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.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENOR-RESPONDENT CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

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QUESTION PRESENTED

Whether a court should apply *Chevron* to review—and thus potentially defer to—an agency's determination of either the existence or scope of its own statutory authority, or instead decide such questions *de novo* as a matter of traditional statutory construction.

CORPORATE DISCLOSURE STATEMENT

Cellco Partnership d/b/a Verizon Wireless ("Cellco") has four partners. Two of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Mobile Systems, Inc. and GTE Wireless Incorporated (collectively, the "Verizon Partners"). Neither of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). Neither of the Vodafone Partners is publicly held. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

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BRIEF FOR INTERVENOR-RESPONDENT CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

INTRODUCTION

This case presents a particularly important question of administrative law—whether a court should apply the familiar two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when reviewing an agency's interpretation of its own jurisdiction, *i.e.*, its substantive authority to regulate in a particular area or with respect to certain entities. The answer to that question is "no."

This answer logically flows from *Chevron* and its progeny, as well as from the important constitutional principles upon which that precedent is based. As all of those sources of law make clear, agencies have no authority save that affirmatively delegated to them by Congress. Thus, although agencies enjoy some judicial deference when they fill in the details of a statutory scheme that Congress has charged them with administering, a "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). Accordingly, an agency's claim to deference for a given decision requires a threshold determination whether Congress delegated authority over that decision to the agency. That threshold determination, in turn, is one that a reviewing *court* must make *de novo*, using traditional tools of statutory construction: because delegation is a *precondition* to deference, there can be no deference in deciding whether that precondition has been satisfied.

In addition, resolving questions concerning the existence or scope of agency authority do not involve the interstitial policymaking or specialized technical expertise that underlie the deference accorded under *Chevron*. They are instead quintessentially legal matters that courts routinely resolve. Nor do principles of political accountability counsel in favor of deference to an agency's determination of its own power. Just the opposite: to hold *Congress* accountable for its judgments about whether and how much authority to delegate to agencies, it is critical that Congress make that judgment in the first instance rather than leave it to agency officials to define their own domain. This is all the more true in the case of "independent" agencies, such as the Federal Communications Commission ("FCC"), that do not answer to the President and are further insulated from the electorate than Executive Branch agencies.

To apply the *Chevron* framework to agency determinations of statutory authority would effectively empower agencies—rather than Congress—to establish the scope of their own regulatory powers, subject only to a lenient "reasonableness" check by the Judiciary. Given the natural tendency of agencies to seek continually to expand their authority, allowing them broad compass in this area would put the fox in charge of the regulatory henhouse.

Petitioners are wrong, however, to the extent they argue that resolution of the *Chevron* question requires reversal of the judgment below. The specific agency action at issue here is well within the FCC's authority to interpret the substantive provisions of the Communications Act, as established by this Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Accordingly, regardless of how

the deference issue is resolved, the judgment of the court of appeals should be affirmed.

STATEMENT OF THE CASE

1. Americans' use of wireless communications services has grown enormously over the past two decades, and it continues to grow at a rapid pace. Wireless carriers' ability to deliver the benefits of seamless nationwide coverage, however, depends on their ability to build wireless facilities. Though wireless service is widely acknowledged to be popular and beneficial, the facilities on which it depends can sometimes be unpopular with nearby property owners. Wireless tower siting requests thus can generate "pressure" on local governments "to tighten and strictly enforce zoning restrictions on wireless facilities, creating numerous pockets of resistance for wireless carriers." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 52 n.9 (1st Cir. 2009).

2. Recognizing this "'not in my backyard' ... problem," *id.*, and the threat it poses to a truly national wireless network, Congress acted in 1996 "to encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] … the impediments imposed by local governments upon the installation of [wireless] facilities," *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted). Congress's chosen means for doing so was to expressly—and in no uncertain terms—preempt state and local authority in certain respects by "impos[ing] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Those limitations are embodied in 47 U.S.C. § 332(c)(7).

Section 332(c)(7)(B) sets forth several "[l]imitations" on state and local government authority over the "regulation of the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(B)(i). In particular, the statute provides that state and local governments "shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii) (emphasis added). Congress further provided that, "[e]xcept as provided in this paragraph" including the limitations set forth in Section 332(c)(7)(B), "nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Congress created a judicial cause of action for "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with [Section 332(c)(7)]." *Id.* § 332(c)(7)(B)(v).

3. In 2008, CTIA—The Wireless Association® ("CTIA"), of which Verizon Wireless is a member, petitioned the FCC to address the substantial delays that wireless carriers encountered when seeking approval to build wireless facilities from state and local governments. CTIA explained that a significant and unacceptable number of wireless tower siting requests were being delayed past any reasonable period of time, contrary to the mandate of Section 332(c)(7)(B)(ii). CTIA presented evidence that of the 3,300 wireless siting applications

pending before local jurisdictions, approximately 760 had been pending for more than one year, and more than 180 applications had been pending for more than three years. CTIA also submitted examples of situations in which particular localities had delayed proceedings for multiple years, held dozens of hearings, and ultimately forced a wireless carrier to go to court before construction could begin. CTIA asked the FCC to declare specific periods beyond which any delay would be a failure to act within "a reasonable period of time," and therefore would violate Section 332(c)(7)(B)(ii).

Verizon Wireless, which has been directly involved in drawn-out controversies over tower siting, submitted substantial evidence supporting the need for action to address the delay of tower siting approvals. At the time, Verizon Wireless had more than 350 new site applications pending, of which more than half had been pending for more than six months and nearly 100 for more than a year.

On November 18, 2009, the FCC issued the *Ruling*, granting some of the relief requested in CTIA's petition. *See Petition For Declaratory Ruling To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C.R. 13994 (2009) ("*Ruling*"). As a threshold matter, the agency concluded that it had authority to interpret substantive provisions of the Act, such as Section 332(c)(7)(B), relying on this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Sixth Circuit's decision in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). It also concluded that its rulings were

consistent with Section 332(c)(7)(A) because it was not "imposing new limitations on State and local governments" but "merely interpret[ing] the limits Congress already imposed on State and local governments" through the express preemption provisions of Section 332(c)(7). *Ruling*, 24 F.C.C.R. at 14002 (¶ 25).

On the merits, the Commission determined that the record included "extensive statistical evidence" to support a finding of "unreasonable delays" and "obstruct[ion]." *Id.* at 14006 (¶ 34). It further found that local governments should generally be reasonably able to review applications for collocations (*i.e.*, the placement of additional radio antennas on existing structures) within 90 days and for new wireless facilities within 150 days. *Id.* at 14012 (¶ 45). Although CTIA, Verizon Wireless, and other industry participants presented evidence suggesting that it would be reasonable to process applications in half that time, the Commission decided that it should allow more time for "explor[ing] collaborative solutions," for localities "to prepare a written explanation of their decisions," and for "reasonable, generally applicable procedural requirements in some communities." *Id.* at 14011 (¶ 44).

Based on its findings, the Commission declared that a local government presumptively fails to act on a collocation application within a reasonable period of time if it does not act within 90 days for a collocation or 150 days for a new facility. *Id.* at 14012 (¶ 45). At that time, a "failure to act" has occurred within the meaning of Section 332(c)(7)(B)(v), and the provider may seek judicial review—though the local government remains free to show in court that, under the circumstances of a particular application, the time it took was reasonable. *Id.* at 14004-05 (¶ 32). The

Commission declined to adopt any presumption about the remedy for unreasonable delay, finding it more consistent with congressional intent for the courts to determine such questions on a case-by-case basis. *Id.* at 14009 (¶ 39).

4. The U.S. Court of Appeals for the Fifth Circuit upheld the *Ruling* on January 23, 2012. *See City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012). The court of appeals held that the Commission had statutory authority to issue the *Ruling*. *See id.* at 247-54. It began by considering whether the *Chevron* framework applied. It acknowledged that the circuits disagree over whether to "apply *Chevron* deference to disputes over the scope of an agency's jurisdiction," but concluded that Fifth Circuit precedent required it to apply *Chevron* to such disputes. *Id.* at 248.

Applying *Chevron*, the Fifth Circuit concluded that the statute did not "unambiguously indicate Congress's intent to preclude the FCC from implementing Section 332(c)(7)(B)(ii) and (v)." *Id.* at 250. As to Section 332(c)(7)(A), the court of appeals found that the provision "certainly prohibits the FCC from imposing restrictions or limitations [on state or local zoning authority] that cannot be tied to the language of § 332(c)(7)(B)," but does not itself speak to the question "[w]hether the FCC retains the power of implementing those limitations," *id.* It further held that Section 332(c)(7)(B)(v), although establishing judicial jurisdiction over "specific dispute[s] between a state or local government and persons affected by the government's failure to act," does "not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those" specific disputes. *Id.* at 251.

The Fifth Circuit then found the FCC's substantive interpretation of Section 332(c)(7)(B) to be reasonable. *See id.* at 252-54. Because the statutory terms "a reasonable period of time" and "failure to act" are ambiguous, the court held that it owed "substantial deference to the FCC's interpretation of those terms." *Id.* at 255. The court thus upheld the regulation as a permissible construction of the statute.

5. On October 5, 2012, the Court granted the petitions for certiorari limited to the question whether reviewing courts should apply *Chevron* to review an agency's determination of its own jurisdiction.

SUMMARY OF ARGUMENT

I. Under this Court's precedent, and consistent with bedrock principles of separation of powers and political accountability, Congress must always make the initial decision that certain activity in our national economy should be subject to federal regulation and then resolve the fundamental policy choices about how and by whom the activity should be regulated. *See, e.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928). When Congress has made those basic policy judgments and delegated authority to an administrative agency to implement the statutory scheme, the agency receives, under *Chevron*, a measure of judicial deference when it fills in statutory gaps in determining how best to accomplish its congressionally-assigned task. The core rationale for this rule is that it fulfills congressional intent by allowing the agency to address interstitial issues with its relatively greater technical expertise, while preserving political accountability for fundamental policy choices in the elected branches of the government.

The rule of *Chevron* also rests upon a crucial premise—namely, that Congress has, in fact, delegated authority over the matter in issue to the agency. If not, there is no basis for deference, because an agency can only act within the sphere of power delegated by Congress. Accordingly, an agency could only be eligible for judicial deference when acting within the scope of authority that Congress has actually delegated to it. A reviewing court must make the determination whether an agency is acting pursuant to congressionally-delegated authority *de novo* because such authority is a "precondition to deference under *Chevron*." *Adams Fruit*, 494 U.S. at 650. When the court determines that the agency's action is based on such authority, it may proceed to the familiar two-step inquiry under *Chevron*.

Moreover, deferring to an agency's judgment about the existence or scope of its own authority would contravene fundamental separation-of-powers principles underlying the *Chevron* framework. Courts defer to an agency's exercise of policymaking authority, but only *if* that authority has been properly delegated. Allowing agencies to decide in the first instance the limits of their policymaking power would improperly transfer legislative authority from Congress to the Executive, and override the Judiciary's exclusive authority to construe legislative delegations, as well as its duty to police the constitutional boundaries between the branches.

The pragmatic considerations that undergird *Chevron* also counsel strongly against deference to an agency's determination of its own statutory authority. First, although agencies may be experts on technical issues within their delegated domain, they "can claim no special expertise in interpreting a statute confining

its jurisdiction." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting). Second, deferring to an agency's determination of its own regulatory bounds would allow Congress to avoid political accountability for making the hard choices as to whether, how, and by whom particular sectors of our national economy should be regulated. While this is true with respect to all federal agencies, it is all the more important in the case of "independent" ones such as the FCC, which are outside the direct control of the President and further removed from political accountability than Executive Branch agencies. Third, agencies have strong institutional incentives to continually expand their powers, and deferring to agency determinations regarding the existence and scope of their own authority would allow them to expand their regulatory domain without any clear indication that Congress ever intended such a result. It is ultimately the Judiciary that much check such self-aggrandizement, for "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

II. To the extent Petitioners argue that resolution of the *Chevron* question requires reversal of the judgment in this case, they are wrong. The agency order at issue here merely interpreted, in a reasonable and well-supported manner, a specific, substantive provision of the Communications Act. In particular, the FCC determined what constitutes a "reasonable period of time" and a "failure to act" under Section 332(c)(7)(B), which speaks directly to the timing of state and local action on wireless tower siting requests. Congress plainly exercised its legislative authority in this area, and this Court has determined that the FCC possesses delegated

authority to interpret the substantive provisions of the Communications Act such as Section 332(c)(7)(B). *Iowa Utils. Bd.*, 525 U.S. at 378, 380. Accordingly, the judgment can and should be affirmed, even without deference to the FCC's judgment regarding its own authority to issue the *Ruling*.

ARGUMENT

I. COURTS SHOULD NOT DEFER TO AN AGENCY'S DETERMINATION AS TO THE EXISTENCE OR SCOPE OF ITS OWN AUTHORITY.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("Determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). That longstanding rule applies fully when the controlling statute is ambiguous as to the existence or scope of the agency's power—courts cannot defer to the agency's resolution of that ambiguity, because determining the limits of an agency's statutory power must be a purely judicial function.

As a general matter, when Congress has delegated to the agency the authority to perform a given task, but the statute is ambiguous or contains gaps in terms of the details as to how the agency is to accomplish that task, the *Chevron* doctrine requires courts to presume that Congress implicitly delegated to the agency the authority to resolve the ambiguity and address those interstitial details. An essential prerequisite for deference under *Chevron*, however, is a congressional delegation

of authority. An agency can only exercise authority that Congress has given it, and so a court can defer only to decisions made within the scope of that authority. Because deference itself requires a delegation of authority, deference cannot be applied to an agency decision about whether there has been a delegation of authority in the first place.

Such decisions are not subject to deference for additional reasons embedded within *Chevron* itself—including fundamental distinctions between the constitutional roles of the Legislative, Executive, and Judicial Branches, as well as pragmatic considerations such as relative institutional expertise and control over agency self-aggrandizement. As explained below, these principles all point to the same conclusion: no deference.

A. Because The *Chevron* Framework Assumes A Valid Delegation Of Authority, It Cannot Logically Be Applied To An Agency's Determination That It Possesses Delegated Authority In The Area At Issue.

1. a. The *Chevron* doctrine rests on the fundamental assumption that Congress has delegated to the agency policymaking authority over the particular matter at issue. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 158-60 (2000). Sometimes that delegation is explicit—Congress may leave a "gap" in the statute and instruct the agency to promulgate rules to fill that gap. *Chevron*, 467 U.S. at 843-44. The delegation may also be "implicit[]," in that Congress has left the statute "silent or ambiguous" with respect to a particular aspect of the job that it has assigned to the agency, *id.* at 843, while delegating to the agency the authority to administer

the statute through interstitial rulemaking or other administrative action, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). When Congress has delegated authority to an agency to perform a particular task, courts presume "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 123; *see also Mead*, 533 U.S. at 229. This so because Congress is likely to "focus[] upon, and answer[]" the "major questions" raised in a statute, leaving "interstitial matters" to agency resolution. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); *see also Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Chevron thus rests on a fundamental premise antecedent to its more familiar two-step inquiry. Before even engaging in that inquiry, the threshold question—which has been described as "*Chevron* Step Zero," Merrill & Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 910 (2001)—is whether Congress has delegated to the agency authority over the matter at issue. As this Court has explained, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit*, 494 U.S. at 650; *see also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (explaining that *Chevron* deference is only appropriate when a rule is "promulgated pursuant to authority Congress has delegated to the official"). Indeed such delegation is a necessary prerequisite to the exercise of *any* power by the agency: for an agency "literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's

power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Regents of Univ. Sys. v. Carroll*, 338 U.S. 586, 597-98 (1950) ("As an administrative body, the [FCC] must find its powers within the compass of the authority given it by Congress"). Thus, absent a proper delegation, an agency's decision is *ultra vires* and entirely invalid, not one that can or should be deferred to.

In short, the *Chevron* framework can logically apply to an agency's decision only to the extent that decision is actually within the power delegated to the agency by Congress. It follows that the *Chevron* framework does *not* apply where Congress did not delegate authority over the matter. *See Mead*, 533 U.S. at 231 n.11 ("If *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply." (quoting Merrill & Hickman, *Chevron's Domain*, at 872)). Thus, as the Court put it in *Mead*, "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency," the *Chevron* framework is wholly "'inapplicable.'" 533 U.S. at 230 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting)); *see also* Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 813 (2002); Sales & Adler, *The Rest is Silence: Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1533-34 (2009).[1]

1. Indeed, the Court has never "read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent.'" Breyer, *Judicial Review of Questions of Law and Policy*, at 373; *see generally Barnhart*, 535 U.S. at 222 (explaining "that whether a court should give [*Chevron*] deference depends in significant part upon ... the nature of the question at issue").

b. This Court has repeatedly resolved this "Step Zero" question *before* applying *Chevron*'s two-step inquiry. *Mead* made the point most directly, holding that *Chevron* does not govern all agency interpretations of ambiguous statutory provisions, but only those statutory ambiguities as to which Congress vested the agency with primary interpretive authority, *i.e.*, only where there is a "Step Zero" delegation. *Chevron* applies, the Court explained, only where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Then, and only then, is a reviewing court "obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.*

The Court followed the same "Step Zero" approach in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), and *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), applying the *Chevron* framework only after assuring itself that Congress clearly conferred authority upon the agency to speak with the force of law regarding the statutory ambiguity at issue. In *Pfennig*, the Court began its analysis by stating that "Respondent does not challenge the Board's authority to issue binding regulations," and only then moved on to applying *Chevron*'s familiar two-step test. 541 U.S. at 238-39. And in *Brand X*, the Court cited *Mead* in explaining that the *Chevron* framework applied precisely because the scope of the Commission's jurisdiction was *not* at issue. *See Brand X*, 545 U.S. at 981 ("[N]o one questions that the order is within the Commission's jurisdiction. Hence …

we apply the *Chevron* framework to the Commission's interpretation of the Communications Act.") (internal citations omitted).

The Court's decision in *Gonzales* adhered to that same approach, but ultimately held that the Attorney General lacked statutory authority to regulate physician-assisted suicide. At issue in that case was the Attorney General's construction of a phrase in the Controlled Substance Act ("CSA"). Although the phrase was concededly ambiguous, and the CSA vested the Attorney General with general "rulemaking power to fulfill his duties under the CSA," the Court concluded on *de novo* review that the Attorney General was "not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." *Gonzales*, 546 U.S. at 258. The inquiry, in other words, ended at "Step Zero": Congress did not delegate to the Attorney General the authority to adopt the rule at issue and thus, even though the statute was ambiguous, deference was inapplicable.

2. The foregoing discussion should suffice to establish that the *Chevron* framework cannot be applied in answering the threshold question whether the agency has authority over a given issue. As explained, the framework applies only when it is first established—at "Step Zero"—that Congress delegated authority over the question to the agency. As a matter of logic, a court cannot defer to the agency in answering that question: deference applies only *if* the agency has authority over the issue, so deference cannot be applied in deciding *whether* the agency has authority over the issue. To hold otherwise would be to say that *Chevron* deference applies to the question whether *Chevron* deference applies, which is nonsensical.

For this reason, the "Step Zero" question of agency authority over the issue is one that logically must be answered by a reviewing court in the first instance. Once the court determines, through the normal judicial tools of statutory construction, that Congress has delegated to the agency the power to act in the area at issue, the *Chevron* framework applies, and the court must defer to the agency's reasonable resolution of statutory ambiguities pursuant to that delegation of authority.

B. Constitutional Separation-Of-Powers Principles Also Preclude Deference To An Agency's Determination Of Its Own Statutory Authority.

Chevron's threshold requirement of a delegation of authority to the agency arises from fundamental separation-of-powers principles. When those principles are applied to the instant context, they preclude courts from deferring to an agency's determination of its own statutory authority.

As explained above, an agency can only act pursuant to congressionally-delegated authority, and thus *Chevron* deference necessarily can apply only to decisions made *within* that authority—not to decisions *about* that authority. Presuming from statutory silence or ambiguity that Congress delegated to an agency the authority to determine the breadth of its own power would be inconsistent with the Constitution's division of responsibilities among the branches. Only Congress can exercise legislative power, *see* U.S. Const. art. I, § 1, and an agency possesses only the power that Congress gives it, *see supra* pp. 12-13. The Executive Branch must "take Care that the Laws" enacted by Congress "be faithfully executed." U.S. Const. art. II, § 3. And the Judiciary has

the exclusive duty to say what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The traditional *Chevron* framework is consistent with those tenets, because it assumes that an agency, in resolving a statutory ambiguity concerning the execution of a task that Congress has assigned it, is merely implementing legislative policy that Congress established. By contrast, the same tenets should preclude an agency from resolving an ambiguity as to its own jurisdiction—subject only to lenient "reasonableness" review—because the agency then would be deciding for itself whether and to what extent legislative power should be delegated and how it should be exercised, thus shifting basic lawmaking power to the agency. That approach would violate both Congress's exclusive authority to exercise legislative power, including by delegation, as well as the Judiciary's exclusive authority to decide whether a statute effectuates such a delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("Whether [a] statute delegates legislative power is a question for the courts[.]").[2]

2. Respecting and enforcing the distinct constitutional functions of the different branches is not merely a formalistic or theoretical imperative. Rather, "[i]t is a familiar notion that the separation of powers doctrine generally serves to protect liberty … by dispersing governmental power." Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 645 (1996); *see, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 450, 452 (1998) (Kennedy, J., concurring) ("Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority" because "concentration of power in the hands of a single branch is a threat to liberty.").

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (quoting Montesquieu, Spirit of the Laws bk. XI, ch. 6, p. 173 (O. Priest ed., T. Nugent transl. 1949)). Yet that is precisely what deference to an agency's determination of its own authority would allow—agencies would answer for themselves the statutorily unanswered question about the existence or extent of their own power, and they would then exercise that self-endowed authority.

It is especially unwarranted to defer to an agency's determination of its authority because the foregoing principles suggest that Congress could not constitutionally delegate such decisions to an agency, even if it tried to do so expressly. This Court has long held that "'Congress may not delegate its purely legislative power.'" *J.W. Hampton*, 276 U.S. at 408 (quoting *Interstate Commerce Comm'n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912)); *see also Whitman,* 531 U.S. at 472 ("Article I, § 1 … vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers."). Congress can only delegate to an agency the power to execute the fundamental choices that Congress has itself made, and thus must set forth an "intelligible principle" to channel the agency's discretion for the delegation to be permissible. *Id.* Congress must not only make the basic policy calls at issue in delegating its authority to an agency, but Congress must be the one to decide whether to make such a delegation at all, *i.e.*, whether to grant an agency the substantive regulatory power to act in a particular area or with respect to particular entities. "It is the hard choices, and not the

filling in of the blanks, which must be made by the elected representatives of the people." *Indust. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). Regardless, it would be especially problematic to conclude that Congress had delegated such critical decisions *implicitly* through statutory silence or ambiguity. At the very least, rejecting the view that such silence or ambiguity can be read as an implicit delegation to an agency of the power to determine its own regulatory domain would avoid a serious constitutional question.

C. Pragmatic Considerations Of Institutional Expertise, Political Accountability, And Control Over Agency Self-Aggrandizement Also Preclude Deference To An Agency's Determination Of Its Own Authority.

The pragmatic considerations underlying *Chevron*—including institutional expertise, political accountability, and the administrative state's institutional tendency toward self-aggrandizement—also counsel strongly against deference to agency determinations of their own authority. This is so for the reasons explained below.

This Court's *Chevron* cases have emphasized that courts should defer to agencies' statutory gap-filling decisions (pursuant to delegated authority) because such decisions "involve[] difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 865-66). As *Chevron* itself observes, the "responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest

are not judicial ones," but instead are "vest[ed] ... in the political branches." 467 U.S. at 866 (citation omitted). *Chevron* thus reasoned that when an agency acts in a gap-filling capacity, its relatively greater expertise and political accountability leave it in a better position than courts to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66.

That principle obtains, however, only to the extent that Congress has, in fact, delegated policymaking responsibilities to the agency. While agencies may be expert in implementing the policymaking power Congress grants them, "agencies can claim no special expertise in interpreting a statute confining its jurisdiction." *Miss. Power & Light Co.*, 487 U.S. at 387 (Brennan, J., dissenting); *see also* Sales & Adler, *The Rest is Silence*, at 1535; Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1013-14 (1999). Construing a statute to identify the limits of agency authority requires no scientific or technical ability; rather, it requires facility with the familiar *judicial* tools of statutory construction.

Nor does the fact that agencies are thought to be more politically accountable than courts warrant judicial deference to an agency's determination of its own authority. *Chevron* reasoned that, when an agency has been granted authority to regulate, its relative political accountability provides a basis for deference in the case of statutory ambiguity because the interpretive question requires "a reasonable accommodation of conflicting

policies that were committed to the agency's care by the statute." 467 U.S. at 845 (citation omitted). When Congress has entrusted the agency with reconciling such conflicting policy choices, the agency (at least in the case of Executive Branch agencies) can theoretically be held accountable for the manner in which it does so. But it is Congress, not the Executive, that must be responsible for making the decision to delegate legislative power and delineating the scope of that delegation in the first place—as explained, "an agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Allowing administrative agencies to resolve statutory ambiguities concerning their own power would allow the responsible body—Congress—to *avoid* political accountability for its decisions about who should make difficult policymaking judgments. And it is far from clear that agencies themselves could be held politically accountable, in any realistic way, for decisions concerning their statutory power.

Another grave practical problem in this context is that agencies have a vested interest in expanding their regulatory reach beyond the domain delegated by Congress. Agencies, like other bureaucratic bodies, have systematic, "institutional interests in expanding [their] own power." *Miss. Power & Light*, 487 U.S. at 387 (Brennan, J., dissenting); *see also* Breyer, *Judicial Review of Questions of Law and Policy*, at 371 ("Courts sometimes fear that certain agencies suffer from 'tunnel vision' and as a result might seek to expand their power beyond the authority that Congress gave them."); Sales & Adler, *The Rest is Silence*, at 1551-54; Merrill & Hickman, *Chevron's Domain*, at 867. Allowing an agency to define its own authority would inevitably lead to the expansion of that authority—"which [would] give [the agency] the

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

Independent agencies—such as the FCC—present especially serious problems when it comes to the possibility of deference on questions of statutory authority. By design, such agencies are even less politically accountable than Executive Branch agencies. In addition to the fact that Congress must remain accountable for the fundamental policy choices about federal regulation, discussed above, another traditional rationale for deference to agency decisions made pursuant to delegated authority is that Executive Branch agencies are politically accountable to the President who, in turn, is ultimately accountable to the people for the actions taken by those in his administration. *See Chevron*, 467 U.S. at 866 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."); *see also id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."). That justification for *Chevron* deference has no force with respect to independent agencies because they are not directly within the President's control. *See* Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376-77 (2001) (arguing that *Chevron's* rationale suggests that courts should apply a less deferential standard to independent agencies). In the case of independent agencies, therefore, concerns about the lack of political accountability are at their zenith. This concern, combined with the general institutional interest of agencies to continually expand their authority, means that it is especially important that courts exercise their own judgment in policing the statutory boundaries of independent agencies. For any federal agency, but

particularly with respect to independent agencies, it is ultimately the Judiciary's responsibility to ensure political accountability and check self-aggrandizement: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951.

Indeed, a rule of deference to agency decisions regarding their own statutory authority inevitably would result in a major expansion of the powers of the administrative state. As a practical matter, such a rule would establish a buffer zone of "reasonableness" around existing agency authority, thereby automatically enlarging the sphere within which agencies could operate. *See* Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, at 1011-12. The boundaries of the administrative state would thus push outward from the domain delegated by Congress as independently construed by courts, to a larger, "jurisdiction plus" basis primarily defined by agencies. To prevent the very aggregation of power that the Framers predicted, and designed the Constitution's structural protections to avoid, this Court should hold that agencies cannot effectively determine their own authority.

D. Courts Can Identify Questions About The Existence Or Scope Of Delegated Authority, And To The Extent It Is Difficult To Do So In A Given Case They Should Err On The Side Of *De Novo* Review.

One concern that has been expressed about the applicability of the *Chevron* framework to questions of agency authority is that it is difficult to distinguish

between cases concerning the existence or scope of an agency's statutory authority, on the one hand, and those concerning the manner in which the agency exercises that authority, on the other. *See Miss. Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). But courts routinely distinguish between grants of, or limitations on, statutory authority and unreasonable exercises of authority already conferred. *See* Br. for Respondents International Municipal Lawyers Association ("IMLA") *et al.* 33-35; Br. for *Amici Curiae* National Governors Association *et al.* 21-31; Br. for *Amici Curiae* America Farm Bureau Federation *et al.* 26-37.

Certain kinds of questions obviously go directly to an agency's authority to act. For example, provisions that expressly limit an agency's authority, *see, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (involving express statutory limitation on FCC authority to regulate broadcasters as common carriers); 47 U.S.C. §§ 153(51), 332(c)(2) (express limitations on FCC authority to regulate certain entities as common carriers), indisputably seek to define the agency's authority, *see Miss. Power & Light*, 487 U.S. at 387 (Brennan, J., dissenting) ("[A] statute confining the agency's jurisdiction … by its nature … manifests an unwillingness to give the agency the freedom to define the scope of its own power."). The same is true with respect to statutes of limitations on governmental action, which "uniquely limit[] when an agency may act—*even within* otherwise lawful bounds." *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 767-68 (D.C. Cir. 2012) (Brown, J., concurring). Likewise, when agencies seek to expand their regulatory reach into entirely new areas involving "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, without any clear congressional mandate to do so, such action inherently presents questions

regarding their statutory authority over those areas, *see* Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, at 1011-12. In this case, the FCC recognized that it was obliged to establish its "authority" to interpret the relevant provisions of Section 332(c)(7), *see Ruling*, 24 F.C.C.R. at 14000-03 (¶¶ 20-26), and the court of appeals had no difficulty recognizing this as a question that went to the agency's delegated authority to do so, *see City of Arlington*, 668 F.3d at 247-54.

In fact, Congress itself has recognized the distinction between questions concerning the existence or scope of agency authority and questions concerning the reasonable exercise of delegated authority. The Administrative Procedure Act ("APA") requires courts to "set aside agency action … *in excess of* statutory jurisdiction." 5 U.S.C. § 706(2)(C) (emphasis added). The APA separately requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). The former provision is about agency action that is *ultra vires*, *i.e.*, undertaken without statutory authority to do so, whereas the latter provision concerns agency action that is based on a grant of delegated authority but implements that authority unreasonably or otherwise improperly. That the APA itself recognizes this distinction should eliminate any concern that the distinction does not exist, or that courts are not able to determine it on a case-by-case basis.

That is not to say that hard cases will not arise. But hard cases arise under any rule, and in these cases, as in others, courts "will make reasoned choices between the two examples, the way courts have always done." *Mead*, 533 U.S. at 237 n.18. The existence of close cases should

not lead judges to simply apply the *Chevron* framework across the board. If anything, the principles described above should resolve any significant doubt in a particular case in favor of concluding that a provision is subject to *de novo* review, so as to assure that agencies are not empowered to define the authority that they exercise. This approach would also encourage Congress to speak clearly in assigning authority to an administrative agency, further reinforcing important constitutional and administrative law principles. And Congress could always clarify an agency's jurisdiction in the event that it does want the agency to exercise authority in a particular area or over particular entities. *See, e.g.*, 21 U.S.C. § 387a (granting FDA authority over tobacco products after *Brown & Williamson*).

E. There Is No Issue In This Case That Warrants A Special Rule For Statutes Purportedly Implicating Matters Of Traditional State And Local Concern.

Contrary to the argument advanced by a group of intervenor-respondents led by the International Municipal Lawyers Association (the "IMLA Respondents"), *see* Br. for IMLA Respondents *et al.* 21-35, this case does not present any serious issue of state and local concern and, in any event, there is no reason to adopt a special rule regarding the applicability of *Chevron* for statutes that arguably implicate such concerns.

First, this is not a case about federalism. It is about the meaning of the statutory terms "reasonable period of time" and "failure to act," both of which reside in the express preemption provisions of 47 U.S.C. § 332(c)(7)(B).

Here, Congress expressly and deliberately "limit[ed]," *id.*, state and local governmental power with respect to the processing of requests for wireless tower siting. The only question here is whether the Commission or the Judiciary is responsible for interpreting those terms in the first instance. This question "is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Because Congress has "unquestionably" manifested its intent to take these issues "away from the States," *id.*, this debate does not implicate any significant federalism concern.

Second, the IMLA Respondents are incorrect. Whether or not to defer to an agency's determination as to its own authority should not turn upon the particular type of statute at issue in a particular case. Rather, it depends upon—and can be fully resolved by—the general principles of congressional intent and *horizontal* separation of powers concepts discussed above. *Chevron*, as explained above, is premised on the proposition that agencies, in determining how to perform particular tasks assigned to them by Congress, are better suited than courts to find a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 845 (quotation omitted). Questions that implicate federal-state relations are not excluded from that rationale.

To the contrary, one of the cases upon which *Chevron* relied was *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), which involved the question whether an FCC regulatory scheme was "intended to preempt any

state regulation of the signals carried by cable system operators," *id.* at 698. Yet in *Capital Cities*, this Court appropriately deferred to the FCC's determination to preempt the state scheme because it "'represent[ed] a reasonable accommodation of conflicting policies' that are within the agency's domain." *Id.* at 700 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). In addition, the Court has applied the *Chevron* framework in reviewing agency interpretations of federal statutes preempting state law. *See, e.g.*, *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (applying *Chevron* to an interpretation by the Office of the Comptroller of the Currency to a provision of the National Bank Act preempting certain state substantive laws affecting banks). The same approach is appropriate here.

Third, this argument does not appear to have been pressed below, and certainly was not passed upon by the Fifth Circuit. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court … is one of final review, not of first view.") (internal quotation marks omitted). Indeed, any decision limited to this ground would prevent the Court from answering the question on which it granted review—whether *Chevron* applies in cases involving agency determinations of their own jurisdiction, not just that subset of cases involving preemption provisions. The Court should provide guidance to the lower courts in the many cases that do not involve fairly unusual provisions such as Section 332(c)(7)(A)—including, most notably, those that comprise the circuit split here. *See, e.g., N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002).

II. THE FCC'S AUTHORITY TO INTERPRET SUBSTANTIVE PROVISIONS OF THE COMMUNICATIONS ACT SUCH AS SECTION 332(c)(7)(B) IS WELL ESTABLISHED.

To the extent that Petitioners argue that resolution of the *Chevron* question in their favor requires reversal of the judgment below, they are wrong.[3] This Court previously decided, in a case paralleling this one, that Congress has delegated to the FCC the authority to interpret, in a legally binding fashion, the substantive provisions of the Communications Act. That decision controls this case.

The statutory provision at issue here, Section 332(c)(7)(B), is a substantive provision of the Communications Act that expressly preempts state and local barriers to competitive wireless entry. Among other things, Section 332(c)(7)(B) includes a requirement that local review of a wireless facility siting application be completed in a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). In addition, Section 332(c)(7)(B) authorizes any person "adversely affected by" a state or local government's "failure to act" to, "within 30 days after such … failure

3. Although Petitioners' argument regarding the FCC's power to issue the *Ruling* appears to be outside the scope of the question on which the Court granted certiorari, they nevertheless urge the Court to address that question and hold, on *de novo* review, that the FCC lacked authority to do so. *See* Br. for Petitioners City of Arlington *et al.* 31-44; Br. for Petitioner Cable, Telecommunications and Technology Committee of the New Orleans City Council 21-25, 32-38. Because Petitioners have elected to argue the merits of the FCC's statutory authority, Intervenor-Respondent Verizon Wireless addresses the issue in support of Respondent FCC and its underlying decision.

to act, commence an action in any court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v).

The question at the heart of this litigation was whether the FCC possesses the authority to interpret the terms "reasonable period of time" and "failure to act" in 47 U.S.C. § 332(c)(7)(B). That question is fully answered by this Court's decision in *Iowa Utilities Board*, which addressed a directly analogous question of FCC authority. There, as here, Congress acted in an area of traditional state control—specifically, local telephone markets. It did so by amending the Communications Act to impose certain duties on local telephone companies to make available wholesale facilities and services to competing carriers, and by prescribing the pricing standards that would apply to those facilities and services. *Iowa Utils. Bd.*, 525 U.S. at 371-73 (discussing 47 U.S.C. § 251 *et seq.*). In the event of disputes, the pricing standards would be applied through arbitration proceedings conducted by state regulatory commissions, subject to challenge in federal district court. *Id.* at 372-73.

Notwithstanding the roles of state governments and federal district courts under the statutory scheme, a feature of Section 332 as well, this Court concluded that the FCC had authority to interpret the pricing standard set out in the statute and to require state regulatory commissions to adhere to its interpretation. *See id.* at 377-78. In so holding, the Court relied principally upon Section 201(b) of the Communications Act, which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The Court found that this provision "means what it says"

and delegates to the FCC the authority to interpret and implement the "substantive" provisions of the Act. *Iowa Utils. Bd.*, 525 U.S. at 378, 380.

The same is true here. Section 332(c)(7)(B) is unquestionably a substantive provision of the Act; it imposes certain limitations on state and local governments when it comes to wireless tower siting. Just as the FCC had authority to interpret the pricing provisions at issue in *Iowa Utilities Board*, it likewise has authority to interpret the standard for timeliness in the provision at issue here.

Petitioners contend that Congress withdrew such interpretive authority from the Commission in Section 332(c)(7)(A). But nothing in Section 332(c)(7)(A) "displace[s]" the Commission's "explicit" authority to interpret and implement Section 332(c)(7)(B). *Iowa Utils. Bd.*, 525 U.S. at 385. Section 332(c)(7)(A) states that, "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The key phrase in this savings clause is: "[e]xcept as provided in this paragraph." That language only reinforces that the substantive provisions of Section 332(c)(7)(B) do in fact "limit or affect the authority of a State or local government." *See City of Arlington*, 668 F.3d at 250 ("§ 332(c)(7)(A), when it states '[e]xcept as provided in this paragraph,' removes § 332(c)(7)(B)'s limitations from its reach and recognizes those limitations as legitimate intrusions into state and local governments' traditional authority over zoning decisions."). Section 332(c)(7)(A) thus does not limit the effect of the preemption

provisions in subparagraph (B) or the Commission's ability to interpret them. Accordingly, there is no basis for overturning the judgment of the court of appeals, for the FCC ultimately committed no legal error here.

CONCLUSION

For the foregoing reasons, this Court should hold that the *Chevron* framework does not apply to agency determinations of their own authority. Nonetheless, the judgment of the court of appeals should be affirmed because, contrary to Petitioners' assertions, the FCC clearly possessed delegated authority to interpret Section 332(c)(7)(B).

Respectfully submitted,

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