No. 11-1545

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,
Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue, NW
Suite 404
Washington, DC 20015
(202) 362-0636

THOMAS D. BUNTON
SENIOR DEPUTY
COUNTY COUNSEL
COUNTY OF SAN DIEGO
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-6456

Counsel for Petitioner County of San Diego, California

JOSEPH VAN EATON
Counsel of Record
JAMES R. HOBSON
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER LLP
2000 Pennsylvania Avenue, NW
Suite 4300
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas; and Texas Coalition of Cities for Utility Issues

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Neither the government nor CTIA-The Wireless Association and Cellco Partnership d/b/a Verizon Wireless (collectively, "CTIA") doubt that the question of whether *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), applies to an agency's determination of its own jurisdiction merits review. Respondents ask only that the Court wait for a better case, but they offer no persuasive reason for the Court to do so. This case presents the issue squarely, in the context of an important dispute about the relationship between the FCC and State and local governments. The Court should grant the petition.

I. Respondents Acknowledge That the Courts Are Divided on Whether *Chevron* Applies to an Agency's Jurisdictional Determinations.

We begin where Petitioners and Respondents agree—but where the lower courts do not. On the question of whether *Chevron* applies to an agency's jurisdictional determinations, Respondents acknowledge what the court below stated plainly: this Court "has not conclusively resolved" the question and lower courts "have adopted different approaches" to it. App. 37a; *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 765-66 (1999) (acknowledging but declining to decide the question). Respondents do not doubt the circuit split, call for its further development, or question its importance. Rather, the government finds "disagreement among the courts of appeals," and CTIA states that the question "may well war-

rant this Court's review." Government Brief in Opposition ("Opp.") 9; CTIA/Verizon Brief in Opposition ("CTIA Opp.") 13.

This "most important—and vexing—question involving *Chevron*'s domain" does warrant review:[1] each time that Congress defines an agency's jurisdiction imprecisely, it starts parties on a path to litigation under a standard of review set by chance. The Court should standardize the courts' approaches to this important and recurring issue.

II. This Case Squarely Presents the Question.

Respondents offer no persuasive reason to wait for another case to resolve this pressing conflict.

1. CTIA suggests that the *Chevron* question was not important to the Fifth Circuit's decision, asserting that the jurisdictional issue is not "sufficiently close" for *Chevron* to be "relevant." CTIA Opp. 14. But the decision demonstrates that *Chevron* was not only relevant, but central. The court found the jurisdictional question ambiguous, that is, "susceptible to more than one reasonable interpretation," (App. 39a) not once,

- "This is a question to which § 332(c)(7)(A) itself does not provide a clear answer." App. 41a.

twice,

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[1] Thomas W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 909 (2001).

- "Whether the FCC retains the power of implementing those limitations . . . remains unresolved." *Id.*

three times,

- "Congressional silence leaves § 332(c)(7)(A)'s effect on the FCC's authority to administer § 332(c)(7)(B)'s limitations ambiguous." App. 42a.

or four,

- "[T]he statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement § 332(c)(7)(B)'s limitations." App. 45a.

but at least *nine* times.[2]

The court then abandoned its search for the statute's best reading: it ruled that if the FCC offered any "permissible" construction of its jurisdiction, it "must defer." App. 45a. The case thus squarely presents the question of whether this deference was appropriate.[3]

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[2] App. 41a ("neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) unambiguously preclude the FCC from establishing the 90- and 150-day time frames"); App. 41a (referring to "Congress's silence on this point"); App. 42a ("Congress did not clearly remove the FCC's ability to implement the limitations"); App. 42a (judicial cause of action "does not resolve § 332(c)(7)(A)'s ambiguity"); App. 44a ("§ 332(c)(7) is ambiguous"); App. 45a ("the statute is silent on the question").

[3] The government's claim that the issue is not properly presented because Petitioners assert that they should prevail

2. The government suggests that the decision "does not create a direct conflict with the Seventh and Federal Circuit cases cited" because "the statutory interpretation at issue here does not implicate the agency's jurisdiction to make rules or adjudicate particular disputes," but merely affects the FCC's authority to "provide guidance to the courts." Opp. 11. This is a distinction without a difference.

The government offers no reason to believe that the Seventh and Federal Circuits would reverse course and defer to the FCC's jurisdictional determination simply because the FCC expressed the determination in a declaratory order instead of a regulation. Rulings and regulations no less than declaratory orders provide "guidance" to the courts, which as the FCC notes, remain the "ultimate arbiters of disputes" even where *Chevron* applies. Opp. 11. The question here does not concern the guidance's format, but whether a court should defer to an agency's determination that it has jurisdiction to issue it. The Fifth Circuit answered "yes"; other courts would answer "no."

Of course, the case would be different if by "guidance" the FCC meant that it did not intend to speak with the force of law. But that is not what the agency said. Applying the statutes that grant it rulemaking

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under *Chevron*'s first step is meritless. Opp. 11-12. The Fifth Circuit rejected that argument and instead applied *Chevron* to determine whether the FCC's interpretation of its own jurisdiction was permissible. Nothing prevents this Court from reviewing that holding and resolving the acknowledged circuit conflict.

authority,[4] the FCC "prescribe[d] . . . rules and regulations" to "interpret and implement" §332(c)(7) (Opp. 6); and instructed that State and local governments must comply with the statute "as defined herein." App. 91a. Neither the FCC nor the Fifth Circuit indicated that the rules are not binding.[5] And if they had, that would be grounds for summary reversal, as *Chevron* deference is not owed interpretative rules. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *cf.* CTIA Opp. 15 (wrongly arguing that government's abandoned argument that declaratory ruling was interpretive rule is an alternative ground for *affirmance*).

III. Under a De Novo Standard, the Case Would Be Resolved in Petitioners' Favor.

Respondents also argue that "even if the court of appeals had engaged in de novo review, there is no reason to believe that the court would have reached a different conclusion about the Commission's authority." Opp. 12; *see also* CTIA Opp. 14. Of course, since the Fifth Circuit only asked if the FCC's reading was "permissible," this is mere speculation and provides no reason to forgo an opportunity to resolve an acknowledged and important circuit conflict. It is also wrong. A court seeking the best interpretation

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[4] 47 U.S.C. §§151, 154(i), 201(b), 303(r).

[5] The government suggests that the Court should wait for a case applying the FCC's rules to a "concrete set of facts" (Opp. 12) but offers no reason why facts would illuminate the purely legal questions the Petition presents.

would rule that the FCC lacks general policymaking authority here.

1. To begin, Respondents' assertion that they would prevail even under the proper standard does not preclude the Court from establishing that standard. As the Solicitor General has explained elsewhere, "the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." *Astrue v. Capato,* No. 11-159, U.S. Cert. Reply 11. That is, in fact, exactly what this Court did in *United States v. Mead Corp.*, 533 U.S. 218, 238-39 (2001): it clarified the Court's *Chevron* jurisprudence, rejected the government's claim to *Chevron* deference for tariff classification rulings, and remanded to the lower court to reconsider its ruling in light of the appropriate standard.

2. In any event, under a de novo standard, Respondents' defense of the FCC's jurisdictional determination would fail.

To start, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), does not settle the issue, but frames it. Although Respondents make much of the Court's statements that the FCC had authority to implement §§251 and 252 because these provisions were "inserted into the Communications Act," (Opp. 12), neither argues that Congress's mere placement of §332(c)(7) empowers the FCC to implement the section if Congress has demonstrated otherwise. Opp. 13; CTIA Opp. 17-18. Nor could they. *AT&T* does not establish a hard and fast rule requiring a court to find FCC jurisdiction, regardless of Con-

gress's intent. Rather, *AT&T* confirms that the FCC lacks jurisdiction when relevant "statutory provisions . . . displace the Commission's general rulemaking authority." 525 U.S. at 385.

3. Respondents argue that there is no displacement: State and local zoning is subject to national policy crafted by the FCC. Petitioners in turn maintain that Congress left § 332(c)(7)'s implementation to the courts through case-by-case adjudications that defer to the expert judgment of State and local zoning officials, not to a uniform national standard developed in Washington, D.C. Section 332(c)(7)'s text, structure, purposes, and history confirm Petitioners' view.

a. Congress considered the model the FCC now proposes—and specifically rejected it. The House passed a bill to "ensure" State or local government action "within a reasonable period of time" by authorizing the FCC to "prescribe and make effective a policy" in this area. H.R. Rep. No. 104-204, 1996 U.S.C.C.A.N. 10, 25 (1995), App. 212a. In conference, Congress completely re-wrote the provision. The conferees changed its title from "Facilities siting policies" to "Preservation of local zoning authority." They considered the language empowering the FCC to "prescribe and make effective" policy—and deleted it. And they replaced it with a broadly-worded preservation clause that not only assigns the FCC *no* general policymaking role,[6] but that also shields

[6] The FCC's only policymaking role appears outside the preservation clause: the Commission may regulate and adjudicate

State and local authority from *any* "limit" or "[e]ffect" caused by *any* other provision of the Act. Accompanying the change, a conference report describes § 332(c)(7) as establishing "limitations" on the FCC's "role and powers." App. 209a-211a. The report directs the FCC to "terminate[ ]" its pending rulemaking, a direction unnecessary if Congress expected the FCC to "implement" the statute.[7] *Id.*

b. The government's central assertion is that the FCC has simply engaged in the ordinary exercise of expertise to clarify an ambiguous statutory phrase. This assertion, however, ignores that §332(c)(7) is designed to require courts to evaluate challenged delays on a case-by-case basis, taking into account local conditions and giving deference not to uniform national standards developed by the FCC, but to the expertise of local zoning officials.

That, in fact, is how the statute operated during the nearly two decades since the law was passed. As one court put it, the statute operates as an "experiment in federalism": it does not offer "a single 'cookie cutter' solution for diverse local situations" and "produce[s] (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and interests of particular communities." *Town of Amherst v. Omnipoint Communs. Enters.,*

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radio frequency emissions matters. 47 U.S.C. §332(c)(7)(B)(iv), (v).

[7] Thus, read in context, the statute *does* "indicate a clear intent to bar FCC implementation." Opp. 15; *contra also* CTIA Opp. 20 n.16.

Inc., 173 F.3d 9, 17 (1st Cir. 1999); *see also N.Y. SMSA Ltd. P'shp v. Town of Riverhead Town Bd.*, 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000); *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198 (D.R.I. 2000). By contrast, to defend its reading that Congress intended it to implement the law by adopting national standards, the government submits that a court faced with a zoning dispute must "replicate the inquiry that the FCC . . . conducted" of national zoning trends. Opp. 17. We are not aware of any court that has found this necessary in light of §332(c)(7)'s structure and purpose.

The government claims that there is "no plausible reason" that Congress would withhold FCC policymaking authority here. Opp. 17. But the FCC itself has acknowledged that it has "traditionally has been reluctant to become embroiled in zoning matters, believing that such issues are within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12631, 12633 (1995). Congress plainly took the same view. The conference report thus directed courts to apply the time limits in the statute not by looking to the FCC for guidance, but by examining the "usual period" established by State and local zoning experts:

> If a request . . . involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject

> their requests to any but the generally applicable time frames for zoning decision.

H.R. Rep. No. 104-458, at 207-208 (1996), App. 210a. The statute's main purpose is not to establish national timing standards but to prevent discrimination against national carriers.

c. To secure this purpose. Congress enacted a broad preservation clause providing that other than §332(c)(7)(B)'s "provided" language, "nothing in this Act shall limit or affect" State and local authority. 47 U.S.C. §332(c)(7)(A). Respondents are adamant that "nothing" means "something": the provisions that give the FCC the authority to make policy.[8] Opp. 13-15; CTIA Opp. 18. Petitioners, by contrast, give full effect to "nothing in this Act": it shields State and local authority from *any* "limit" or "[e]ffect" caused by *any* other provision of the Act, including those granting the FCC policymaking authority.

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[8] Respondents never explain why Congress would have required the FCC to speak with the force of law on issues that were to be determined based on local facts and circumstances. The FCC's only policymaking role appears outside the preservation clause: the Commission may regulate and adjudicate radio frequency emissions matters. 47 U.S.C. §332(c)(7)(B)(iv), (v). The government suggests that it needs to set national time limits to avoid potential statute of limitations issues where a "failure to act" is at issue, but the FCC can cite no case where a dispute has arisen as to how to apply the statute of limitations where a "failure to act" is alleged.

To be sure, §332(c)(7)(B) itself did "limit" and "affect" State and local authority. But after the Declaratory Ruling, State and local authority is "affect[ed]" differently. A reviewing court does not merely apply §332(c)(7)(B)'s reasonableness test in light of the conference report and local facts. Instead, the court now evaluates local action against a federal, administrative policy: one that takes an average of review times in certain jurisdictions, and then shifts the burden to State and local governments after they expire. What caused this new "effect?" The FCC tells us: its use of four other provisions "in this Act." App. 87a-88a.

d. Respondents' views create tensions and inconsistencies within §332(c)(7). Respondents, for example, disagree that the FCC's broad view of its authority renders §332(c)(7)(B)(iv)'s specific grant of authority to address RF matters surplusage. Opp. 15; CTIA Opp. 21. CTIA speculates that this specific grant of authority serves the distinct purpose of withdrawing agency discretion. Opp. 21. CTIA does not explain why this would be a concern. The better view is that without this specific grant, the FCC could not address the issue. More importantly, the inconsistencies all point in a single direction—absence of FCC jurisdiction—while Respondents offer nothing other than the fact that § 332(c)(7) appears in the Act to suggest that Congress meant for the FCC to create national zoning rules.

4. Respondents claim that Congress did not displace the FCC's authority because, unlike the statute at issue in *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986), §332(c)(7)(A) does not use the word

"jurisdiction." Opp. 14; CTIA Opp. 18-19. But this is not about magic words. As the Court explained in *AT&T*, the FCC's authority over a section added to the Act does not derive from Congress's utterance of "jurisdiction," 525 U.S. at 380-381, but from Congress's placement of the section within the operative reach of the FCC's general rulemaking authority. 525 U.S. at 380-381.[9] Since Congress expands the FCC's jurisdiction in this way, it likewise demonstrates the absence of FCC authority by stating that the FCC's general powers cannot so much as "affect" a new section's subject matter.

5. Finally, Respondents' claims that "[t]his is not a case about federalism" (CTIA Opp. 22-24) and that the court properly elected not to consider the presumption against preemption (Opp. 16) miss § 332(c)(7)'s central purpose. The government asserts that the Fifth Circuit correctly determined that the presumption did not apply because Congress "indicated a preference for federal preemption of state and local laws governing . . . time frames." *Id.* But, as we have shown, this is precisely what §332(c)(7)(B)(ii) did *not* do. Congress sought not to preempt State and local timeframes, but to ensure that State and local governments heeded them. Here, however, the FCC openly acknowledges that its new rules do not accommodate all State laws. Pet. 9. In short, because the FCC has changed Con-

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[9] The Court explained that the word "jurisdiction" in §2(b), 47 U.S.C. §152(b), operates to prevent the FCC from exercising "ancillary" authority, which the agency has not claimed here. *Id.*

gress's regime of deference to State and local government policy to one of deference to its own, this case indeed presents an important federalism issue.

Conclusion

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

Respectfully submitted,

Joseph Van Eaton
Counsel of Record
James R. Hobson
Matthew K. Schettenhelm
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Avenue NW, Suite 4300
Washington, DC 20006
(202) 785-0600
joseph.vaneaton@bbklaw.com
Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas, and Texas Coalition of Cities for Utilities Issues

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue NW, Suite 404
Washington, DC 20015
(202) 362-0636

Thomas D. Bunton
Senior Deputy County Counsel
COUNTY OF SAN DIEGO
1600 Pacific Highway, Room 355
San Diego, CA 92101
(619) 531-6456
Counsel for Petitioner
County of San Diego, California

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