No. 11-1545

In The Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

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

AMICUS CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, SAN LUIS & DELTA MENDOTA WATER AUTHORITY, AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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 Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington.

Amicus Association of California Water Agencies ("ACWA") represents approximately 90% of the public water agencies in California, which agencies are responsible for distributing water supplies for urban and agricultural use in California. Many ACWA members, in order to provide water supplies for their customers, have contracts with federal and state agencies entitling them to water deliveries from federal and state water projects.

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[1] Counsel of record for the parties to this petition have received notice of intent to file this *amicus curiae* brief at least 10 days prior to the due date of the brief (Rule 37.2). The petitioners and respondents have consented to the filing of this brief. None of the parties to the petition nor their counsel have authored the brief in whole or in part, and no such party or counsel made a monetary contribution to fund the preparation or submission of the brief (Rule 37.6).

Amicus San Luis & Delta-Mendota Water Authority ("SLDMWA") is a California joint powers authority, comprised of 29 member water agencies, which meet the water supply needs of over 2.8 million acres of agricultural lands within areas of Fresno, Kings, Merced, San Benito, San Joaquin, Santa Clara, and Stanislaus Counties; municipal and industrial use for more than 1 million people in the Silicon Valley as well as cities in the San Joaquin Valley, and for approximately 51,500 acres of private waterfowl habitat in the San Joaquin Valley, California.

Amicus Westlands Water District ("WWD"), 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 California's Central Valley farmlands which produce a substantial portion of the fruits and vegetables grown and consumed in the nation.

The *amici* or their members obtain water supplies by diverting water from various water bodies, or by entering into contracts with federal and state agencies for delivery of water supplies from federal or state water projects. The U.S. Environmental Protection Agency ("EPA") has taken the position that it may require water users, including the federal and state water projects, to reduce water diversions and deliveries in order to provide additional supplies for endangered species under the Endangered Species Act ("ESA"). Thus, the *amici* have an interest in the issue presented in this case, which is whether the "*Chevron* doctrine," based on this Court's decision in

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), applies when an agency interprets a statute defining its jurisdiction.

BACKGROUND OF THE CASE

A. The Telecommunications Act of 1996

The underlying dispute involves the interpretation of two provisions of the Telecommunications Act of 1996 ("TCA") – subsections (A) and (B) of section 332(c)(7) – which grant authority to state and local governments to regulate personal wireless service facilities and impose limitations on the grant of such authority. 47 U.S.C. §§ 332(c)(7)(A), (B). Subsection (A) 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 state and local authority to adopt such regulations. *Id.* at § 332(c)(7)(B). Specifically, subsection (B) provides that state and local governments shall not adopt regulations that "prohibit or have the effect of prohibiting" the provision of personal wireless services, *id*. at § 332(c)(7)(B)(i); that state and local governments must act on requests to place, construct or modify personal wireless facilities "*within a reasonable period of time*," *id*. at

§ 332(c)(7)(B)(ii); and that any person injured by a state or local government's "*failure to act*" may commence a judicial action within 30 days challenging the decision, *id*. at § 332(c)(7)(B)(v) (emphases added).

The Federal Communications Commission ("FCC") issued a Declaratory Ruling stating 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). The FCC concluded that there has been no "failure to act" within the meaning of subdivision (B)(v) – and thus no basis for commencing a judicial action under that provision – as long as a state or local government acts on an application within the 90- and 150-day time frames. *Id*. The FCC determined that it was authorized to adopt the 90- and 150-day time frames under its general authority to make rules and regulations necessary to carry out the TCA's provisions. *Id*. at 247.

The City of Arlington argued below that subsection (A) precludes the FCC from implementing the limitations in subsection (B), and thus precludes the agency from adopting the 90- and 150-day time frames. *Id*. In rejecting the argument, the FCC concluded that subsection (A) merely precludes the FCC from imposing additional limitations on state and local authority beyond those imposed in subsection (B), and that subsection (A) does not otherwise restrict

the FCC's authority to implement the subsection (B) limitations. *Id*. In short, the FCC construed subsection (A) as not restricting its authority to adopt time frame presumptions under subsection (B).

B. The Fifth Circuit Decision

The Fifth Circuit applied the *Chevron* doctrine in upholding the FCC's interpretation of its authority under subsections (A) and (B). *Arlington*, 668 F.3d at 247-54. Under the *Chevron* doctrine, the courts must defer to an agency's interpretation of a statute that it is responsible for administering and enforcing, if the statute is ambiguous and the agency's interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-44 (1984). The Fifth Circuit acknowledged that this Court has never decided whether *Chevron* deference applies to an agency's interpretation of a statute defining its jurisdiction, and that the federal circuit courts disagree whether *Chevron* applies in this context. The court stated:

> The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeal have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an agency's jurisdiction, some do not, and some circuits have thus far avoided taking a position. In this circuit, we

> apply *Chevron* to an agency's interpretation of its own statutory jurisdiction, and therefore, we will apply the *Chevron* framework when determining whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames.

Arlington, 668 F.3d at 248 (footnotes omitted).[2] The court concluded that subsection (A) and (B) are ambiguous concerning the FCC's authority to adopt the time frame presumptions, that the FCC's interpretation of the subsections is not unreasonable, and therefore that the FCC's interpretation must be upheld under *Chevron*. *Id*. at 248-54.

The petition for writ of certiorari raises two questions, the first of which is whether the *Chevron* doctrine applies to an agency's interpretation of a statute defining its jurisdiction. This *amicus* brief addresses solely that question.

[2] According to the Fifth Circuit, the Fifth, Third and Tenth Circuits have held that *Chevron* applies to an agency's interpretation of a statute defining its jurisdiction, the Seventh Circuit and Federal Circuit have held that *Chevron* does not apply, and the First and Sixth Circuits have avoided taking a position. *Arlington*, 668 F.3d at 248 & nn. 90-94.

SUMMARY OF ARGUMENT

The *Chevron* doctrine does not apply to an agency's interpretation of a statute defining its jurisdiction, if the agency construes the statute as expanding its jurisdiction and thus limiting the jurisdiction of state and local governments to regulate the subject matter. If *Chevron* were applied in this context, its application would contradict another, more salient canon of statutory construction – that under long-standing, constitutionally-based principles of federalism fashioned by this Court, Congress presumptively does not authorize federal regulation of subjects traditionally regulated by state and local governments under their police power or other authority. Congress presumptively does not authorize federal intrusion into traditional areas of state and local regulation unless Congress speaks with a clear voice – and, if Congress speaks with a clear voice, the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms. The long-standing principles of federalism fashioned by this Court provide a more reliable guide for construing Congress' intent than the *Chevron* doctrine. Simply put, an agency cannot properly construe an ambiguous statute as expanding its jurisdiction at the expense of state and local jurisdiction over the subject matter, and – if an agency does so – the courts should not grant *Chevron* deference to the agency's construction. *Chevron* does not contradict or displace these long-standing principles of federalism, but instead provides a means for construing ambiguous statutes where these principles do not apply.

It follows that if an agency construes a statute as *limiting* its jurisdiction and not intruding into traditional areas of state and local regulation, the agency's construction is more likely to be congruent with principles of federalism established by this Court and to be entitled to *Chevron* deference. If, conversely, an agency construes a statute as *expanding* its jurisdiction and thus intruding into traditional areas of state and local regulation, the agency's construction is less likely to be congruent with these principles of federalism and to be entitled to deference. The authority of state and local governments to regulate subjects within their traditional areas of jurisdiction is entitled to greater deference than a federal agency's expansive interpretation of its authority under an ambiguous statute.

Indeed, this Court has declined to apply *Chevron* deference to an agency's interpretation of an ambiguous statute, such as the Clean Water Act, 33 U.S.C. § 1342(b), where the agency's interpretation expanded its jurisdiction to regulate subjects traditionally regulated at the state and local level, 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 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). In *SWANCC*, this Court declined to apply *Chevron* deference because the agency's expansive interpretation of its jurisdiction would result in an "impingement" of the states' traditional regulatory authority, and Congress would not have "encroach[ed]" on the states' traditional authority

without a "clear expression" of its intent. *SWANCC,* 531 U.S. at 172-74. On the other hand, this Court recently applied *Chevron* in upholding and applying a federal regulation that *limited* federal authority under the Endangered Species Act, 16 U.S.C. §§ 1536(a)(2), (c)(1), and thus limited federal intrusion into areas traditionally regulated by the states. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Although this Court has never expressly distinguished for *Chevron* purposes between an agency's limiting and expansive definition of its jurisdiction, this Court's decisions in these and other cases support such a distinction.

The instant case provides an opportunity for the Court to clearly articulate the distinction for *Chevron* purposes between an agency's expansive and limiting interpretation of its statutory authority. Here, the FCC expansively interpreted its authority – and thereby narrowly interpreted state and local authority – to regulate personal wireless service facilities under the Telecommunications Act, and the Fifth Circuit mechanically applied *Chevron* in upholding the FCC's interpretation. In the *amici*'s view, the *Chevron* doctrine does not apply here, and the Fifth Circuit wrongly applied it.

This Court has never directly decided whether *Chevron* deference applies to an agency's interpretation of its statutory jurisdiction, and the federal circuit courts disagree concerning whether *Chevron* applies in this context. This Court should grant the

petition in order to decide this nationally-significant issue and resolve the conflict among the circuit courts.

ARGUMENT

I. THIS COURT HAS NEVER DIRECTLY DECIDED WHETHER THE *CHEVRON* DOCTRINE APPLIES TO AN AGENCY'S INTERPRETATION OF A STATUTE DEFINING ITS JURISDICTION. 4

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, 842-44 (1984); *see Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). Under the *Chevron* doctrine, the reviewing court is required to undertake a two-step analysis: first, the court determines whether the statute is ambiguous, and, second, if the statute is ambiguous, the

court defers to the agency's interpretation if it is permissible. *Chevron*, 467 U.S. at 842-43.[3]

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present – that is, if the statute is ambiguous and an agency's interpretation is permissible – this Court has not always applied *Chevron* based on these objective factors, and instead has often considered additional factors in deciding whether to grant deference. For example, the Court has held that deference to an agency interpretation is particularly appropriate if the agency has made a "scientific determination" within the agency's "area of special expertise," thus indicating that deference is less appropriate if these factors are not present. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 103 (1983*)*; *see Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. 607, 656 (1980) (plurality opinion). This Court has construed federal statutes in order to avoid constitutional conflicts, thus limiting its deference to an agency's interpretation of the statute in such cases. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172 (2001); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009). This Court has deferred to an agency's interpretation of its

[3] Even if *Chevron* does not apply, a court may still defer to an agency's interpretation of a statute if the agency's interpretation is "persuasive." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

statutory authority to resolve an interstate water pollution dispute, which, although not mentioned by the Court, had the effect of lessening the need for this Court to resolve the interstate dispute under its original jurisdiction. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). As one commentator has observed:

> It turns out that the [Supreme] Court does not regard *Chevron* as a universal test for determining when to defer to executive interpretations: the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question. Nor have the multiple factors identified in the pre-*Chevron* period disappeared; to the contrary, the Court continues to rely upon them in many cases, despite their apparent irrelevance under *Chevron.*

T. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 971 (1992).

This Court has never directly decided whether the *Chevron* doctrine applies to an agency's interpretation of a statute defining its jurisdiction. In *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), Justices Scalia and Brennan, in their respective concurring and dissenting opinions, expressed divergent views concerning whether *Chevron* applies in this context.[4] Justice Scalia argued:

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[4] In *Mississippi*, this Court held that the Federal Power Act, 16 U.S.C. § 791a, authorizes the Federal Energy Regulatory

(Continued on following page)

> [I]t is plain that giving deference to an administrative interpretation of its [the agency's] statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. . . . And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, *within broad limits*, for resolving ambiguities in its statutory authority or jurisdiction.

Mississippi, 487 U.S. at 381-82 (Scalia, J., concurring) (original emphasis except last emphasis). Justice Brennan argued:

> Our agency deference cases have always been limited to statutes the agency was "entrusted to administer." Agencies do not "administer" statutes confining the scope of their jurisdiction, and such statutes are not "entrusted" to agencies. Nor do the normal reasons for agency deference apply. First, statutes confining an agency's jurisdiction do not reflect

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Commission to determine the prudency of retail electricity rates charged by public utilities, and preempts the authority of state utility commissions to determine the prudency of such rates. The Court reached this conclusion based on principles of preemption and the Court's own precedents, and did not apply the *Chevron* doctrine or otherwise mention the doctrine in its majority opinion.

> conflicts between policies that have been committed to the agency's care [citations], but rather reflect policies in favor of limiting the agency's jurisdiction that, by definition, have not been entrusted to the agency and that may indeed conflict not only with the statutory policies the agency has been charged with advancing but also with the agency's institutional interests in expanding its power. Second, for similar reasons, agencies can claim no special expertise in interpreting a statute confining its jurisdiction. Finally, we cannot presume that Congress implicitly intended an agency to fill "gaps" in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power. It is thus not surprising that this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.

Id. at 386-87 (Brennan, J., dissenting). [Citations omitted].

Although Justices Scalia and Brennan expressed divergent views concerning whether *Chevron* applies to an agency's interpretation of its statutory jurisdiction, it is not clear whether, or how much, their views would diverge in a particular case. Although Justice Scalia said that an agency is responsible for determining its jurisdiction "within broad limits," *Mississippi*, 487 U.S. at 381-82 (Scalia, J., concurring), he did not spell out how far these "broad limits" might

extend, or whether they might preclude *Chevron*'s application where an agency seeks to expand its jurisdiction into areas traditionally regulated by the states. Indeed, Justice Scalia's later joinder of this Court's majority opinion in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) – which declined to apply *Chevron* deference to an agency's expansive interpretation of its jurisdiction under the Clean Water Act – suggests that Justice Scalia would not grant *Chevron* deference to an agency's overly expansive view of its jurisdiction.[5] Thus, Justice Brennan's categorical view and Justice Scalia's qualified view of *Chevron* deference may converge in a particular setting, depending on whether the agency's interpretation exceeds the "broad limits" mentioned in Justice Scalia's concurring opinion.

II. THE *CHEVRON* DOCTRINE APPLIES TO AGENCY STATUTORY INTERPRETATIONS THAT LIMIT AGENCY JURISDICTION, BUT NOT TO AGENCY INTERPRETATIONS THAT EXPAND JURISDICTION.

Although this Court has never directly decided whether *Chevron* deference applies to an agency's

[5] This conclusion is supported by Justice Scalia's comment in a law review article, in which he stated that "[i]t is . . . relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt." A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521.

interpretation of its statutory jurisdiction, this Court has considered an important, and indeed apparently paramount, factor in determining whether *Chevron* applies in such circumstances – namely, whether the agency's interpretation expands its jurisdiction or instead limits its jurisdiction, and in particular whether an agency's expansive interpretation allows it to regulate subjects traditionally regulated by state and local governments under their police power or other authority. This Court has readily applied *Chevron* to an agency's limiting interpretation of its jurisdiction, but has rarely, if ever, applied *Chevron* to an agency's expansive interpretation of its jurisdiction, where the agency's expansive interpretation limits the traditional regulatory authority of state and local governments. If an agency interprets an ambiguous statute as authorizing it to regulate subjects normally regulated at the state and local level, countervailing principles of federalism come into play that limit 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 – in which case the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms. *See, e.g., Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 44 (1994) (narrowly interpreting federal statute limiting state authority); *Federal Energy Regulatory Comm'n v. Mississippi,* 456 U.S. 742, 767-68 n. 30 (1982) (same).

For example, this Court has held that Congress presumptively does not preempt state and local

authority to regulate subjects within their traditional areas of jurisdiction "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *see Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992); "We ordinarily expect a 'clear and manifest' expression from Congress to authorize an unprecedented intrusion into traditional state authority. [Citation.]" *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion); *see BFP v. Resolution Trust Corp*., 511 U.S. 531, 544 (1994). Similarly, this Court has held that the Commerce Clause of the Constitution limits Congress' power to enact laws that "effectually obliterate the distinction between what is national and what is local. . . ." *United States v. Lopez*, 514 U.S. 549, 557 (1995); *see United States v. Morrison*, 529 U.S. 598, 619 n. 8 (2000).

Thus, if a federal agency interprets an ambiguous statute as *limiting* its jurisdiction, the *Chevron* doctrine is more likely to converge with principles of federalism and be applied. If, on the other hand, the agency interprets an ambiguous statute as *expanding* its jurisdiction, and as authorizing it to regulate subjects traditionally regulated at the state and local level, the *Chevron* doctrine is more likely to diverge from principles of federalism and not be applied.

A. This Court Has Declined To Apply *Chevron* Deference To Agency Statutory Interpretations That Expand Agency Jurisdiction.

This Court has specifically declined to apply *Chevron* deference where an agency interpreted an ambiguous statute as authorizing the agency to expansively regulate subjects traditionally regulated by state and local governments, such as water use and land use.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001), this Court declined to grant *Chevron* deference to a U.S. Army Corps of Engineers regulation authorizing the Corps to regulate "isolated" waters, *i.e*., waters not physically connected to navigable waters, under the Clean Water Act. Under the Act, the Corps is authorized to regulate "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). Although the Court stated that the phrase "the waters of the United States" is not ambiguous, the Court also stated that – even if the phrase were ambiguous – there would be no basis for applying *Chevron*. *SWANCC*, 531 U.S. at 172-73. The Court stated that the states have traditionally and historically regulated non-navigable waters, and thus the Corps' assertion of jurisdiction over "isolated" waters – which by definition are not navigable – would result in a "significant impingement of the States' traditional and primary power over land and water use," *id*. at 161, 174, thus allowing "federal

encroachment upon a traditional state power," *id*. at 173. The Court stated that Congress would not have invoked the "outer limits" of its constitutional power without a "clear expression" of its intent. *Id.* at 172. Invoking its "prudential desire not to needlessly reach constitutional issues," *id*. at 172, the Court concluded that the Corps does not have jurisdiction under the Clean Water Act to regulate "nonnavigable, isolated, intrastate waters," *id*. at 166. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *SWANCC,* 191 F.3d 845, 853 (7th Cir. 1999), *rev'd,* 531 U.S. 159, 174 (2001). Thus, the Court declined to apply *Chevron* deference in determining the Corps' regulatory jurisdiction, and instead applied long-standing principles of federalism that recognize the primacy of state and local authority.

Subsequently, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court's plurality opinion again declined to apply *Chevron* deference to a regulation adopted by the Army Corps of Engineers under the Clean Water Act, which interpreted the phrase "the waters of the United States" – over which the Corps has jurisdiction – as including virtually all wetlands in the nation. Although the plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition,"

Rapanos, 547 U.S. at 731,[6] the plurality opinion also stated 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. Citing the Court's decision in *SWANCC*, the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary authority over land and water use,'" and that "[w]e would ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id*. at 738 (citations and internal quotation marks omitted). Thus, the plurality opinion stated that the traditional canons of construction based on principles of federalism, rather than the *Chevron* doctrine, apply in construing an ambiguous jurisdictional statute. Although the dissenting opinion argued that the Court should apply *Chevron* deference in upholding the Corps' regulation, *id*. at 2252-53 (Stevens, J., dissenting), the plurality opinion rejected the argument.

Even before *Chevron*, this Court applied longstanding principles of federalism in construing the authority of federal agencies to regulate subjects

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[6] 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.

traditionally regulated by the states, such as water use and land use, rather than deferring to the federal agencies' interpretation of their jurisdiction. In *California v. United States*, 438 U.S. 645 (1978), this Court rejected the United States' argument that the Secretary of the Interior was authorized under the Reclamation Act of 1902 to regulate water uses served by federal reclamation projects in the western states. The Secretary had long taken the position that the Reclamation Act – which requires the Secretary to comply with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation," 43 U.S.C. §§ 372, 383 – requires the Secretary to comply only with state laws defining proprietary rights in water, and not with state laws regulating water uses served by the federal projects. The statutory language was unclear; indeed, this Court had earlier upheld the Secretary's determination that the statutory language applied only to proprietary rights. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 279 (1958). Nonetheless, this Court in *California* held that the statutory language requires the Bureau to comply with state laws regulating water uses served by the projects. The Court reasoned that Congress had adopted a long-standing policy of deferring to state water laws, and that this long-standing 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.*[7] Thus, the Court deferred to Congress' long-standing policy of recognizing the supremacy of state water rights laws rather than the Secretary's expansive interpretation of his authority under the Reclamation Act. The outcome of the case would likely have been entirely different if this Court had granted *Chevron*-like deference to the Secretary's expansive interpretation of his authority.

B. Conversely, This Court Has Applied *Chevron* Deference To Agency Statutory Interpretations That Limit Agency Jurisdiction.

On the other hand, this Court has applied *Chevron* deference in upholding agency statutory interpretations that *limit* agency jurisdiction and that do not circumscribe the traditional regulatory authority of state and local governments.

In *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court applied *Chevron* deference in upholding a federal regulation limiting the authority of federal regulatory agencies under the Endangered Species Act ("ESA"). There,

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[7] 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 deferring to state water laws. *United States v. California*, 694 F.2d 1171, 1176, 1178 (9th Cir. 1982).

the State of Arizona applied to the U.S. Environmental Protection Agency ("EPA") for authority to administer its permit program under the Clean Water Act. The Clean Water Act provides that the EPA "shall" approve a state permit program that meets the Act's 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 is required to "consult" with a designated service agency 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, held that a regulation adopted by the Secretaries of Interior and Commerce, which defined the consultation obligation of federal agencies under the ESA, did not require the EPA to consult, and that under *Chevron* the Secretaries' regulation was entitled to deference. 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 Clean Water Act 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 that the EPA was not required to

consult before approving the program. *Home Builders*, 551 U.S. at 665-68. Thus, the Court applied *Chevron* deference in upholding an agency regulation that *limited* an agency's consultation obligation under the ESA and thus avoided intrusion into areas traditionally regulated by the states.

Similarly, the Eleventh Circuit recently applied *Chevron* deference in upholding another federal regulation that limited federal jurisdiction under the Clean Water Act and thereby limited federal intrusion into traditional areas of 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 from one water body to another does not result in the "addition" of a pollutant to the second water body (even though the transfer may introduce a pollutant to the second water body) and therefore the transferor is not required to obtain a permit from the EPA under the Clean Water Act in order to make the transfer. 40 C.F.R. § 122.3(i). The Eleventh Circuit held that the Clean Water Act 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 deference was appropriate under *Chevron*. *Friends of the Everglades*, 570 F.3d at 1127. Notably, the court 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 concluded – before

the EPA adopted its regulation – that an EPA permit was required for a water transfer. In effect, the Eleventh Circuit declined to follow the precedent of a sister circuit court, and instead deferred to an agency's limiting interpretation of its jurisdiction under *Chevron*, as this Court did in *Home Builders*.

C. The Fifth Circuit Wrongly Applied The *Chevron* Doctrine.

In this case, the FCC expansively interpreted its authority and narrowly interpreted the states' authority to regulate personal wireless service facilities under the TCA. Specifically, the FCC narrowly construed subsection (A) of 47 U.S.C. § 332(c)(7), which *grants* regulatory authority to the states, and expansively construed subsection (B), which *limits* the grant of authority to the states. *Arlington*, 668 F.3d at 235. Based on its construction, the FCC concluded that it has statutory authority to implement subsection (B)'s limitations of state authority. *Id*. Since the FCC expansively interpreted its authority and narrowly interpreted the states' authority, the Fifth Circuit wrongly applied the *Chevron* doctrine.

The *amici* do not contend that *Chevron* does not apply because the TCA is not "ambiguous," or because the FCC's interpretation is not "permissible." The *amici* do not address the question whether the FCC's interpretation of the TCA is correct or incorrect. Rather, the *amici* contend that the Fifth Circuit applied the wrong methodology by applying *Chevron* to

an agency's expansive interpretation of its statutory authority, an interpretation that circumscribed state and local authority over the same subject matter. The Fifth Circuit, rather than applying *Chevron*, should have determined the FCC's statutory authority under other canons of construction, which *inter alia* require consideration of the meaning, purpose and context of the statute. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Regardless of whether the Fifth Circuit reached the right result in determining the FCC's jurisdiction, the court employed the wrong methodology by applying *Chevron*.

This Court has never directly decided whether *Chevron* applies to an agency's construction of a statute defining its jurisdiction,[8] and the federal circuit

[8] To be sure, Justice Scalia has argued that "we have held that this [*Chevron*] rule of deference applies to an agency's interpretation of a statute designed to confine its authority," *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring), although Justice Brennan argued in the same case that "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction." *Id*. at 349 (Brennan, J., dissenting). Regardless of whether Justice Scalia or Justice Brennan was right, there is at least disagreement among this Court's present and past members over whether the Court has decided the issue, which alone provides a basis for this Court to review the issue. The Fifth Circuit stated – correctly, in our view – that this Court has never resolved the issue. *Arlington*, 668 F.3d at 248. In any event, this Court has never expressly distinguished for *Chevron* purposes between agency interpretations that *limit* agency jurisdiction and agency interpretations that *expand* agency jurisdiction – although this Court's above-cited cases appear to support

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courts disagree concerning whether *Chevron* applies in this context. *Arlington*, 668 F.3d at 248. This Court should review the case to decide this nationally-significant issue and resolve the intercircuit conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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such a distinction – and this case presents an opportunity for this Court to expressly decide whether the distinction exists.