has held that the Commerce Clause grants broad authority to Congress to regulate interstate commerce, but that the Commerce Clause nonetheless limits Congress' power to regulate subjects traditionally regulated by the states. *Nat'l Federation of Business v. Sibelius*, 132 S. Ct. 2566, 2578 (2012); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *United States v. Morrison*, 529 U.S. 598, 619 (2000). "[T]he scope of the interstate commerce power must be considered in light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local. . . ." *Lopez,* 514 U.S. at 557 (citations and internal quotation marks omitted). Under the Tenth Amendment, Congress may not "commandeer" state resources in order to implement congressional goals and objectives. *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot circumvent that prohibition by conscripting the State's officers directly."). Under the Eleventh Amendment, a state has sovereign immunity from a suit by its citizens in federal court, unless the state waives its immunity and consents to the suit. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the

statute."); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

In interpreting federal statutes, this Court has held that Congress presumptively does not preempt the "historic police powers of the States" unless Congress' purpose is "clear and manifest." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). "If Congress intends to alter the usual balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and internal quotation marks omitted). *See also BFP v. Resolution Trust Corp*., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be clear and manifest." (citations and internal quotation marks omitted)); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[T]he ordinary rule of statutory construction [is] that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (citation and internal quotations marks omitted)); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). Based on these limiting principles, this Court has narrowly construed federal statutes limiting state sovereign authority. *E.g., Hess*

v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994); *FERC v. Mississippi,* 456 U.S. 742, 767-768 (1982).

This Court has also applied principles of federalism in fashioning its own rules of jurisprudence, which in some cases may be a form of federal common law and in other cases a limitation on federal common law. Under the abstention doctrine, certain federal actions involving fundamental state law principles and issues must be maintained in the state courts, not the federal courts. *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co*., 319 U.S. 315 (1943). Under the equal footing doctrine, the states are deemed to acquire sovereign ownership and control of their navigable waters upon their admission to statehood, subject only to the federal government's paramount power to regulate navigable waters under the Commerce Clause. *Oregon v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). This Court has held that state law, not federal common law, applies in defining property in our federal system. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980); *Oregon v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). This Court has sometimes "borrowed" state laws in interpreting federal law. *American Elec. Power Co. v. Connecticut,* 131 S. Ct. 2527, 2536 (2011) ("Absent a demonstrated need for a federal rule of decision, the Court has taken the

prudent course of adopting the ready made body of state law as the federal rule of decision until Congress strikes a different accommodation." (citations and internal quotation marks omitted)); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("Federal interpretation of the federal law will govern, not state law," but "state law . . . may be resorted to in order to find the rule that will best effectuate the federal policy."); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("[I]n our choice of the applicable federal rule we have occasionally selected state law."). This Court has limited the scope of the federal common law in instances where its application would impair the sovereignty of the states in our federal system. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.").

Although these principles of federalism establish a canon for construing ambiguous statutes, they are more than that: They are the bedrock principles of the constitutional foundation itself. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citation and internal quotation marks omitted). These principles of federalism enhance the liberties of individual citizens that are inherent in the

constitutional design. "State sovereignty is not an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Nat'l Federation of Business v. Sibelius*, 132 S. Ct. 2566, 2578 (2012). As Justice Kennedy has observed, "[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez,* 514 U.S. 549, 576 (1995) (Kennedy, J. concurring). This Court has stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458. This Court has plainly indicated that these principles of federalism must be applied in construing ambiguous congressional statutes, stating:

> [I]nasmuch as this Court in *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] has left primarily to the political process the protection of the States against intrusive exercise of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such

> an exercise. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory, 501 U.S. at 464, quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988) (original emphasis).

C. This Court Has Not Applied *Chevron* Deference Where Its Application Would Contravene Principles of Federalism.

1. Decisions Declining to Apply *Chevron* Deference

These constitutionally-imbedded principles of federalism inform the applicability of the *Chevron* doctrine in the context of an agency's interpretation of its jurisdiction.[2] If an agency interprets its

[2] To be sure, it may be difficult to distinguish a statute defining an agency's "jurisdiction" from one that does not define its "jurisdiction." In a broad sense, all statutes granting authority to agencies define the agencies' jurisdiction, because all such statutes authorize agencies to perform certain functions and activities and, to that extent, define the agencies' "jurisdiction" to perform these functions and activities. *See United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001) (an agency has only authority delegated to it by Congress); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-473 (2000) (same). Although some statutes are reasonably clear in defining an agency's "jurisdiction," other statutes are less clear, and are not specifically couched in terms of agency "jurisdiction." In this case, for example, the FCC claims authority to regulate certain activities relating to personal

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jurisdiction expansively, as extending to subjects traditionally regulated by state and local governments, the agency interpretation is likely to conflict with principles of federalism and *Chevron* deference would be inappropriate. If, instead, an agency interprets its jurisdiction narrowly as not extending to such subjects, the agency interpretation is likely to converge with principles of federalism and *Chevron* deference would be appropriate.

This Court has declined to grant *Chevron* deference to agency interpretations that – by authorizing federal intrusion into areas traditionally regulated at the state and local level – contravened these principles of federalism. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"),* 531 U.S. 159 (2001), this Court declined to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the Clean Water Act ("CWA"), which authorized the Corps to regulate "isolated" waters, *i.e.*, waters not physically connected to navigable waters. The CWA authorizes the Corps to regulate "navigable waters," which are defined as "the waters of the United States," 33 U.S.C. §§ 1344(a), 1362(7); the Corps' regulation

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wireless service facilities pursuant to its general authority under the Telecommunications Act to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Pet. App. 87a. The Act does not specifically mention the FCC's "jurisdiction" to impose these regulations. Thus, the Act effectively defines the FCC's jurisdiction without explicitly saying so.

interpreted the latter phrase as including "isolated" waters. Although the Court stated that the phrase "the waters of the United States" is not ambiguous and does not include "isolated" waters, the Court also stated that – even if the phrase were ambiguous – there would be no basis for deferring to the Corps' regulation under *Chevron*. *SWANCC*, 531 U.S. at 172-173. The Court stated:

> Where an administrative interpretation of a statute invokes the *outer limits* of Congress' power, we would expect a *clear indication* that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where *the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power*. Thus, where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Id. at 172-173 (emphases added; citations and internal quotation marks omitted). The Court stated that the states have traditionally regulated water use and land use, and that to allow the Corps of Engineers to regulate "isolated" waters having no connection to

navigable waters would result in a "significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 191 F.3d 845, 853 (7th Cir. 1999), *rev'd*, 531 U.S. 159, 174 (2001). Thus, the Court declined to grant *Chevron* deference to a federal regulation that expanded federal authority to regulate subjects traditionally regulated at the state and local level, and instead applied long-standing principles of federalism in construing the CWA.[3]

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[3] The history of the *SWANCC* case demonstrates how the *Chevron* doctrine can be misapplied to reach results contrary to an administrative agency's actual intent in adopting a regulation. Shortly after the CWA's enactment in 1972, the Army Corps of Engineers adopted a regulation that limited the Corps' authority to regulate waters under the CWA; the Corps' regulation interpreted the phrase "the waters of the United States" – which defines the Corps' jurisdiction under the CWA – as limited to traditionally navigable waters that this Court has recognized as within Congress' jurisdiction under the Commerce Clause. *SWANCC*, 531 U.S. at 168-169. The federal district court reviewing the Corps' regulation declined to grant *Chevron* deference; instead, the court, applying *de novo* review, overturned the regulation on the ground that the phrase "the waters of the United States" includes waters beyond those that this Court has recognized as within Congress' traditional jurisdiction. *NRDC v. Callaway,* 382 F.Supp. 685, 686 (D. D.C. 1975). The Corps, in response, adopted a regulation interpreting the phrase more broadly; the new regulation authorized the Corps to regulate non-traditionally navigable waters, such as sandflats, mudflats, prairie potholes, as well as wetlands. 33 C.F.R.

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Similarly, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court again declined to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which interpreted the statutory phrase "the waters of the United States" as including virtually all wetlands in the nation. The Court's plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition," *Rapanos*, 547 U.S. at 731, but that "[e]ven if the phrase 'the waters of the United States' were ambiguous . . . , our own canons of construction would establish that the Corps' interpretation of the statute is impermissible." *Id.* at 737. Quoting the *SWANCC* decision, the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impairment of the States' traditional and primary authority over land and water use.'" *Id*. at 738. The plurality opinion stated that "[r]egulation of land use . . . is a

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§ 328.3. In the *amici*'s view, the *Chevron* deference doctrine does not apply where, as in *SWANCC,* an agency adopts a regulation expansively interpreting its jurisdiction in response to a lower court decision overturning the agency's earlier regulation narrowly interpreting its jurisdiction. Otherwise, *Chevron* would be applied as a basis for deference to the lower court's statutory interpretation rather than the agency's own original statutory interpretation.

Notably, in *Rapanos v. United States*, 547 U.S. 715, 737 (2006), this Court's plurality opinion declined to apply *Chevron* deference in reviewing the Corps' new regulation as applied to wetlands, and this Court's dissenting opinion argued that *Chevron* deference should be applied in upholding the Corps' regulation. *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

quintessential state and local power," and that "[w]e ordinarily expect a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id*. (citations and internal quotation marks omitted). As in *SWANCC*, the plurality opinion applied principles of federalism rather than the *Chevron* doctrine in construing the CWA.[4]

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), this Court declined to grant *Chevron* deference to the U.S. Attorney General's interpretation of his authority under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*., under which the Attorney General claimed authority to override state laws allowing doctors to prescribe regulated drugs for use in physician-assisted suicide. The Court held that the statute did not delegate authority to the Attorney General to decide whether doctors should be allowed to administer such drugs. *Gonzales*, 546 U.S. at 258-269. "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an

[4] The plurality opinion interpreted the phrase "the waters of the United States" as including only "relatively permanent, standing or flowing bodies of water," *Rapanos*, 547 U.S. at 732, and as including only wetlands that have a "continuous surface connection" to such waters, *id*. at 742. Justice Kennedy wrote a concurring opinion arguing that the phrase "the waters of the United States" also includes wetlands that have a "significant nexus" to navigable waters, *id*. at 782 (Kennedy, J., concurring), but Justice Kennedy's concurring opinion, like the plurality opinion, did not apply the *Chevron* doctrine in reaching its conclusion.

administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id*. at 258 (citation omitted.) The Court relied on principles of federalism in reaching this conclusion, stating:

> [T]he background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements [citations] or presumptions against pre-emption [citations] to reach this commonsense conclusion.

Id. at 274.[5]

Even before *Chevron* was decided in 1984, this Court has applied long-standing principles of federalism in construing federal statutes that defined the authority of the states to regulate certain subjects,

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[5] In *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), this Court applied the *Chevron* doctrine as part of its analysis in upholding the Secretary of the Interior's regulation defining "take" under the Endangered Species Act ("ESA"), 515 U.S. at 703, but the Court applied *Chevron* only after it had already determined that its interpretation was supported by the "text of the Act," *id*. at 697, by the "broad purpose" of the Act, *id*. at 698, and by the fact that Congress "understood" that the Act prohibited "indirect as well as deliberate takings," *id*. at 700. Although the Court's decision may have expanded federal authority at the expense of state and local authority, the decision was based largely on the Court's own analysis of the statute and not on the Court's deference to the Secretary's regulation under *Chevron*.

such as water use and land use, rather than deferring to federal agency interpretations that expanded federal authority and limited state authority to regulate such subjects. In *California v. United States*, 438 U.S. 645 (1978), this Court rejected the United States' argument that deference should be accorded to the Secretary of the Interior's interpretation of the Reclamation Act of 1902, which authorizes him to regulate federal reclamation projects in the western states; the Secretary interpreted the Act as authorizing him to regulate water uses served by the projects, and as precluding the states from regulating such water uses. Specifically, the Secretary interpreted section 8 of the Act – which requires him to comply with state laws relating to the "control, appropriation, use, or distribution" of water, 43 U.S.C. §§ 372, 383 – as applicable only to state laws defining proprietary rights in water, and as not applicable to state laws regulating water uses. Rejecting the United States' argument, this Court held that section 8 authorizes the states to regulate water uses served by the federal projects, and that the Secretary is required to comply both with state laws regulating water uses and with state laws defining proprietary rights. The Court reasoned that Congress had adopted a long-standing policy of deference to state water laws, and that this congressional policy informed the meaning of the Reclamation Act. *Id*. at 653. As the Court stated, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

and continued deference to state water law by Congress." *Id*[6]. Thus, the Court deferred to Congress' long-standing policy of recognizing the states' primary authority to regulate water uses, rather than deferring to the Secretary's interpretation that limited such state authority. The Court's landmark decision likely would have been entirely different if this Court had granted *Chevron*-like deference to the Secretary's expansive interpretation of his authority under the federal statute.

2. Decisions Applying *Chevron* Deference

Conversely, *Chevron* deference is more appropriate where a federal agency interprets an ambiguous statute as *limiting* the agency's authority to regulate subjects of traditional state and local regulation, because such an agency interpretation is congruent rather than incongruent with the principles of federalism that form the constitutional foundation. Indeed, an agency interpretation that applies these federalism principles is entitled to heightened deference, because the agency interpretation furthers the constitutional design rather than impedes it. An agency interpretation that limits the agency's authority to

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[6] On remand, the Ninth Circuit, in a decision written by then-Judge Kennedy, reaffirmed that the Reclamation Act must be read in light of Congress' long-standing policy of deference to state water laws. *United States v. California*, 694 F.2d 1171, 1176, 1178 (9th Cir. 1982).

regulate subjects of traditional state and local regulation gains the benefit of two canons of construction – the federalism canon, which presumes that Congress does not intrude into traditional areas of state regulation unless its intention is "unmistakably clear," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989), and the *Chevron* canon, which provides for deference to an agency's interpretation of a statute. An agency interpretation supported by both the *Chevron* canon and the federalism canon is entitled to much greater deference than an agency interpretation supported by the former canon but that conflicts with the latter. Indeed, the *Chevron* canon does not properly apply in the latter situation.

For example, in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court applied *Chevron* deference in upholding and applying a federal regulation that limited the consultation obligation of federal agencies under the Endangered Species Act ("ESA"), and thereby limited federal intrusion into areas traditionally regulated by the states. There, the State of Arizona applied to the Environmental Protection Agency ("EPA") for authority to administer its permit program under the CWA; the CWA provides that the EPA "shall" approve a state permit program if it meets the CWA's statutory criteria. 33 U.S.C. § 1342(b). The EPA determined that the Arizona program met the statutory criteria, and approved the Arizona program. The Ninth Circuit held that the EPA violated the ESA by failing to

"consult" with a designated service agency before approving the Arizona program; under the ESA, a federal agency must "consult" before taking any action "authorized, funded or carried out" by the agency that may affect an endangered species. 16 U.S.C. §§ 1536(a)(2), -(c)(1).

This Court, overturning the Ninth Circuit decision, granted *Chevron* deference in upholding and applying a regulation adopted by the Secretaries of Interior and Commerce that limited the consultation obligation of federal agencies under the ESA. *Home Builders*, 551 U.S. at 665-668, 673. The Secretaries' regulation required federal agencies to consult in "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This Court held that since the CWA provides that the EPA "shall" approve state permit programs that meet the statutory criteria, the EPA had no "discretionary" authority to disapprove the Arizona program, and therefore the EPA was not required to consult before approving the Arizona program. *Home Builders*, 551 U.S. at 665-668, 673.

Thus, *Home Builders* invoked *Chevron* in upholding and applying the Secretaries' regulation limiting the consultation obligation of federal agencies under the ESA. By limiting the consultation obligation, the regulation limited federal intrusion into the states'

traditional authority to regulate fish and wildlife.[7] As applied in *Home Builders*, the regulation effectively broadened the states' ability to obtain federal approval of state permit programs under the CWA, consistently with Congress' declared intent in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

In the same vein, the Eleventh Circuit recently applied *Chevron* deference in upholding a federal regulation that limited federal jurisdiction under the CWA and thereby limited federal intrusion into areas of traditional state regulation. *Friends of the Everglades, et al. v. S. Fla. Water Mgmt. Dist., et al.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643 (2010). There, an EPA regulation provided that a transfer of water containing a pollutant from one water body to another water body does not result in the "addition" of the pollutant to "the waters of the United States" if both water bodies fall within the latter classification – since the pollutant was already in "the waters of the United States" to begin with – and therefore the transferor is not required to obtain a permit under the CWA in order to make the

[7] In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), this Court held that the states' authority to regulate wild animals is subject to the limitations of the Commerce Clause, but that "[w]e consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and welfare of their citizens." *Hughes*, 441 U.S. at 337.

transfer. 40 C.F.R. § 122.3(i). The Eleventh Circuit held that the CWA is ambiguous concerning whether a water transfer results in the "addition" of a pollutant; that the EPA's regulation provides a permissible construction of the statutory language; and therefore that *Chevron* deference was appropriate. *Friends of the Everglades*, 570 F.3d at 1127. Notably, the Eleventh Circuit declined to follow the Second Circuit's earlier decision in *Catskill Mountains Chapter v. New York City*, 451 F.3d 77 (2d Cir. 2006), which had reached the opposite conclusion prior to the EPA's adoption of its regulation. In effect, the Eleventh Circuit deferred to the EPA's limiting interpretation of its authority under *Chevron*, as this Court did in *Home Builders*, rather than following the precedent of a sister circuit court. Accord, *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980 (2005) (holding that *Chevron* deference applies even though agency interpretation conflicts with federal circuit court precedents).[8]

[8] Another case pending before this Court on the merits, *Decker, et al., v. Northwest Environmental Defense Center, et al.*, Nos. 11-338 and 11-347, raises the question whether the *Chevron* deference doctrine applies to the EPA's Silvicultural Rule, which defines the phrase "point source discharge," as used in the CWA, as not applicable to stormwater discharges from logging road operations. 40 C.F.R. § 122.27(b). Under the Silvicultural Rule, such stormwater discharges are subject to state and local laws regulating "nonpoint source discharges." *Id*.

In sum, *Chevron* deference does not properly apply where an agency construes an ambiguous federal statute as authorizing it to regulate subjects of traditional state and local authority, as this Court held in *SWANCC* and *Rapanos*, but *Chevron* deference may be appropriate where an agency construes a statute as precluding it from regulating such subjects, consistently with this Court's decision in *Home Builders*. As this Court has stated, "the background principles of our federal system . . . belie the nation that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales v. Oregon,* 546 U.S 243, 274 (2006). By the same token, the "background principles" of our federal system belie the notion that an agency interpretation of an "obscure" grant of authority is entitled to deference under *Chevron*, where the agency interpretation allows federal intrusion into areas "traditionally supervised" by the states.

II. THE FIFTH CIRCUIT WRONGLY APPLIED THE *CHEVRON* DOCTRINE.

The Fifth Circuit applied the *Chevron* doctrine in upholding the FCC's interpretation of its authority under the Telecommunications Act. The Fifth Circuit did not, however, consider whether the FCC's interpretation expanded the agency's authority and limited state and local authority to adopt zoning and land use requirements for wireless communication

facilities. By failing to undertake this inquiry, the Fifth Circuit wrongly applied the *Chevron* doctrine.

The statutory dispute concerns the meaning of two provisions of the Telecommunications Act of 1996 – subsections (A) and (B) of section 332(c)(7) – which grant authority to state and local governments to regulate personal wireless service facilities and also impose limitations on the grant of such authority. 47 U.S.C. §§ 332(c)(7)(A), -(B). Subsection (A) – entitled "[p]reservation of local zoning authority" – grants "[g]eneral authority" to state and local governments to regulate the placement, construction and modification of personal wireless service facilities, and provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit the authority" of state and local governments to adopt such regulations. *Id*. at § 332(c)(7)(A).

Subsection (B) imposes "[l]imitations" on the grant of authority to state and local governments contained in subsection (A). *Id*. at § 332(c)(7)(B). Subsection (B) provides that state and local governments shall not "unreasonably discriminate" among providers of functionally equivalent services, and shall not "prohibit" the provision of personal wireless services. *Id*. at § 332(c)(7)(B)(i). The subsection also provides that state and local governments shall act on applications to place, construct or modify personal wireless service facilities "within a reasonable period of time," and that any person injured by a state or local government's "failure to act" has the right to seek judicial relief within a specified time period. *Id*.

at § 332(c)(7)(ii), -(v). Subsection (B) does not, however, establish specific timeframes for determining a "reasonable period of time" or "failure to act," or specifically prohibit state or local governments from denying applications based on the presence of other competitors in the market.

The FCC, in its Declaratory Ruling, concluded that the Telecommunications Act authorizes the FCC to establish specific timeframes that state and local governments must comply with in processing applications for personal wireless communication facilities,[9] and also that the Act authorizes the FCC to prohibit these governments from denying applications based solely on the presence of one or more competitors in the market. Pet. App. 116a-120a, 127a-128a; *City of Arlington, et al. v. Federal Communications Comm'n*, 668 F.3d 229, 235-236 (5th Cir. 2012). Thus, the FCC claimed authority under the Act to adopt both procedural requirements, pertaining to timeframes for

[9] Specifically, the FCC concluded that the phrase "within a reasonable period of time," as used in subsection (B)(ii), presumptively means 90 days for applications requesting modifications, *i.e.*, "collocations," of existing personal wireless service facilities, and 150 days for all other applications. *City of Arlington, et al. v. Federal Communications Comm'n*, 668 F.3d 229, 235 (5th Cir. 2012). According to the FCC, there has been no "failure to act" within the meaning of subdivision (B)(v) if the state or local government acts on these applications within the 90-day or 150-day time frames. *Id.* If, on the other hand, the state or local government fails to act within these time frames, the state or local government has not acted "within a reasonable period of time" and thus has caused a "failure to act." *Id.*

processing applications, and substantive requirements, pertaining to the grounds for denying applications, that apply to state and local regulation of the wireless communication facilities. The FCC claimed authority to adopt these requirements under its statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); Pet. App. 87a. The FCC also contended that subdivision (A) does not limit its authority to adopt the timeframes, because subdivision (A) simply prohibits the FCC from creating additional "limitations" beyond those enumerated in subdivision (B). *Id.*

It is notable that the FCC thus *narrowly* construed the provision that grants *broad* regulatory authority to state and local governments, *i.e.*, subsection (A), and *broadly* construed the provision that *limits* the grant of such state and local authority, *i.e.*, subsection (B). The FCC claimed authority to adopt these constructions pursuant to its general statutory authority to adopt regulations "to carry out the provisions of this Act" – a virtually boilerplate provision that commonly appears in statutes administered by a federal agency. Under the FCC's interpretation, a state or local government must comply with FCC-mandated timeframes, rather than its own timeframes, in determining what constitutes a "reasonable period of time" and "failure to act" – even though the statute does not define these terms or specifically authorize the FCC to define them. The

FCC has construed an admittedly ambiguous statute as authorizing it to establish procedural and substantive requirements that preempt state and local requirements, notwithstanding that the statute expressly provides for the "[p]reservation of local zoning authority." 47 U.S.C. § 332(c)(7)(A).

The Fifth Circuit mechanically applied the *Chevron* doctrine in upholding the FCC's regulations because, the court stated, the two objective factors requiring *Chevron* deference were present – the Telecommunications Act is "ambiguous" and the FCC's interpretation is "permissible." *Arlington*, 668 F.3d at 248-254. The court did not consider other factors that this Court has applied in determining the applicability of *Chevron*, such as the agency's "relative expertness." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). This factor appears to weigh against *Chevron* deference, because state and local governments – not the federal government – have traditional expertise in adopting zoning and land use regulations pertaining to communication facilities, a category that includes the wireless communication facilities involved here.

Most significantly, the Fifth Circuit failed to consider an additional factor – indeed, in the *amici*'s view, the determinative factor – in determining whether *Chevron* applies. This factor is whether the FCC's statutory interpretation authorizes it to regulate a subject traditionally regulated by state and local governments, and thus limits traditional state and local authority to regulate the subject. This Court

has consistently held that the regulation of land use, including the adoption of zoning regulations, is a traditional – indeed "quintessential" – function of state and local governments. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*") (states have "traditional and primary power over land and water use."); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("Regulation of land use . . . is a quintessential state and local power."); *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). In *SWANCC* and *Rapanos,* this Court struck down federal regulations that resulted in a "significant impingement" of the states' "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738.

The FCC regulations, at least on their surface, appear to regulate land use by establishing timeframes for local governments to process applications for personal wireless communication facilities. Under the FCC regulations, a local agency that wishes to adopt or apply zoning restrictions for the placement of wireless communication facilities must comply with FCC-mandated timeframes, rather than the agency's own timeframes, in processing applications to construct and place such facilities. There may be legitimate reasons for the local agency to take more

time to process such applications than the FCC regulation allows; for example, the local agency may need to take additional time in establishing general land use and zoning plans applicable to wireless service facilities, and to determine how to integrate the construction and placement of individual facilities into the general plans. Under the FCC regulations, however, the local agency's reasons for taking additional time are entitled to no weight or consideration. Thus, the FCC has established national procedural and substantive standards applicable to the construction and placement of personal wireless communication facilities, rather than allowing state and local governments to establish their own standards. The Telecommunications Act, on the other hand, expressly grants "general authority" to state and local governments to establish these standards and provides for the "[p]reservation of local zoning authority," subject only to "limitations" that do not mention the standards adopted by the FCC. 47 U.S.C. § 332(c)(7)(A), -(B).

The *amici* do not, however, contend that the FCC's interpretation of its authority under the Telecommunications Act is necessarily incorrect. Nor do the *amici* contend that the objective factors cited by the Fifth Circuit as the basis for applying *Chevron* – that the statute is "ambiguous" and the agency interpretation "permissible" – are not present in this case. Rather, the *amici* contend that the FCC's interpretation authorizes it to regulate a subject – land use – that is traditionally regulated by state and local

governments, and thus that the Fifth Circuit wrongly applied the *Chevron* doctrine for that reason. Although the Fifth Circuit mechanically applied *Chevron* because of the presence of the two objective factors – relating to statutory ambiguity and permissibility of agency construction – the court failed to consider the additional, dispositive factor of whether the FCC interpretation allowed federal intrusion into an area traditionally regulated at the state and local level.

Under the Fifth Circuit decision, the *Chevron* canon of construction, which requires deference to agency interpretations of ambiguous statutes, trumps the federalism canon of construction, which precludes statutory interpretations that authorize federal intrusion into traditional areas of state and local regulation. This Court has held, however, that the federalism canon trumps the *Chevron* canon where the two are in conflict. *SWANCC*, 531 U.S. at 172-173; *Rapanos*, 547 U.S. at 737-738. Therefore, regardless of whether the Fifth Circuit reached the right result in construing the statute, the court employed the wrong methodology by invoking the *Chevron* doctrine in reaching this result.

CONCLUSION

This Court should reverse the Fifth Circuit decision, and hold that the *Chevron* doctrine does not apply to an agency's interpretation of its jurisdiction, if the agency's interpretation expands its authority

and reduces state and local authority to regulate subjects that are traditionally regulated by state and local governments under their police power or other authority.

Respectfully submitted,

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