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

REPLY BRIEF FOR RESPONDENTS INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; CITY OF CARLSBAD, CALIFORNIA; AND CITY OF DUBUQUE, IOWA IN SUPPORT OF PETITIONERS

PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondents in Support of Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

REPLY BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONERS

Both the horizontal separation of federal powers and the vertical protections of federalism prohibit *Chevron* deference in this case. Only Congress can authorize agency action, and the courts must adequately police the bounds of that authority. Deference to an agency that possesses regulatory authority is a straightforward application of *Chevron*. Deference to an agency on the threshold question of whether it possesses the very regulatory authority that would justify deference is simply an abdication unjustified by the theory of *Chevron* and at odds with bedrock principles of the separation of powers. Basic principles of federalism point in the same direction. Here, the federal agency not only seeks to enlarge its jurisdiction based on statutory ambiguity, but to do so at the expense of state and local authorities. Courts applying ordinary principles of statutory construction would demand a clear statement before recognizing such an intrusion into areas of traditional state and local control. An ambiguous grant of authority to an agency is no substitute for a clear statement.

The Federal Respondents' response to all this is to point to a handful of cases in which this Court has applied deference to questions that arguably implicate an agency's jurisdiction or state and local authority. But such "drive-by" rulings that did not directly consider the issue are no match for later cases of this Court that expressly declined to defer when agency aggrandizement or federalism considerations were at play. The Federal

Respondents' remaining contention is that the line between jurisdictional and non-jurisdictional questions is too difficult to police. But this Court has rejected such arguments before. Nothing would be easier to administer than a bright-line rule that says agencies are always entitled to deference. But in a variety of contexts this Court has established threshold tests that courts must apply before deferring to an agency. And none of those other rules—all of which present some difficult questions at the boundary—is more conceptually important than the principle that an agency is entitled to deference only on matters within its regulatory authority. In the end, there is simply no substitute for the courts determining that threshold question for themselves as a matter of plain old, non-deferential statutory construction.

ARGUMENT

I. Agencies' Jurisdictional Assertions are Not Entitled to *Chevron* Deference.

A. Granting Deference on Jurisdictional Questions Would Make Nonsense of the *Chevron* Doctrine.

1. Courts must determine the scope of an agency's jurisdiction *before* applying *Chevron* deference. As a doctrinal matter, this conclusion flows directly from the *Chevron* framework itself. The entire justification for an agency receiving deference is the necessary premise that "Congress delegated authority to the agency generally to make rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In the

absence of that premise—which must be established by ordinary principles of judicial review—there is no justification for giving special deference, beyond *Skidmore* deference, to an agency's construction of a statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (explaining that courts will "defer to the 'executive department's construction of a statutory scheme it is *entrusted to administer*'" (emphasis added) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

It is thus nothing short of incoherent to suggest that *Chevron* principles support giving deference to the agency in establishing the essential precondition for *Chevron* deference. *Chevron* deference is premised on the idea that an agency's views on ambiguous statutory language should be granted special solicitude *because* Congress has granted the agency authority to regulate the relevant subject matter. That rationale does not hold if an agency does not have jurisdiction over the subject matter it seeks to regulate. Thus, before granting deference, it is necessary for courts first to ascertain whether the agency has jurisdiction—*i.e.*, whether *Chevron* should apply at all. It cannot be that courts defer to the agency because a matter is within the agency's discretion, and that matter is within the agency's discretion because the courts defer, and so on and so forth. Any contrary rule would untether the *Chevron* doctrine from its conceptual basis and would stand on no firmer analytical foundation than "'turtles all

the way down.'" *Rapanos v. United States*, 547 U.S. 715, 754 (2006) (plurality opinion).

Indeed, in the most recent case to squarely confront the question, the Court refused to defer to an agency's view of its own statutory jurisdiction. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), this Court addressed the Attorney General's assertion of jurisdiction, under the Controlled Substances Act, to "prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." *Id.* at 249. "*Chevron* deference," this Court emphasized, "is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id.* at 258. As with the FCC here, the Attorney General possessed at least some regulatory authority under the statute; the question was whether he possessed jurisdiction over the specific matter he sought to regulate. *See id.* at 258–59.[1]

---

[1] Though *Gonzales* suggested in passing that the FCC's regulatory authority will often be "'clear,'" because the agency has "'broad power to enforce all provisions of the statute,'" *see also* Br. for Fed. Resps. at 35, that brief reference to the Communications Act in the midst of an opinion about the Controlled Substances Act did not purport to be an exhaustive consideration of the subject, as this dispute demonstrates. Indeed, the very question here is whether the FCC has regulatory jurisdiction under specific statutory provisions found in section 332(c)(7) of the Telecommunications Act of 1996—which expressly preserve local zoning authority over wireless siting applications, channel disputes to the courts, and conspicuously *do not* grant the FCC any express, competing

This Court addressed that question *de novo*. It set out to ascertain the Attorney General's regulatory authority under the Controlled Substances Act just as it would analyze any other matter of statutory construction, by looking to the text, structure, and history of the Act. *Id.* at 258–68. Following that classic exercise, the Court concluded that the Attorney General did not possess the claimed regulatory power—without according the Attorney General's jurisdictional assertion any special consideration under *Chevron*. *See Id.* at 268. And the *de novo* analysis in *Gonzales* parallels the Court's reasoning in *Mead*. There, as in *Gonzales*, this Court employed the traditional tools of statutory construction, without deferring to the agency's interpretation, to determine whether "Congress would expect the [Customs Service] to be able to speak with the force of law" on tariff classifications. 533 U.S. at 229. Again as in *Gonzales*, this Court answered that question in the negative as a matter of ordinary statutory construction.

Federal Respondents have no real answer concerning either the conceptual foundation for *Chevron* deference or these on-point precedents. Indeed, their position here is no different from their position in *Gonzales*—that *Chevron* deference is required anytime an agency has interpreted an ambiguous statute. *Compare* Br. for Pet'rs at 21,

---

authority over the subject matter. Moreover, *Gonzales*'s passing reference to the FCC's general authority does not suggest the FCC is always entitled to deference on questions of its own jurisdiction, but instead that the agency's jurisdiction will often be clear.

Gonzales, 546 U.S. 243 (No. 04-623), 2005 WL 1126079, *with* Br. for Fed. Resps. at 15, 20. This Court soundly rejected that argument in *Gonzales*, *see* 546 U.S. at 258, and it should do the same here.

The cases Federal Respondents cite to resist this inevitable conclusion all predate *Gonzales* and apply *Chevron* either in *dicta* or without squarely addressing whether deference is appropriate. In both *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 333, 341 (2002), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), the Court held that the statutes at issue were unambiguous and thus the question of deference was not essential to those decisions. In *Reiter v. Cooper*, 507 U.S. 258, 269 (1993), and *CFTC v. Schor*, 478 U.S. 833, 844 (1986), the Court granted deference without any discussion of whether doing so is appropriate for jurisdictional questions. Such "drive-by" exercises of deference have no precedential force, especially when the Court has squarely addressed the issue and resolved it to the contrary in later cases like *Mead* and *Gonzales*. *Cf. Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."). And Federal Respondents' remaining citations are a concurring opinion, a dissenting opinion, and a treatise—which even taken together are hardly "settled law." Br. for Fed. Resps. at 18.

As the foregoing demonstrates, this is not an effort "to carve out exceptions to *Chevron*'s

applicability." Br. for Fed. Resps. at 20 (internal quotation marks omitted). Rather, it is an effort to limit the *Chevron* doctrine to those contexts in which the foundational premise for the doctrine is satisfied. That is neither a retrenchment nor even a refinement of the doctrine; it is a straightforward application of it. The basic doctrinal logic of *Chevron* simply does not afford agencies deference on jurisdictional matters.

2. Nor do the subsidiary rationales underlying the *Chevron* doctrine support deference on jurisdictional questions. Federal Respondents suggest (at 21) that agencies' ability to "collect and evaluate the facts" make them better equipped than courts to define the bounds of their regulatory power. But questions of statutory jurisdiction are legal matters that require no technical expertise or the balancing of policy considerations. Adversary representation of those competing theories of statutory construction should more than suffice.

Moreover, to the extent that an agency's expertise would bear on a jurisdictional question, courts will not ignore that expertise. When *Chevron* deference does not apply, *Skidmore* deference does. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Mead*, 533 U.S. at 234–35. Courts will therefore grant an agency's interpretation of its own jurisdiction "a respect proportional to its 'power to persuade.'" *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). This includes the agency interpretation's "thoroughness, logic, and *expertness*, its fit with prior interpretations, and any other sources of weight." *Id.* (emphasis added). Thus,

while an agency's relative expertise will properly inform a court's interpretation of the agency's statutory jurisdiction, an *unpersuasive* agency interpretation of the scope of its own statutory jurisdiction will not *bind* the court.

Federal Respondents' argument (at 21) that "an agency can announce an interpretation with nationwide effect" may be true, but it is irrelevant. So can this Court, and although lower federal courts' statutory decisions do not have nationwide effect (despite the occasional effort to enter a nationwide injunction), that is by design. On ordinary issues of statutory construction it is a virtue not a vice that multiple courts of appeals can consider the question and this Court can intervene when there is a split of authority. Moreover, the government's identification of nationwide uniformity begs the question. An agency's ability to resolve a statutory ambiguity nationwide is desirable only to the extent the question is within the agency's authority to resolve. If not, the imposition of a nationwide rule in one fell *ultra vires* swoop is that much worse than *ultra vires* action of more modest impact.

B. Granting Deference on Jurisdictional Questions Would Violate the Separation of Powers.

Constitutional first principles also foreclose affording *Chevron* deference to an agency interpreting the scope of its own jurisdiction. It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

"An agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). This is because our Constitution vests all legislative power in Congress. *See* U.S. Const. art. I, § 1. Administrative agencies are limited to implementing congressionally-enacted legislation. *See* U.S. Const. art. II, § 3, cl. 5 (Take Care Clause). And the judiciary is uniquely tasked with interpreting the metes and bounds of Congress' enactments, *see* U.S. Const. art. III, § 1, even when an agency claims to act pursuant to its statutory authority, *see, e.g.*, *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *Gonzales*, 546 U.S. at 258–68. Allowing agencies to set the bounds of their own jurisdiction would flatly violate this horizontal separation of federal powers.

It makes no difference that agencies will on rare occasions disclaim authority. *See* Br. for Fed. Resps. at 26–27. Although a hammer may on occasion take a pass on something that bears some resemblance to a nail, that is not the natural tendency or a sound basis for constructing a rule of deference or a theory of the separation of powers. The natural tendency is for agencies to view even an arguable grant of statutory authority as a mandate for regulation—as the FCC does here, as the Customs Service did in *Mead*, and as the Attorney General did in *Gonzales*.

And *Chevron*'s first step does not eliminate this constitutional problem, *see* Br. for Fed. Resps. at 27, in cases like this where the agency demands deference beyond *Skidmore* at step two of the *Chevron* analysis. Under Federal Respondents' rule, when a statute contains ambiguity, but the better, more persuasive interpretation would limit agency

authority, courts must adopt the agency's less persuasive but more aggrandizing construction.

Likewise, it makes no difference that *Chevron* deference applies only when the agency's interpretation is within reason. *See* Br. for Fed. Resps. at 28. While "reasonably" unlawful action may be entitled to qualified immunity, it is still unlawful, and there is no reason to allow unlawful or *ultra vires* agency action to proceed on the theory that "close counts." That is particularly true on matters of jurisdiction. The judiciary, for its part, requires much more than a "reasonable" basis to assure itself of its own jurisdiction—because courts, like agencies, can confer no authority to themselves. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

These principles apply with equal force when an agency otherwise possesses broad regulatory authority. In such circumstances, Federal Respondents appear to propose (at 30–32) a presumption in favor of jurisdiction, absent a clear statement from Congress *removing* jurisdiction from the agency. That rule would reverse the proper separation of powers. Agencies start with no delegated power; they are entirely creatures of congressional enactment. But if Congress must *grant* an agency jurisdiction to act, it is not Congress' obligation to state with clarity when it has *not*

granted such authority. To be sure, when interpreting a jurisdictional statute *de novo*, a court might consider the context and structure of the law as part and parcel of the ordinary exercise of statutory interpretation. But that would not translate into a *presumption* that an agency with jurisdiction over many related subjects has jurisdiction over the subject matter in dispute, especially when the subject matter implicates concerns, like federalism, not shared by the related issues.

The separation-of-powers problems raised by the government's extraordinary claim to deference even as to the bounds of its deference-enabling authority are no mere abstraction. Enabling agencies unilaterally to expand their jurisdiction in this manner poses a grave threat to individual liberty. The separation of powers exists, of course, as a means to check government intrusion on personal freedom. *See Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.'" (quoting Montesquieu, *Spirit of the Laws*, bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent trans. 1949)). Agencies already enjoy substantial discretion when exercising delegated authority. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). Allowing them to set the bounds of that authority would unconstitutionally compound that discretion into unchecked regulatory power. No doubt, this would only "encourage[] [an] agency to" interpret its jurisdiction broadly, "which [would] give it the power,

in future [rulemaking and] adjudications, to do what it pleases." *Talk America,* 131 S. Ct. at 2266 (Scalia, J., concurring).

C. Courts Can Distinguish Between Jurisdictional and Non-Jurisdictional Questions.

All that is left of Federal Respondents' argument is a fear that courts will be incapable of differentiating jurisdictional questions from run-of-the-mill questions of implementation. This is simply not so. As the American Farm Bureau *amici* amply demonstrate (at 26–37), drawing the line between jurisdictional and non-jurisdictional questions in the agency context is no more difficult than in the vast number of other circumstances where courts must draw such lines, and the need for drawing such lines is, if anything, greater. The potential for difficult decisions hardly warrants a rule granting agencies the power to expand their jurisdiction beyond statutory authorization.

The question of an agency's jurisdiction is at bottom one of statutory power: Has Congress granted the agency authority to regulate a certain person, place, or subject matter. Non-jurisdictional questions concern the implementation of that regulatory power once it has been confirmed to exist. The former concerns whether the agency may act at all; the latter concerns *how* the agency acts when it has the power to do so.

This case clearly illustrates the distinction. Both the FCC and the Court of Appeals understood that their analysis must proceed in two steps: (1) Does

the FCC have jurisdiction over state and local zoning procedures concerning wireless siting applications? If so, (2) Has the FCC adopted a permissible interpretation of the limitations set forth in section 332(c)(7) of the Telecommunications Act? (This second step, of course, would break down further to the two steps of the *Chevron* analysis.) Despite the Federal Respondents' protestation that the line is murky and artificial, neither the agency nor the court below had any trouble drawing this distinction and breaking their analysis into the antecedent jurisdictional question and the subsequent question of implementing section 332(c)(7)'s statutory terms.

Gonzales is similarly instructive. There, as here, it was clear that the necessary first question was whether statutory jurisdiction existed over the subject matter being regulated. Because this Court recognized that this jurisdictional question necessarily precedes any *Chevron* deference on the substance of the Attorney General's actions, it addressed the matter *de novo*. The same should occur here.

Federal Respondents' attempt to avoid this conclusion, again, relies largely on cases predating *Gonzales*. *See* Br. for Fed. Resps. at 24–25 (citing *Gulf Power Co.*, 534 U.S. 327; *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)). All of the cases cited by Federal Respondents applied deference either in *dicta*, *see Gulf Power*, 534 U.S. at 333 ("This is our own, best reading of the statute, which we find unambiguous.");

Your Home Visiting Nurse Servs., 525 U.S. at 453 ("The Secretary's reading … frankly seems to us the more natural—but it is in any event well within the bounds of reasonable interpretation …."), or in drive-by rulings that did not confront the distinction between jurisdictional and non-jurisdictional questions, *see Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011); *Gulf Power*, 534 U.S. at 341–42; *Riverside Bayview Homes*, 474 U.S. at 131; *Your Home Visiting Nurse Servs.*, 525 U.S. at 453; *Holly Farms*, 517 U.S. at 398–99. Indeed, the Federal Respondents' reliance on *Riverside Bayview Homes* is triply problematic. Not only does that decision not focus on the jurisdiction/non-jurisdictional distinction and predate *Gonzales*, it also predates this Court's related decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), which did *not* defer to jurisdictional assertions in nearly identical circumstances, *see infra*.[2]

Finally, the line between jurisdictional and non-jurisdictional questions is no more difficult to enforce than other tests for determining *Chevron*'s

---

[2] Even if Federal Respondents' citations were valid, at most they would demonstrate that this Court has, at times, gone in different directions on whether *Chevron* applies to jurisdictional questions, which is presumably why the Court granted *certiorari*. Setting aside precedential quibbles, it is clear that the logic of *Chevron*, the separation of powers, and this Court's federalism jurisprudence prohibit deference on jurisdictional questions.

applicability, and yet this line is far more vital. *Mead* already requires courts to determine if "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." 533 U.S. at 226–27. To the extent this inquiry differs from the jurisdictional/non-jurisdictional inquiry, it is no easier to administer. Likewise, before affording *Chevron* deference, courts must determine whether a statute confers authority on multiple agencies, *see, e.g.*, *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (citing *Bowen v. American Hosp. Ass'n,* 476 U.S. 610, 643 n.30 (1986)), and whether certain forms of agency policymaking possess the "force of law," *see, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). And before deferring to an agency's interpretation of its own ambiguous regulation, courts must determine whether that interpretation "'reflect[s] the agency's fair and considered judgment.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). Those inquiries can prove difficult in borderline cases, but such difficulties have hardly proven insuperable. The jurisdictional line is no different.

II. *Chevron* Deference Is Especially Inappropriate When an Agency's Jurisdictional Assertion Affects Traditional State and Local Authority.

Principles of federalism preclude *Chevron* deference here as well. For at least as long as it has applied the *Chevron* doctrine, this Court has required

a clear statement before a federal statute will be construed to interfere with traditional state functions, *see Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), or upset the balance between the national authority and state and local governments, *see Jones v. United States*, 529 U.S. 848, 858 (2000); *United States v. Bass*, 404 U.S. 336, 349 (1971). The application of that clear statement rule here is not an "exception" or "carve-out" to the *Chevron* doctrine. It is a separate constitutional rule of equal application that reinforces the correct result here. An unclear delegation of authority to a federal agency is hardly a clear congressional statement that the federal-state balance is to be altered. When an agency attempts to expand its jurisdiction at the expense of state and local governments, principles of both separation of powers and federalism demand that courts resolve the question as an ordinary exercise in statutory construction. And, as in any other exercise of statutory construction, well-settled principles demand something more than ambiguity to upset the traditional federal-state balance.

Like the separation of powers, "[f]ederalism secures the freedom of the individual." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *see also Printz v. United States*, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); *The Federalist* No. 51. This Court's clear statement rule presumes that "Congress does not readily interfere" with state and local authority and thus guarantees that "the States retain substantial sovereign powers under our constitutional scheme." *Gregory*, 501 U.S.

at 461. It recognizes that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

The FCC's assertion of jurisdiction here clearly threatens to trench on state and local zoning procedures. The FCC's rule imposes universal, rigid limits on those procedures. It makes no difference that section 332(c)(7) already set forth *some* clear limitations. The question is whether Congress clearly authorized the FCC to go further, and the answer is no. The Federal Respondents essentially concede as much with the suggestion (at 38) that the FCC acted only to "clarify" an already preemptive statutory provision. Ambiguous statutes require clarification; clear statements do not.

This is precisely how this Court has reconciled the clear statement rule and the *Chevron* doctrine in the past when it has addressed the issue expressly. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, this Court rejected the government's plea for deference to the Army Corps of Engineers' assertion of jurisdiction over intrastate waters that serve as habitats for migratory birds, because there was no "clear indication that Congress intended that result." 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *see also Rapanos*, 547 U.S. at 738

("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

Federal Respondents do not mention these cases, nor explain why their reasoning does not apply. Instead, they cite *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), which is unavailing for multiple reasons. First, *Smiley* squarely held that *Chevron* deference "extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws," *id.* at 739, and never viewed the matter as a jurisdictional question. It is, at best, another drive-by ruling predating Supreme Court decisions directly on-point. Equally important, *Smiley* did not address a disruption of state or local power and thus did not involve the clear statement rule. Rather, it concerned the Comptroller of the Currency's interpretation of a federal banking law that preempted a contrary state law. Here, by contrast, the FCC seeks to impose deadlines on state and local government procedures—which strikes to the heart of the federal balance of power—and thus the clear statement rule applies.

The no-deference rule thus reconciles the clear statement rule with the plain logic of *Chevron*. When the clear statement rule is satisfied through unmistakable statutory language, no resort to *Chevron* is even necessary. And when a statute is silent or ambiguous on regulatory jurisdiction over

state or local functions, a precondition for *Chevron* deference, then the requisite clear statement is missing. This doctrinal syllogism is consistent with the logic of our Constitution's horizontal and vertical separations of power. An act of Congress that "'significantly change[s] the federal-state balance,'" *Jones*, 529 U.S. at 858 (quoting *Bass,* 404 U.S. at 349), is a remarkable event that requires unambiguous action by both houses of the legislature and approval by the President. Regulatory actions that disrupt the federal structure must clearly derive from such legislative authorizations. The courts must ensure this is so as a core exercise of judicial review, and not as an exercise in deference to even unpersuasive agency intrusions into areas of traditional state and local concern.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W., Ste. 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

January 9, 2013

Counsel for Respondents in Support of Petitioner