Nos. 11-1545 and 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

BRIEF OF *AMICI CURIAE* T-MOBILE USA, INC. AND THE COMPETITIVE CARRIERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

T-Mobile USA, Inc. ("T-Mobile") is a national provider of wireless voice, messaging, and data services to over 33 million subscribers. It provides its services through a cellular radio telephone network comprised of more than 50,000 cell sites (*e.g.*, cell phone towers), switching facilities and other network elements. The federal government licenses blocks of radio frequency spectrum to wireless carriers like T-Mobile. This spectrum is used to provide wireless telecommunications services to customers through cell sites. The location, construction and modification of cell sites are subject to limited state or local permitting authority.

The Competitive Carriers Association ("CCA"), initially founded in 1992 by rural and regional wireless carriers, is now the nation's leading association for competitive wireless providers serving all areas of the United States. Today, the licensed service area of CCA's over 100 carrier members covers more than 95 percent of the nation, which depends on the cell towers and other cell sites permitted by state and local authorities consistent with the Telecommunications Act of 1996.

The interest of *amici* arises from the necessity of obtaining wireless siting approval from state and local authorities, and the need for a fair, reasonable

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[1] By a filing dated November 6, 2012, all parties have consented to the filing of *amici curiae* briefs supporting either party. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

and timely process in aid of expanding and improving the national wireless infrastructure. T-Mobile and CCA's other carrier members generally must obtain state or local zoning approval before building or improving cell sites. Because the failure to act on a request for approval within a reasonable time, or at all, operates as an effective denial, *amici* have a strong interest in prompt decisions on wireless siting applications. In response to delays in receiving those decisions, to ensure reasonably timely local action on such requests, *amici* urged Congress to enact what is now § 332(c)(7) of the Communications Act. Through their participation in the administrative proceeding below, *amici* supported the Federal Communications Commission's adoption of the Declaratory Ruling challenged by petitioners and their *amici*.

SUMMARY OF THE ARGUMENT

At least eight decisions of this Court assessing challenges to agency jurisdiction to issue gap-filling interpretive guidance – including at least three involving the Federal Communications Commission ("FCC" or "Commission") – have agreed that even where agency jurisdiction is at issue, considerable deference is owed to the construction of a statute by those charged with its execution. Deference to agency jurisdictional decisions is warranted particularly where the agency is working at the narrow end of the spectrum of agency authority – where it is working interstitially to provide interpretive guidance concerning particular words or phrases, in the heartland of agency authority. *See, e.g., Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002); *Barnhart v. Walton,* 535 U.S. 212, 222 (2002). Deference on jurisdictional issues may be

appropriate under other circumstances as well, but it is particularly warranted here given the limited nature of the FCC's assertion of jurisdiction.

In assessing whether Congress has delegated power to administer a challenged statute, particularly in FCC cases, the Court has consistently looked to the broad authority Congress has delegated. It has then turned to the more specific provisions at issue only to ask whether the power to administer otherwise granted has been displaced. By focusing on 47 U.S.C. § 332(c)(7) in the first instance, and ignoring 47 U.S.C. §§ 201(b), 151, 154(i), and 303(r), petitioners and their *amici* depart from this Court's consistent approach.

No act of Congress and no authority from this Court direct courts to narrow the jurisdiction otherwise afforded by Congress simply because the interpretive guidance being offered arguably affects state authority. The very nature of the jurisdiction afforded the FCC necessarily entails the power to reduce "impediments imposed by local governments upon the installation of facilities for wireless communications," and that was precisely the means Congress employed in enacting §332. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115 (2005). The decision to leave local authorities with the power to make local siting decisions – and thus the decision to prevent the Commission from preempting that local power altogether – reflected no withdrawal of the Commission's usual power to provide interstitial interpretive guidance about the lines that Congress itself drew. The FCC's ruling at issue here added no new federal limitations, but simply provided greater clarity with respect to the line Congress drew, which the Commission, because of its expertise and fact-

finding capacities, was far better suited than courts to do.

Although either statutory text or legislative history might properly counsel against deferring to an agency's delegated gap-filling authority in any given case, neither supports the petitioners here.

ARGUMENT

DEFERENCE TO AN AGENCY'S DETERMINATION OF ITS INTERPRETIVE JURISDICTION IS APPROPRIATE WHERE CONGRESS HAS DELEGATED GAP-FILLING AUTHORITY TO THE AGENCY WHICH USES THAT AUTHORITY IN AREAS OF CORE COMPETENCE CONSISTENT WITH STATUTORY ENACTMENTS.

A. *CHEVRON* DEFERENCE APPLIES WHEN CONGRESS INTENDS TO DELEGATE AUTHORITY TO AN AGENCY TO INTERPRET EXISTING STATUTORY LIMITATIONS.

The Court has long recognized that many statutes enacted by Congress do not anticipate and resolve all the issues that may arise with exact precision, and that an agency's interpretive guidance for those statutes is entitled to judicial deference where Congress clothed the agency with the authority to interpret or administer the statute. As Justice Stevens's influential opinion for the Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) held, "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

Chevron held that a reviewing court should defer to an agency's interpretation of the statute it administers when the statute contains ambiguities or gaps (*Chevron* Step 1), and if the agency's interpretation is "a permissible construction of the statute" (*Chevron* Step 2). *Chevron*, 467 U.S. at 842-43.

As the doctrine's rationale and classic formulation make plain, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see*, *e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

Thus, before a reviewing court engages in a *Chevron* analysis of an agency's challenged statutory interpretation, the court must initially ascertain that the agency does administer the statute at issue, so as to ensure that it possesses the necessary "interpretive jurisdiction" to clarify statutory ambiguities or fill in gaps. This initial determination of interpretive jurisdiction is referred to, by petitioners and others, as "*Chevron* Step 0." *See* City of Arlington Pet. Br. 16-17; *see generally* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).

In enacting the 1996 Act, a pro-competitive and deregulatory statute, Congress knew that state and local governments sometimes hindered the rapid deployment of new telecommunications services by delaying consideration of or denying cell site permit applications. To that end, Congress enacted specific limitations on state and local regulatory authority over wireless facilities in 47 U.S.C. § 332(c)(7)(B).

More generally, Congress granted the FCC specific authority to remove barriers to the entry of new telecommunications services by enacting 47 U.S.C. §253(d) as part of the 1996 Act, which empowers the FCC to preempt the enforcement of any state or local government statute, regulation or legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Three years earlier, Congress had directed the Commission to produce an annual report on the state of competition in the mobile service marketplace that ensured its continuing attention to precisely the issues and evidence leading to the Declaratory Ruling. 47 U.S.C. § 332(c)(1)(C).

More recently, in response to perceived resistance by local authorities to national broadband deployment, Congress significantly narrowed the scope of the state and local zoning review that can be imposed on collocations to and modifications of existing towers and base stations used to provide wireless services in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("TRA"), codified at 47 U.S.C. §1455(a). In TRA Section 6003, Congress granted the FCC authority to "implement and enforce" Title VI of the TRA "as if this title is a part of the Communications Act of 1934." It is beyond argument that Congress intends the FCC to have a robust and vital role in helping Congress achieve the national goal of rapid deployment of new and competitive wireless services, to enable consumers to secure the benefits that derive from a healthy competition among wireless service providers.

Petitioners and their *amici* assert the Fifth Circuit erred in according *Chevron* deference to the FCC's determination. They insist that reviewing courts must ignore an agency's own assessment of its power to administer the statute, even when the agency has done no more than interpret the very words Congress used. They assert that to do otherwise would amount to appointing the fox to guard the henhouse. City of Arlington Br. 28. They also invoke federalism concerns, contending that deference to an agency's assessment of its own authority to interpret a statute it administers could allow the agency to tread on authority reserved for state and local government. City of Arlington Br. 12-13. Those arguments are incorrect. They ignore the extensive history of judicial deference to the FCC, particularly in upholding interpretations offered with respect to specific provisions enacted by Congress.

1. As Justice Scalia correctly concluded in his concurrence to *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380 (1988), the Court has long and repeatedly held that *Chevron* deference "applies to an agency's interpretation of a statute designed to confine its authority." The following cases, some of which Justice Scalia cited, support that proposition:

- *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969), where in deciding whether the FCC's jurisdiction extended to issuing rules governing personal attacks, the Court held that the Commission had such jurisdiction, relying on "the [ ] venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ."

- *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 260 (1975), where in deciding whether the NLRB had jurisdiction to decide that the National Labor Relations Act permitted employees to bring union representatives to disciplinary interviews, the Court held that the Board's exercise of jurisdiction "should have been sustained" because it was "a permissible construction" of the Board's power.
- *Bayside Enters., Inc. v. NLRB,* 429 U.S. 298, 304 (1977), where in deciding whether the NLRB had jurisdiction over employees who truck poultry to farms to feed chickens, the Court upheld the Board's jurisdiction on the ground that "regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order."
- *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 n.7 (1984), where the Court expressly *rejected* the argument that "because 'the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board," and noted that it had never "held that such an exception exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here."

- *Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985), where in deciding whether the EPA had power to modify certain requirements, which modifications were argued to be beyond its jurisdiction, the Court afforded *Chevron* deference to the agency on the ground that "the statutory language does not foreclose the Agency's view of the statute. We should defer to that view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress."
- *CFTC v. Schor*, 478 U.S. 833, 844-45 (1986), where the Court deferred to the CFTC's determination that the Commodity Exchange Act grants the CFTC "the power to take jurisdiction over" state law counterclaims to federal reparations claims, holding that the CFTC's "interpretation of the statute it is entrusted to administer" was entitled to "considerable" deference.
- *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988), where in deciding whether the FCC had jurisdiction to preempt state and local technical standards governing the quality of cable television signals, the Court noted that "in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area," and held that courts should defer to such determinations "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned" (internal quotations and citation

omitted).

- *Nat'l Cable & Telecomms. Ass'n v. Gulf Power, Inc.,* 534 U.S. 327, 333, 342 (2002), where in upholding FCC jurisdiction to impose two regulatory provisions, the Court observed that it would have deferred to the FCC's view of its jurisdiction had the jurisdictional grant been ambiguous.

Despite petitioners' attempt to distinguish those cases, the holdings in each support the conclusion that the Court has repeatedly deferred to agencies' readings of their jurisdiction.[2]

2. As the Court has suggested, deference to an agency at *Chevron* Step 0 is particularly appropriate when the agency is engaged in gap-filling, providing interpretive guidance as to key statutory terms used by Congress. *See Barnhart v. Walton,* 535 U.S. 212, 222 (2002); Sunstein, *supra,* 92 Va. L. Rev. at 217 ("[W]hether an agency's decision is 'interstitial' has now become highly relevant to the question of deference"). Whatever deference may be appropriate (or not) where an agency is using a broad delegation of authority to launch into new initiatives beyond any Congress may have anticipated, the case for deference must be at its apogee where an agency has

[2] That Congress intended the FCC to retain its delegated power as to § 332(C)(7)(B) is the conclusion reached by the Sixth Circuit when addressing another subsection, § 332(c)(7)(B)(i)(II), directing that local siting regulation "shall not prohibit or *have the effect of prohibiting* the provision of personal wireless services." *See, e.g., T-Mobile Cent., LLC v. Township of W. Bloomfield*, 691 F.3d 794, 805 (6th Cir. 2012). The Sixth Circuit noted that the FCC had issued its interpretation after a split among the circuits, *id.*, based on its expertise and in a commendable effort to quell confusion.

unmistakable broad power and is using it simply to fill statutory gaps through the use of its expertise. The agency in this latter scenario is not drawing new lines, but merely making the ones that Congress established clearer and more definite.

When Congress leaves gaps in a statute for an agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. That is particularly so where the issue is sufficiently minor and technical that Congress likely would not have drilled down to the requisite level of detail, and the gap-filling would entail application of the agency's own experience and expertise within the constraints established by Congress. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

Petitioners concede that when Congress demonstrates the intent to delegate to agencies the authority to resolve statutory ambiguities and make interstitial judgments about the scope of federal law, those agencies are entitled to deference. City of Arlington Br. 11. As the Court explained in *Barnhart*:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the

> question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Barnhart, 535 U.S. at 222 (upholding the Social Security Administration's gap-filling interpretation of phrases in the Social Security Act as within its lawful interpretive authority).

Those considerations weigh heavily in favor of deference here. The FCC ruling at issue expressly provided an interpretation regarding matters resolved by Congress, albeit in broad strokes. Pet. App. 90a-92a, 142a. The Declaratory Ruling was the product of the agency's unique expertise and its understanding of the general problem posed by unreasonable and undue delay in multiple jurisdictions. *See* Pet. App. 96a-97a ("The evidence in the record demonstrates that personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services"); 98a ("the record shows that unreasonable delays are occurring in a significant number of cases"); 98a-106a (extensive findings on the need for gap-filling interpretation). Nor can there be any doubt that the Commission was far better situated and equipped to interpret what is generally a reasonable period of time for local decisions on applications to add personal wireless service facilities than courts could have developed in case-by-case adjudication, and to do so more quickly.

B. THE FCC'S AUTHORITY UNDER § 201(B), APPLIED BY THIS COURT IN *IOWA UTILITIES BOARD*, PROVIDES THE FCC WITH AUTHORITY TO INTERPRET UNDEFINED PROVISIONS OF § 332(C)(7)(B).

Without explanation, petitioners and their *amici* assume that the necessary delegation must be located in the statutory subsection that was the subject of the Commission's Declaratory Ruling, rather than in the broader statutory provisions delegating authority to administer the Communications Act. But multiple decisions from this Court make plain the error of that approach.

1. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-87 (1999), for example, the Court was faced with challenged regulations implementing provisions of the 1996 Act that were argued to be outside the FCC's jurisdiction. In holding that *Chevron* properly applied (*see id.* at 377-78, 397), the Court did not begin with, or limit itself to, the 1996 Act, but considered the Commission's jurisdiction under the Communications Act: "Since Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions." The Court followed that same approach in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), where in construing the Commission's responsibilities under provisions enacted with the 1996 Act, the Court looked to the delegation to administer the Communications Act, in which the 1996 Act's provisions were codified. *Id.* at

980-81. Section 332(c)(7), like the provisions at issue in those cases, was enacted as part of the 1996 Act.

Rather than insisting (as petitioners and their *amici* do) that any delegated power be framed squarely within the statutory provision under challenge, *Iowa Utilities* relied in the first instance on the Commission's basic authority under 47 U.S.C. § 201(b). It considered the provisions on which the FCC was offering interstitial interpretation not to see if the power to administer was granted in the first place, but only to ask whether the authority otherwise granted had been eliminated or displaced. *Iowa Utils.*, 525 U.S. at 385; *cf. City of N.Y. v. FCC*, 486 U.S. 57, 61, 69 (1988) (noting an absence of language in the Cable Act showing Congress would not have sanctioned the FCC's preemption of state and local cable television technical standards); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172, 177 (1968) (refusing to limit the FCC's authority when nothing in the language, history, or purpose of the Communications Act limits the FCC's authority; "we may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'") (internal citation omitted).

Notably, the Court rejected every attempt to use the later provisions to limit the FCC's previously conferred jurisdiction. Noting the "general authority" conferred by § 201(b), the Court criticized as "overly subtle" the attempts to narrow it by pointing to some word or phrase in (or missing from) the narrower statutes. Placing the burden of establishing carve-outs from that general power to administer squarely on the challengers, the Court framed the question as

whether the opponents had met their burden of showing "enough to displace that explicit authority." *Iowa Utils.*, 525 U.S. at 385; *see also id.* (asking whether challengers showed that the "Commission's § 201(b) authority is [ ] superseded," and holding that statutory provisions that "do not logically preclude the Commission's issuance" of interpretive guidance will generally not suffice).

The FCC's interpretation of § 332(c)(7)(B), suggesting that zoning authorities presumptively should be able to decide on wireless collocation and siting applications within 90 to 150 days, is clearly within its § 201(b) authority, and precisely the type of agency action that is entitled to deference under *Chevron*. "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency," *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 745, 742 (1996), because filling statutory gaps "involves difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomms. Ass'n,* 545 U.S. at 980.

Determining whether an agency has gap-filling authority may be "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, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845).

Especially where the FCC is concerned, there can be no doubt that Congress knows full well of this

Court's decisions and expects judicial deference to the FCC's interpretation.[3]

2. Deference to the FCC's interstitial interpretation may well be appropriate in other circumstances, although deference to an agency's assertion of jurisdiction to undertake broader initiatives may raise closer questions than are presented when an agency interprets ambiguous or undefined statutory language at the core of its responsibilities. *See, e.g., Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power, Inc.,* 534 U.S. 327, 342 (2002) (holding that because the "attachments at issue . . . fall within the heartland of the Act, [t]he agency's decision, therefore, to assert jurisdiction over these attachments is reasonable and entitled to our deference").

In this case, moreover, the conclusion (based on § 201(b)) that Congress intended courts to defer to delegated FCC authority used to interpret undefined statutory terms in § 332(c)(7)(B) is supported by at least two further factors: (i) the fact that the policy adopted is in the statute's heartland, aimed at

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[3] Among this Court's holdings according deference to the FCC's rules or orders are *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007); *Nat'l Cable & Telecomms. Ass'n*, *Inc.*, 545 U.S. 967; *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power,* 534 U.S. 327 (2002); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *City of N.Y.,* 486 U.S. 57; *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); and *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Each of these can fairly be characterized as according deference to agency determinations where the FCC's power to issue the determinations was challenged.

fostering competition in a nationwide system that would be beneficial to consumers, and (ii) the absence of any clear withdrawal of that authority in § 332(c)(7) or other good reason to find § 201(b) inapplicable. The conclusion is additionally supported by Congress's subsequent actions further narrowing the ability of local authorities to thwart the national interest in competitive mobile radio service nationwide. *See supra* at 6 (discussing 47 U.S.C. § 1455(a)).

Section 201(b) empowers the FCC to provide gap-filling interpretation: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[4] The Court has already determined that the authority Congress delegated to the FCC in § 201(b) "explicitly gives the FCC

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[4] *Amici* focus principally on the Commission's § 201(b) authority because it was so comprehensively addressed by this Court in *Iowa Utilities*. But both the Commission and the Fifth Circuit bottomed the Commission's jurisdiction on multiple provisions, including 47 U.S.C. §§ 151, 154(i), and 303(r). *See* Pet. App. 34a, 87-88a; *see also Brand X*, 545 U.S. at 980-81 (stating that §§ 151 and 201(b) "give the Commission the authority to promulgate binding legal rules"); *City of N.Y.*, 486 U.S. at 70 n.6 ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power"); *id.* at 67 (noting additional rulemaking authority under 47 U.S.C. § 154(i); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978) ("[I]t is now well established that this general rulemaking authority [in § 303(r)] supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable").

Congress subsequently further limited local authority concerning cell sites by enacting what is now 47 U.S.C. § 1455(a) and giving the FCC the power to "implement and enforce" that provision. *See supra* at 6.

jurisdiction to make rules governing matters to which the 1996 [Telecommunications] Act applies." *Iowa Utils.*, 525 U.S. at 380; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 58 (2007) ("Congress, in § 201(b), delegated to the agency authority to 'fill' a 'gap'").

Iowa Utilities' Chevron–based holding that the FCC possessed most of the disputed authority it claimed is part of a long line of authority deferring to the FCC's interpretation of its own statutory jurisdiction under those circumstances. *See*, *e.g.*, *Brand X*, 545 U.S. at 980-81 (holding §§ 151 and 201(b) of the Communications Act "give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction" when the FCC interpreted the applicability of the Communication Act's common carrier regulations); *Nat'l Cable & Telecomms. Ass'n, Inc.,* 534 U.S. at 333 (upholding the FCC's jurisdiction under the Cable Act over pole attachments for comingled television and internet services, and stating that if the statute had been ambiguous, the FCC's assertion of jurisdiction would have been entitled to deference).

C. THE FCC'S AUTHORITY TO INTERPRET § 332(C)(7)(B) IS CONSISTENT WITH CONGRESSIONAL INTENT TO BALANCE FEDERAL AND LOCAL INTERESTS, AS EVIDENT IN THE PLAIN LANGUAGE OF THE STATUTE

Recognizing that an effective national wireless telecommunications network requires the construction and improvement of a national system of cell

sites, and also that land use is generally regulated at the local or state level, Congress sought in the 1996 Act to balance competing federal and local concerns. *See, e.g.,* H.R. Rep. No. 104-204, pt. 1, at 1 (1995) (describing how Congress enacted the Telecommunications Act, in part, "to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technologies"); *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the [Telecommunications Act] to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies. One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers") (internal quotations and citation omitted).

The bargain Congress struck to further the national interest in a nationwide wireless telecommunications network began by first preserving local zoning authority: "[N]othing in this chapter 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). But local authority was expressly "limited" by various federally imposed standards and requirements, including the requirements that local authorities act on siting and collocation applications "in a reasonable period of time," refrain from "prohibiting the provision of personal wireless services," and refrain from discriminating between

"providers of functionally equivalent services." 47 U.S.C. §§ 332(c)(7)(B)(i), (ii); *see generally* Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996)(Conf. Rep.) (preserving state and local zoning authority "except in the limited circumstances as set forth in the conference agreement. . . . The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. . . . Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services.").

By enacting federal limitations on local authority, without defining in any detail the boundaries of those limitations, Congress left the door open for the FCC to engage in interstitial gap filling. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Iowa Utils.*, 525 U.S. at 397. The FCC's rulemaking authority under § 201(b) entitles it to deference when it determines, based on record evidence and its own expertise, that defining certain terms Congress included in the 1996 Act would be useful in furthering the Act's aims. In this instance, the FCC's exercise of authority to define what constitutes a "reasonable period of time" corresponds precisely to the role Congress expected the FCC to have when it enacted the 1996 Act.

Petitioners' protest that the FCC's interpretation of what constitutes a "reasonable period of time" for siting approval runs afoul of federalism concerns is wholly unwarranted, and unsupported by any of the

authorities cited by petitioners. The Court of Appeals correctly observed that § 332(c)(7)(B) "already acts to preempt these state laws by creating a federal time frame defined through reference to reasonableness." *City of Arlington v. FCC*, 668 F.3d 229, 253 (5th Cir. 2012); *see also Iowa Utils.*, 525 U.S. at 381 n.8 ("Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (under the Supremacy Clause of Article VI of the Constitution, a "federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."). And petitioners' suggestion that the separate statutory provision concerning pole attachments reflects a different, proper approach to federalism ignores that that provision itself displaces any state or local regulation if a permitting decision is not made within specified time frames. *See* 47 U.S.C. § 224(c)(3).

Moreover, the FCC did not, as petitioners claim, expand its authority into new domains by creating a broad regulation in a new, previously uncharted field.[5] City of Arlington Pet. Br. 13. When the FCC

[5] *Amici* agree that the FCC's authority does not extend to areas in which Congress has not delegated it authority, and where the assumption of authority would "wrest a considerable degree of . . . control" from local authorities. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979). *Compare id.* at 700, 708 (finding FCC cable television rules inappropriately "transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium" absent congressional delegation of that authority), *with Southwestern Cable*, 392 U.S. at 172-73 (upholding certain FCC rules regarding CATV as within its jurisdiction) *and Midwest Video*, 406 U.S. at 664-65 (same).

interpreted the undefined phrase "reasonable period of time" in § 332(c)(7)(B)(ii), it did not add a new limitation on state and local power, but clarified an *existing* federally-imposed limitation. This interstitial interpretation was crafted after wide-ranging fact-finding that agencies are in a far better position than courts to conduct, and carefully respected the balance between federal and local interests that Congress struck in the plain language of the 1996 Act. It cannot be reasonably understood to have displaced or moved the federal-local boundaries set by Congress.

The FCC's interpretation of undefined terms concerning unreasonable delay that federal law already prohibits does not transfer to the FCC the substantive power to make zoning decisions. *See* City of Arlington Br. 37, 42-43. Rather, leaving state and local responsibility for those decisions untouched, the FCC's interpretive definition of what constitutes a "reasonable period of time" was promulgated to alleviate the destructive impact that state and local delays were causing to the necessary expansion of the nation's wireless infrastructure, and was based on the Commission's expertise and fact-finding capacities. *See* Pet. App. 94a-100a. That judgment is no more than another instance in a long history of rulemaking and adjudication that advances statutory policies clarifying congressional lines that turn out to be too indefinite to serve their purposes in a developing world. *See*, *e.g.*, *City of N.Y. v. FCC*, 486 U.S. 57, 66-67 (1988) (noting that the FCC, when it prohibited local authorities from imposing stringent technical standards pursuant to its "delegation of authority" and "legitimate discretionary power," had been preempting state and local cable television technical standards for ten years).

It is not hard to hypothesize FCC regulation whose broad displacement of traditional state authority would be so unprecedented, or so contrary to Congress's evident direction, that it might be fairly held to be beyond the Commission's power (*Chevron* Step 0) or contrary to statutory direction (*Chevron* Step 1), or an unreasonable construction of statutory authority (*Chevron* Step 2). But that is not this case, where the Commission has done no more than provide useful, evidence-based interpretation of the lines already drawn by Congress, using its superior capacity to do so when its expertise and fact-finding abilities made plain further guidance was essential.

D. PETITIONERS HAVE FAILED TO SHOW EITHER LANGUAGE OR LEGISLATIVE HISTORY THAT WEIGHS AGAINST DEFERENCE TO THE FCC'S AUTHORITY IN THIS INSTANCE

The FCC's rulemaking authority under § 201(b) and the other provisions cited above, coupled with statutory circumstances that show Congress would have expected the FCC to exercise gap-filling authority to interpret the 1996 Act, trigger a presumption that Congress intended the FCC to have interpretive jurisdiction over § 332(c)(7)(B). *Long Island Care at Home v. Coke*, *Ltd.*, 551 U.S. 158, 173-74 (2007). Under these circumstances, to show otherwise petitioners must establish that some other provision of the 1996 Act takes that jurisdiction away. "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005).

Entirely absent here are factors that that might weigh against deference to the FCC's assessment of the scope of its gap-filling authority.

1. Nothing in the statutory text reflects any displacement or implicit repeal of the power the Commission would otherwise have to interpret what is a "failure to act" or an "unreasonable period of time" under the § 332(c)(7)(B).

Petitioners claim that § 332(c)(7)(A), which provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or effect the authority of State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities," prohibits the FCC from interpreting a "reasonable period of time" to be 90 to 150 days. City of Arlington Br. 31. That argument fails for two independent reasons.

First, petitioners' argument runs afoul of the "over decisions" clause of § 332(c)(7)(A), which provides that nothing in the Communications Act "[e]xcept as provided in this paragraph . . . shall limit or affect the authority of a State or local government . . . *over decisions regarding the placement, construction, and modification* of personal wireless service facilities" (emphasis added). The Commission's provision of a general timeframe in which state and local authorities should ordinarily decide applications for cell phone tower constructions and improvements does not "limit or affect the authority" of state or local governments regarding "the placement, construction, and modification of personal

wireless service facilities." A federal court adjudication is not "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

Second, nothing in § 332(c)(7)(A) purports to displace or supersede the FCC's longstanding regulatory authority to fill gaps by interpreting the various limitations in § 332(c)(7)(B) (or any provisions of the Communications Act).[6]

Congress's decision to retain in the first instance the traditional authority of state and local authorities over cell sites, subject to federal limitation, is not inconsistent with the Commission's retention of authority to interpret a "reasonable period of time." The Declaratory Ruling addresses only the timeliness of such decisions, and mandates no particular result that any governmental entity must reach. Had Congress sought to deny the Commission any authority to issue gap-filling, interpretive guidance on the "reasonable period of time" limitation, it could have easily said so. The statutory phrasing it did enact is not naturally or properly read as withdrawing the Commission's authority to fill gaps concerning the timing of such decisions.

Moreover, the preservation of state and local authority in § 332(c)(7)(A) is expressly limited by

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[6] *See supra* at 13-14, 18 (discussing *AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366 (1999)); *see also, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("We have repeatedly stated, however, that absent 'a clearly expressed congressional intention' . . . 'repeals by implication are not favored,' . . . . An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.") (citations omitted).

§ 332(c)(7)(B) (through the introductory phrase "Except as provided in this paragraph").

Whatever substantive decision a local permitting authority chooses to make, it remains free to make within the limitations imposed by the Communications Act. At most, the FCC's interpretation might affect the judicial determination, in any proceeding under § 332(c)(7)(B)(v), as to whether the local authority acted "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." § 332(c)(7)(B)(ii). That kind of gap-filling is not what Congress restricted in § 332(c)(7)(A).

The FCC's interpretation did not expand its authority beyond the bounds permitted by the Communications Act, or even approach its limits. The Commission's interpretive ruling falls at the interstitial gap-filling end of the spectrum of potential agency authority, and spoke ultimately to courts. It leaves local authorities free to make traditional arguments related to "the nature and scope of such request" they could or would have made in a proceeding under § 332(c)(7)(B)(v), and federal courts free to consider or be persuaded by any such argument. Acceptance of the FCC's view of its powers on this point is amply supported by this Court's cases. *See*, *e.g.*, in addition to those cited *supra* at 7-10, *Brand X*, 545 U.S. at 984 (upholding the FCC's rulemaking authority to interpret the definition of "telecommunications service" under the Communications Act, as amended by the 1996 Act); *Iowa Utils.*, 525 U.S. at 385 (upholding the FCC's rulemaking authority under § 201(b) to guide state commissions with rules implementing pricing and nonpricing

provisions of the 1996 Act, without engaging in analysis of whether agency's determination of interpretive jurisdiction is entitled to *Chevron* deference).

Prior to the FCC's issuance of the Declaratory Ruling challenged in this proceeding, the limitations Congress sought to impose on local zoning or regulatory power were for practical purposes unenforced and a nullity. *See generally* Pet. App. 98a (finding, *inter alia*, that "there were then more than 3,300 pending personal wireless service facility siting applications before local jurisdictions . . . approximately 760 [were] pending final action for more than one year"). The Commission's interpretation was not contrary to congressional directive, but in aid of it, and clearly within the FCC's power to so decide.

2. Nor does the legislative history of § 332 help petitioners. They attempt to make much of the fact that the House of Representatives' initial version of § 332(c)(7) explicitly delegated to the FCC power to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services," and adopt policies requiring state and local authorities to act "within a reasonable period of time after the request is fully filed with such government or instrumentality," but was ultimately rejected and revised by Congress. City of Arlington Br. 32 (citing H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995)). But the absence of this language from the final version of the statute is subject to many possible explanations, and does not necessarily reflect Congress's intent to deny such authority to the FCC. Regardless, given the history of this Court's repeated recognition of the FCC's authority to regulate in aid of the broad

statutory directives to foster an advanced, effective national telecommunications system, the Court should defer to the FCC's judgment in the absence, within the four corners of § 332(c)(7), of yet another delegation of interpretive authority. *Cf. Southwestern Cable Co.*, 392 U.S. at 169-70 (the FCC's failure to obtain legislation explicitly authorizing its regulation of CATV systems was not dispositive of the breadth of its existing authority). Congress's decision to create a statutory framework for cell phone tower construction and modification to be filled in by the FCC, rather than to give the FCC unrestricted regulatory authority over these matters, simply reflects the balance Congress sought to strike between federal and local authority in the Communications Act.

Similarly overreaching is petitioners' contention that because the FCC was ordered to terminate "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities," Sen. Rep. No. 104-230, pt. 2, at 208 (1996) (Conf. Rep.), Congress intended to prevent the FCC from interpreting § 332(c)(7)(B). That language concerned only "pending" rulemakings "concerning the preemption of local zoning authority." It has no bearing on an as-yet-uncontemplated proceeding ten years later aimed not at preempting local siting decisions but at alleviating unanticipated delays.

Although petitioners also point to legislative history showing that the 1996 Act establishes "limitations on the role and powers of the Commission . . . relate to local land use regulations," they identify nothing in the legislative history that shows Congress intended to prohibit the FCC's power

to make clearer and more easily enforceable the lines Congress drew in § 332(c)(7)(B). City of Arlington Br. 32-33. Congress's judgment not to displace local zoning power altogether does not require the displacement of the FCC's regulatory authority that the petitioners seek. *See* Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996) (Conf. Rep.) (preserving state and local zoning authority "except in the limited circumstances as set forth in the conference agreement. . . . Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services."); *cf. id.* at 209 ("The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications"). The Court of Appeals correctly found that the legislative history "does not indicate a clear intent to bar FCC implementation of the limitations already expressly provided for in the statute." *City of Arlington v. FCC*, 668 F.3d 229, 253 (5th Cir. 2010).

Nor is the interpretive authority otherwise created by § 201(b) displaced by the provision in § 332(c)(7)(B)(iv) concerning radio emissions. It is not at all unusual, in the Communications Act or elsewhere, for general and specific grants of authority to overlap, or for Congress to highlight specific areas it wants a court or agency to address. *See*, *e.g.*, *Iowa Utils.*, 525 U.S. at 383 n.9, 385 (finding no inconsistency with the FCC's requisite rulemaking authority under § 251(e) and its authorization to engage in rulemaking under § 201(b)). To paraphrase the reasoning in that opinion, it would be peculiar for

Congress to have "conferr[ed] Commission jurisdiction over such curious and isolated matters as [radio frequency emissions] . . . but den[ied] Commission jurisdiction over much more significant matters. We think it most unlikely that Congress created such a strange hodgepodge." *Iowa Utils.*, 525 U.S. at 381 n.8.

Also meritless is the argument that because Congress intended the courts to have "exclusive jurisdiction over all other disputes arising under this section," Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996) (Conf. Rep.), it necessarily intended to prevent the FCC from interpreting § 332(c)(7)(B). City of Arlington Br. 5. The FCC's interpretive rule does not claim for the FCC any "jurisdiction over [ ] disputes arising under this section." The provision giving courts exclusive jurisdiction over such proceedings does not repeal, impliedly or otherwise, the FCC's authority to interpret and enforce the substantive prohibitions of § 332(c)(7). Courts alone entertain such proceedings, and only they have the final say over whether any specific delay in processing wireless collocation and siting requests is "reasonable."

Nor is the provision of a right of action inconsistent with the FCC's continuing interpretive rulemaking authority to clarify when a wireless provider could seek judicial relief under § 332(c)(7)(B)(v). *Cf. City of N.Y. v. FCC*, 486 U.S. 57, 69 n.5 (1988) (holding that FCC cable television technical standards preempted state and local standards, despite availability of remedy for state and local authorities to petition the FCC for individualized waivers on standards). "None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority." *Iowa Utils.*, 525 U.S. at 385 ("While it is

true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions . . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments"). While the FCC's Declaratory Ruling appropriately provides a trigger for bringing an action in court, the FCC expressly confirmed that any case-specific unreasonable delay determinations were for courts to make in § 332(c)(7)(B)(v) proceedings. Indeed, the Commission rejected a proposal that its Ruling deem as granted applications on which state and local authorities had not acted within the 90 to 150-day timeframe. Pet. App. 106a-112a.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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