No. 11-1547

# In the Supreme Court of the United States

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
*Respondents*.

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

## PETITIONER'S BRIEF ON THE MERITS


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## QUESTION PRESENTED

This case involves a challenge to the FCC's jurisdiction to implement § 332(c)(7) of the Communications Act of 1934, titled "Preservation of Local Zoning Authority." On October 5, 2012, this Court entered an Order granting the petitions for writs of certiorari limited to the following question:

> Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction?

## PARTIES TO THE PROCEEDING

**Petitioner/Intervenor:**

1. Cable and Telecommunications Committee (Now Cable, Telecommunications, and Technology Committee) of the New Orleans City Council

**Defendants-Respondents**:

1. Federal Communications Commission
2. United States of America
3. CTIA - The Wireless Association

## TABLE OF CONTENTS

QUESTION PRESENTED . . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

TABLE OF AUTHORITIES . . . . . vi

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . . . 5

STATEMENT OF THE CASE . . . . . 8

SUMMARY OF THE ARGUMENT . . . . . 12

ARGUMENT . . . . . 16

(A) Before Chevron deference can be applied, courts must first determine, de novo, definitively that Congress intended to delegate final interpretive authority over a statute to the agency . . . . . 17

(1) Given the clear precedent on the issue, the Fifth Circuit erred in failing to apply Chevron Step 0 . . 19

(2) The actual language of Section 332(c)(7) reveals Fifth Circuit error when applying Chevron Step 0 . . 21

(B) Chevron deference should not be applied in any situation where an agency seeks to determine the scope of its own jurisdiction except where Congress has explicitly granted jurisdiction . . . . . 25

(1) Agencies can claim no special expertise in interpreting a statute confining its jurisdiction . . . . . 28

(2) Chevron deference poses the risk of agency aggrandizement . . . . . 30

(3) In this particular case, the legislative history dictates that Chevron deference not be granted. 32

(C) The application of Chevron deference where an agency seeks to determine the scope of its own jurisdiction is a violation of the Separation-of-Powers Doctrine except where there has been an explicit delegation by Congress . . . . . 38

(1) Chevron Step 0 represents a shift back to the traditional notion of the Separation-of-Powers Doctrine . . 40

(2) The Fifth Circuit erred in its mechanical application of Chevron deference and presumptively delegating to the FCC the power to interpret a statute limiting its jurisdiction and upsetting

Congress' careful jurisdictional balance . . . . . 42

(D) The application of Chevron deference where an agency seeks to determine the scope of its own jurisdiction is a violation of the Administrative Procedure Act except where there has been an explicit delegation by Congress . . . . . 45

(1) The Fifth Circuit's mechanical application of Chevron deference is a violation of the Administrative Procedure Act . . . . . 46

(2) The FCC's usurpation of Court authority violated the Administrative Procedure Act . . . 47

CONCLUSION . . . . . 53

## TABLE OF AUTHORITIES

### CASES

*Adams Fruit Co. v. Barrett*,
494 U.S. 638 (1990) . . . . . 20

*Am. Bus. Ass'n v. Slater*,
231 F.3d 1 (2000) . . . . . 26

*Bethesda Hosp. Ass'n v. Bowen*,
485 U.S. 399 (1988) . . . . . 49

*Bowen v. Georgetown Univ. Hosp.*,
488 U.S. 204 (1988) . . . . . 41

*Capital Cities Cable, Inc. v. Crisp*,
467 U.S. 691 (1984) . . . . . 31

*Chevron, USA, Inc. v. Natural Res. Def. Counsel, Inc., et al.*,
467 U.S. 837 (1984) . . . . . *passim*

*Christensen v. Harris Cnty.*,
529 U.S. 576 (2000) . . . . . 20, 41

*City of Arlington Texas v. FCC*,
668 F.3d 229 (5th Cir. 2012) . . . . . *passim*

*City of New York v. FCC*,
486 U.S. 57 (1988) . . . . . 31

*Commodity Futures Trading Comm'n v. Schor*,
478 U.S. 833 (1986) . . . . . 27

*Dunn v. Commodity Futures Trading Comm'n*,
519 U.S. 465 (1997) . . . . . 20

*Gonzales v. Oregon*,
576 U.S. 243 (2006) . . . . . 20

*Gregory v. Aschcroft*,
501 U.S. 452 (1991) . . . . . 36

*K Mart Corp. v. Cartier, Inc.*,
486 U.S. 281 (1988) . . . . . 49

*Legal Servs. Corp. v. Valazquez*,
531 U.S. 533 (2001) . . . . . 40

*Long Island Care at Home, Ltd. v. Coke*,
551 U.S. 158 (2007) . . . . . 18, 20

*Louisiana Pub. Serv. Comm'n v. FCC*,
476 U.S. 355 (1986) . . . . . 43, 44

*Marbury v. Madison*,
5 U.S. (1 Cranch) 137 (1803) . . . . . 39

*Mayo Found. for Med. Educ. & Research v. U.S.*,
131 S.Ct. 704 (2011) . . . . . 17

*MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*,
512 U.S. 218 (1994) . . . . . 49

*Miss. Power & Light Co. v. Miss. ex rel. Moore*,
487 U.S. 354 (1988) . . . . . 28, 30, 31, 36

*Morton v. Ruiz*,
415 U.S. 199 (1974) . . . . . 48

*National R.R. Passenger Corp. v. Boston & Maine Corp.*,
503 U.S. 407 (1992) . . . . . 49

*NCIA v. Brand X Internet Servs.*,
545 U.S. 967 (2005) . . . . . 43

*Nixon v. Fitzgerald*,
457 U.S. 731 (1982) . . . . . 40

*NLRB v. City Disposal Sys., Inc.*,
465 U.S. 822 (1984) . . . . . 27

*Offshore Logistics, Inc. v. Tallentire*,
477 U.S. 207 (1986) . . . . . 49

*Phillips v. Marine Concrete Structures, Inc.*,
895 F.2d 1033 (5th Cir. 1990) . . . . . 49

*Pruidze v. Holder*,
632 F.3d 234 (6th Cir. 2011) . . . . . 49

*Skidmore v. Swift & Co.*,
323 U.S. 134 (1944) . . . . . 41

*Smiley v. Citibank, S.D.*,
517 U.S. 735 (1996) . . . . . 20

*United Servs. Auto Ass'n v. Perry*,
102 F.3d 144 (5th Cir. 1996) . . . . . 49

*United States v. Home Concrete & Supply, LLC*,
132 S.Ct. 1836 (2012) . . . . . 17

*United States v. Mead Corp.*,
533 U.S. 218 (2001) . . . . . *passim*

*VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*,
342 F.3d 818 (7th Cir. 2003) . . . . . *passim*

*White v. INS*,
75 F.3d 213 (5th Cir. 1996) . . . . . 49

**CONSTITUTION**

U.S. Const. art. I, § 1 . . . . . 40

**STATUTES**

5 U.S.C.A. § 706 . . . . . 7, 8, 45

5 U.S.C.A. § 706(2)(C) . . . . . 46

28 U.S.C.A. § 1254 . . . . . 4

28 U.S.C.A. § 2344 . . . . . 11

47 U.S.C.A. § 151 *et seq.* . . . . . *passim*

47 U.S.C.A. § 332(c)(7) . . . . . *passim*

47 U.S.C.A. § 402(a) . . . . . 11

47 U.S.C.A. § 601(c)(1) . . . . . 38

**ADMINISTRATIVE OPINIONS**

*In the Matter of 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*, 25 F.C.C.R. 1215 (2010) . . . . . 1, 2, 3

*In the Matter of 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) . . . . . 2

*In the Matter of 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*, 25 F.C.C.R. 11157 (2010) . . . . . 1, 3

**OTHER AUTHORITIES**

Armstrong, Timothy K., *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB POL'Y, 203 (2004) . . . . . 31

CTIA's Petition for Rulemaking, In re Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial

Mobile Service Providers, RM 8577 (December 22, 1994) . . . . . 9, 10

H.R. Conf. Rep. No. 104-458 (1996) . . . . . *passim*

H.R. Rep. No. 104-204 (1995) . . . . . 9, 33

http://wireless.fcc.gov/siting/local-state-gov.html . 37

Merrill, Thomas W. & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833 (2001) . . . 27

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Pub. L. No. 104-104, 110 Stat. 56 (1996) . . . . . 2, 32

Sales, Nathan A. & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009) . . . . . 28, 29, 46, 52

Singer, Norman J., 2A Sutherland Statutory Construction § 45.02 (5th ed. 1992) . . . . . 49

Singer, Norman J., 3 Statutes and Statutory Construction § 65.2 (2001) . . . . . 25

Sustein, Cass R., *Constitutionalism after the new deal*, 101 HARV. L. REV. 421 (1987) . . . . . 39

*The Federalist No. 78* (A. Hamilton)(C. Van Doren ed. 1945) . . . . . 39

## OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's denial of the Petition for Rehearing En Banc of Intervenor Cable and Telecommunications Committee of the New Orleans City Council and denial of the Petition for Rehearing En Banc of Intervenors City of Dubuque, Iowa; City of los Angeles, California; Los Angeles County, California; Texas Coalition of Cities for Utility Issues; and Petitioner City of Arlington Texas dated March 29, 2012, appears as Petition Appendix 1 of the City of Arlington's Petition for Writ of Certiorari and is not reported.

The opinion of the United States Court of Appeals for the Fifth Circuit in *The City of Arlington Texas v. Federal Communications Commission, et al.,* dated January 23, 2012, appears as Petition Appendix 4 of the City of Arlington's Petition for Writ of Certiorari and is reported at 668 F.3d 229.

The FCC's Order dated August 3, 2010, denying the Petition for Reconsideration of the Declaratory Ruling *In the Matter of 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* appears as Petition Appendix 33 of the City of Arlington's Petition for Writ of Certiorari and is reported at 25 F.C.C.R. 11157.

The FCC's Order dated January 29, 2010, denying the Emergency Motion for Stay of the Declaratory Ruling *In the Matter of 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* appears as Petition Appendix 43 of the City of Arlington's Petition for Writ of Certiorari and is reported at 25 F.C.C.R. 1215.

The FCC Declaratory Ruling *In the Matter of 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* dated November 18, 2009, appears Petition Appendix 51 of the City of Arlington's Petition for Writ of Certiorari and is reported at 24 F.C.C.R. 13994.

## JURISDICTION

The Federal Communications Commission (the "FCC") issued an Order on November 18, 2009,[1] granting part of the petition of CTIA - The Wireless Association ("CTIA") and establishing new rules interpreting portions of Section 332(c)(7) of the Telecommunications Act of 1996 (the "Order").[2]

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[1] *In the Matter of 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).

[2] Pub. L. 104-104, 110 Stat. 56 (February 8, 1996). The Telecommunications Act of 1996 was enacted to amend certain

An Emergency Motion for Stay was filed on December 17, 2009, by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, and denied on January 29, 2010.[3]

A Petition for Reconsideration of the FCC Declaratory Ruling was filed on December 17, 2009 by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, and denied on August 3, 2010 (the "Reconsideration Order").[4]

A Panel of the U.S. Court of Appeals for the Fifth Circuit issued an Opinion on January 23, 2012, dismissing the Petition for Review of the

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sections of the Communications Act of 1934, 48 Stat. 1064. The Communications Act is codified as amended at 47 U.S.C.A. § 151 *et seq*.

[3] *In the Matter of 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,* 25 F.C.C.R. 1215 (2010).

[4] *In the Matter of 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,* 25 F.C.C.R. 11157 (2010).

Reconsideration Order of the City of San Antonio, and denying the Petition for Review of the Reconsideration Order of the City of Arlington (the "Panel Opinion").[5]

The U.S. Court of Appeals for the Fifth Circuit denied a Petition for Rehearing En Banc on March 8, 2012, filed by Intervenor Cable and Telecommunications Committee of the New Orleans City Council, and denied a Petition for Rehearing En Banc on March 8, 2012, filed by Intervenors City of Dubuque, Iowa, City of Los Angeles, California, Los Angeles County, California, Texas Coalition of Cities for Utility Issues, and Petitioner City of Arlington, Texas.

Petitioners requested a writ of certiorari from this Court. This Court issued an Order granting Petitioners writ of certiorari on October 5, 2012. Jurisdiction to review the Fifth Circuit's judgment denying the Petition for Review of the Reconsideration Order by a writ of certiorari is conferred on this Court by 28 U.S.C.A. § 1254.

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[5] *City of Arlington Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

47 U.S.C.A. § 332(c)(7) provides:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing 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.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof 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.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any 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 this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

5 U.S.C.A. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

**(2)** hold unlawful and set aside agency action, findings, and conclusions found to be-

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

**(D)** without observance of procedure required by law;

**(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## STATEMENT OF THE CASE

Section 332(c)(7) was adopted as part of the Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C.A. § 151 *et seq*. It provided certain statutory protections to an applicant who applies for siting of a personal wireless service facility such as a cell phone tower. These protections are in addition to the standard protections afforded by equal protection, due process, and state law.

When Congress adopted Section 332(c)(7), it did so amidst trying to balance local police powers in regulating the build out of commercial mobile radio services ("CMRS") infrastructure, and the development of a competitive and efficient marketplace for telecommunications providers.[6] The Conference Report ("Report") regarding Section 332(c)(7) clearly sets forth Congress' intention as to this Section; that "other than Section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section."[7] The FCC did retain authority in one area - radio frequency rules - and the authority to hear complaints regarding local regulation of radio frequency emissions.

The Report further directed ***the courts*** to measure State and local authorities' reasonableness and timeliness with the "generally applicable time frames for zoning decision" in a particular community,[8] and stated that "any pending Commission rulemaking concerning the preemption of local zoning authority

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[6] CTIA's Petition for Rulemaking, In re Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers, RM 8577, at 17 (December 22, 1994).

[7] H.R. Rep. No. 104-204, at 25 (1995).

[8] *Id.*

over the placement, construction or modification of CMRS facilities should be terminated."[9]

Despite this clarity, on July 11, 2008, the CTIA filed a petition requesting that the FCC clarify portions of Section 332(c)(7).[10] The FCC improperly assumed jurisdiction and proceeded to establish new rules, including a new requirement under Section 332(c)(7)(B)(ii) defining "a reasonable time" to mean 90 and 150 days for State and local authorities to act on personal wireless service facility siting applications;[11] declaring that it is a "failure to act" under Section 332(c)(B)(v) by the State or local authority if it does not act within these time frames;[12] and declaring that upon expiration of the established time frames, a wireless provider has 30 days in which it may sue a State or local authority for failure to act on its application.[13] The FCC further found that the State or local government may toll the time frame by notifying an applicant within 30 days of receipt, that the application is incomplete.[14]

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[9] *Id.*

[10] CTIA Petition.

[11] Pet. App. 51 at ¶¶ 4, 32, 37, 45.

[12] *Id.* at ¶¶ 4, 32, 37, 39.

[13] *Id.* at ¶ 49. The FCC also found that the "reasonable period of time" can be extended by the mutual consent of the State or local government and the personal wireless service provider, and that in such a situation, the 30 day period would be tolled. *Id.*

[14] *Id.* at ¶ 53.

Five organizations[15] filed a Petition for Reconsideration of the FCC Declaratory Ruling on December 17, 2009, which was denied on August 3, 2010 (the "Reconsideration Order").[16] The City of Arlington, Texas then filed a Petition for Review of the Reconsideration Order with the Fifth Circuit on January 14, 2010, and on October 1, 2010, the City of San Antonio filed a Petition for Review of the Reconsideration Order.[17] The cases were considered under the same docket number, and the Cable and Telecommunications Committee of the City of New Orleans, intervened.

A Panel of the Fifth Circuit issued its Opinion on the petitions on January 23, 2012, dismissing the City of San Antonio's petition for failure to timely file, and denying the City of Arlington's petition.[18] The Panel held, in pertinent part, that: (1) the FCC's Declaratory Ruling was the product of adjudication and not rulemaking, and the lack of strict compliance with the notice and comment requirements was harmless;[19]

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[15] The five organizations are: National Association of Telecommunications Officers and Advisors ("NATOA"), the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association.

[16] Pet. App. 33 at ¶ 7.

[17] The jurisdiction of the Fifth Circuit was based on 47 U.S.C.A. § 402(a) and 28 U.S.C.A. § 2344.

[18] *City of Arlington Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012).

[19] *Id.* at 16, 20.

(2) the due process rights of State and local governments were not violated by the failure of the FCC to individually serve copies of the CTIA's Petition on each State or local government;[20] (3) the FCC did possess the statutory authority, as analyzed under the *Chevron* standard, to interpret the language of 322(c)(7) and impose the 90 and 150 day time frames for the application process;[21] (4) the 90 and 150 day time frames are permissible interpretations of the statute and hold up under the Chevron standard;[22] and (5) the FCC's establishment of the 90 and 150 day time frames were not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

## SUMMARY OF THE ARGUMENT

This Court has requested that the parties brief the issue of whether the courts should apply *Chevron* deference in reviewing an agency's determination of its own jurisdiction. This brief responds to that inquiry in the abstract – that is it takes the position that on the whole courts should not apply *Chevron* deference in reviewing an agency's determination of its own jurisdiction unless Congress specifically intended same (*Chevron* Step 0) – and in the specific – that is that in the case at bar *Chevron* deference should not have been afforded to the FCC (*Chevron* Steps 1 & 2).

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[20] *Id.* at 25.

[21] *Id.* at 39.

[22] *Id.* at 41.

Pursuant to *Chevron* Step 0, unless Congress has indicated otherwise, the answer to this Court's inquiry is a resounding "no." *Chevron* Step 0 requires some affirmative indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency. Only after this affirmative indication of congressional delegation of administrative authority is *Chevron* implicated at all. If a court finds affirmative evidence, from the agency's generally conferred authority and other statutory circumstances, that Congress intended to delegate final interpretive power to the agency, it then will move to *Chevron* Steps 1 and 2. Even then, however, *Chevron* deference is not automatic. Step 1 is a determination of whether Congress eliminated the agency's discretion over the precise subject matter addressed by clearly resolving the specific question at issue. If not, only then will Step 2 apply and deference will be given to the agency's determination of its own jurisdiction, unless it is determined that the agency's rationale is arbitrary and/or unreasonable.

In the case at bar, the Fifth Circuit should not have mechanically applied *Chevron* deference to review the FCC's interpretation of its own statutory jurisdiction. Rather, it should have performed a *Chevron* Step 0 analysis, *de novo*, on the issue of whether Congress specifically delegated final interpretive authority over Section 332(c)(7) of the Telecommunications Act of 1996. Had such an analysis been done, the Fifth Circuit would have been required to apply the traditional methods of statutory construction, and apply the presumption that Congress did not intend to expand the FCC's jurisdiction into an area of traditional State and local regulation.

In the abstract, *Chevron* Step 0 dispenses with all of the reasons advanced for mechanical application of *Chevron* deference. Specifically, agencies can claim no special expertise in interpreting a statute confining its jurisdiction, as courts are required to address jurisdictional questions implicating the scope of federal power routinely. Furthermore, courts have a competitive advantage at resolving jurisdictional questions in a consistent and predictable fashion. Thus, while an agency may be expert in resolving technical questions within the subject matter of its mission, it actually has less expertise than courts in figuring out when jurisdiction exists.

In addition, mechanical application of *Chevron* deference without some affirmative indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency, poses a substantial risk of agency aggrandizement. As agencies have no inherent regulatory powers, their power must be explicitly delegated by Congress. As such, a presumption against agency authority entails a presumption against the delegation of authority to determine the scope of its own jurisdiction. *Chevron* deference, however, without affirmative Congressional delegation, not only eliminates the presumption *against* authority for agencies, it actually goes further and reverses same and instead creates a presumption *in favor* of authority for agencies. This reverse presumption has the potential to lead to agencies participating in power-grabs to assert jurisdiction where Congress did not intend. In the specific case at bar, the FCC has an interest in facilitating its own policy interests by expanding its jurisdiction and has done so at the expense of State and local authority.

The particular legislative history in this matter dictates that *Chevron* deference is improper. In enacting the Telecommunications Act of 1996, Congress recognized that there are legitimate State and local concerns involved in regulating the siting of wireless communication facilities. It opted to preserve the authority of State and local governments over zoning and land use matters except in very limited circumstances under Section 332(c)(7). Despite this clear legislative history, the FCC used *Chevron* to power-grab the authority Congress wished to leave to the State and local governments. This is a classic example of agency aggrandizement and why *Chevron* deference should not be extended to an agency's determination of its own jurisdiction. It clearly does not pass the *Chevron* Step 0 test, as the legislative history shows that Congress did not intend to give the FCC, rather than the courts, final interpretive authority over the statute.

Application of *Chevron* deference also is an arguable violation of the separation-of-powers doctrine. *Chevron* establishes that in certain circumstances administrators should decide the scope of their own authority even where Congress has not specifically delegated that authority. However, interpretations of statutes, and in particular issues involving jurisdiction, is an inherent judicial function under our Constitution. Yet, *Chevron* shifts this power/authority from the courts and places it with the agencies/executive. This is particularly troubling in cases where, like this one, an agency's self-interest is at issue.

Finally, the application of *Chevron* deference is a violation of the Administrative Procedure Act. The

APA establishes that courts are to decide all relevant questions of law, including jurisdiction. It further provides that courts are to invalidate and set aside those agency actions determined to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. Application of *Chevron* deference improperly shifts the authority for answering certain legal questions from the courts to the administrative agencies.

## ARGUMENT

The Fifth Circuit Panel held that § 332(c)(7) is ambiguous with respect to the FCC's authority to establish time frames. It reasoned that, although the statute bars the FCC from using its general rule making power under the Telecommunications Act to create additional limits on state and local governments beyond those provided in section (B), since the statute didn't explicitly deny the FCC general authority to implement section (B)'s limitations, it is silent on the issue and therefore ambiguous. In other words, the Panel held that, despite the other explicit limiting language in the statute, since the statute did not explicitly foreclose the FCC from setting limits on time frames under section (B), it was ambiguous. It therefore concluded that *Chevron* deference should be applied, apparently following the Fifth Circuit approach of mechanically deferring to agency jurisdictional determinations unless Congress has clearly removed the authority to make those determinations.

### (A) Before *Chevron* deference can be applied, courts must first determine, *de novo,* definitively that Congress intended to delegate final interpretive authority over a statute to the agency.

The error committed by the Fifth Circuit Panel is that it mechanically applied *Chevron* deference without first, *de novo*, performing a *Chevron* Step 0 analysis. Given Section 332(c)(7)'s language, context, and clear legislative history, as well as *Chevron's* progeny, it appears clear that a court should *not* apply *Chevron* deference mechanically. Rather, courts must first scrutinize whether "the agency's generally conferred authority and other statutory circumstances" make apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704, 714 (2011).[23] This approach, which is called *Chevron* Step 0, is grounded in the uncontroversial idea that deference to agency interpretation of statutes it administers is appropriate only where Congress has specifically delegated that authority.

Consequently, the threshold question, *Chevron* Step 0, is one of interpretive jurisdiction. It asks whether

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[23] *See* also *United States v. Home Concrete & Supply, LLC*, 132 S.Ct. 1836, 182 L.Ed. 2d 746, 759 (2012) (Scalia, J., concurring) (noting that "a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted the particular ambiguity in question to be resolved by the agency.")

Congress empowered the courts, or the agency, final interpretive authority over the statute in question. Ambiguity on that issue, which is what the Fifth Circuit Panel found in this case, does not automatically enure to the benefit of the agency. Quite the opposite, *Chevron* Step 0 requires some *affirmative* indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency.[24] Only after this affirmative indication of congressional delegation of administrative authority is *Chevron* implicated at all. If a court finds affirmative evidence, from the agency's generally conferred authority and other statutory circumstances, that Congress intended to delegate final interpretive power to the agency, it then will move to *Chevron* Step 1 and Step 2. Even then, however, *Chevron* deference is not automatic. Step 1 is a determination of whether Congress eliminated the agency's discretion over the precise subject matter addressed by clearly resolving the specific question at issue.[25] If not, Step 2 applies deference to the agency's determination of its own jurisdiction unless it is determined that the agency's rationale is arbitrary and/or unreasonable.[26]

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[24] *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ('[T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of gap filling authority.")

[25] *See Chevron, USA, Inc. v. Natural Res. Def. Counsel, Inc., et al.*, 467 U.S. 837 (1984).

[26] *Id.*

*Chevron* Step 0 is a definitive answer to the question posed by this Court in granting certiorari – [w]hether a court should apply *Chevron* to review an agency's determination of its own jurisdiction? The answer is a resounding "no" in most circumstances. The sole exception is when there is some *affirmative* indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency at issue. This determination is done *de novo,* and ambiguity falls to the benefit of the courts rather than the agency. Even where there is some affirmative indication, however, it must be remembered that agency deference is not automatic. *Chevron* Steps 1 and 2 still need to be applied and resolved in favor of the agency in order for agency deference to apply.

### (1) Given the clear precedent on the issue, the Fifth Circuit erred in failing to apply *Chevron* Step 0.

The Fifth Circuit Panel committed reversible legal error by failing to apply *Chevron* Step 0 at all, despite numerous precedent for its application. Rather, the Panel held that its perceived ambiguity in the statute automatically enured to the benefit of *Chevron* deference.[27] However, courts have consistently held that statutory ambiguity alone is not enough to

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[27] *City of Arlington Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012) ("If the provisions are ambiguous, . . . we must defer to the FCC's interpretation . . . so long as the FCC's interpretation represents a reasonable construction of their terms.").

establish *Chevron* deference.[28] Rather, *Chevron* Step 0 establishes that before a *Chevron* analysis can be performed, which may or may not result in affording *Chevron* deference, there must be some *affirmative* indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency.

In *Adams Fruit Co. v. Barrett*, the Court stated that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." 494 U.S. 638, 649 (1990); *see also Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997) (explaining that *Chevron* deference "arises out of background presumptions of congressional intent" (citing *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740-41 (1996)). Additionally, in *Christensen v. Harris County*, a majority of the Court held that Congress can only be said to have impliedly delegated the power to interpret ambiguous statutory language when it has granted an agency power to take actions that bind the public with the "force of law." 529 U.S. 576, 87-88 (2000). The Court reasoned that the scope of an agency's authority to interpret ambiguous statutory text only extends as far as the agency's own authority to take actions with the force of law.[29] Justice Breyer, in his dissent, concluded that "where one has doubt that Congress actually intended to delegate interpretive authority to

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[28] *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007); *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved.")

[29] *Christenson*, 529 U.S. at 587.

the agency (an 'ambiguity' that *Chevron* does not presumptively leave to agency resolution),' *Chevron* deference does not apply. *Id.* at 597 (Breyer, J., dissenting).

The Court in *United States v. Mead Corporation*, in concluding that the United States Customs Service's tariff classification rulings were not entitled to *Chevron* deference, made clear that congressional intent is the touchstone for the analysis. The Court stated that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 544 U.S. at 226-27. These precedents clearly establish that ambiguity in a statute does not automatically enure to the benefit of *Chevron* deference. Thus, the Panel's application of automatic deference, because of its perceived ambiguity in Section 332 (c)(7), is clearly legal error. On this fact alone, the Panel's decision should be reversed. Additionally, a review of the actual statutory language in question further reveals error committed by the Panel.

**(2) The actual language of Section 332(c)(7) reveals Fifth Circuit error when applying *Chevron* Step 0.**

There clearly is no affirmative indication in the statute in question on the part of Congress of its intention to delegate interpretive jurisdiction to the FCC. In fact, a review of the pertinent language of the statute in question actually provides affirmative

language of congressional intention to delegate authority *to the courts*.

47 U.S.C.A. § 332 (C)(7) provides:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, ***nothing 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.
>
> (B) Limitations
>
> . . .(ii) A State or local government or instrumentality thereof 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.
>
> . . .(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities

> comply with the Commission's regulations concerning such emissions.
>
> (v) Any 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 this subparagraph may, within 30 days after such action or failure to act, ***commence an action in any court of competent jurisdiction.*** The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

The Panel ruled that this language is ambiguous and thus mechanically applied *Chevron* deference to the FCC's usurpation of jurisdiction. Petitioner disagrees with the assertion of ambiguity. However, this Court did not grant certiorari on that issue. Rather, it limited certiorari to the issue of when, if ever, it is prudent to apply *Chevron* to review an agency's determination of its own jurisdiction. In that context, and with the *Chevron* Step 0 standard in mind, Petitioner examines the actual language of the statute.

The Telecommunications Act provides that a local zoning authority must act on any request for authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of

time."[30] Recognizing the complexities, as well as the multiple variances that can take place at the local level relative to siting applications, Congress did not specifically set a time frame or definition for "within a reasonable period of time." Congress realized that establishing a uniform, strict deadline for local governments to act upon a tower siting request would not be practical, because the nature and scope of each request are uniquely different.

What Congress did do, however, was establish a remedy for anyone who was adversely affected by any final action *or failure to act* by a State or local government. That remedy is access to the courts where that person could be afforded a remedy by presenting a prima facie case of unreasonableness on the part of the State of local government. Congress, therefore, specifically provided affirmative language of congressional intention to delegate authority to determine reasonableness to the courts.

Contrast this language with the language regarding radio frequency emissions wherein Congress stated that "[a]ny person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief." 47 U.S.C.A. § 332(c)(7)(B)(v). In that instance, Congress provided affirmative language in favor of the FCC. Thus, the FCC arguably could have *Chevron* deference in connection with issues involving radio frequency emissions. However, the fact that the language in

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[30] 47 U.S.C.A. § 332(c)(7)(B)(ii).

question favors court intervention in all other cases certainly does not bode well for *Chevron* deference under *Chevron* Step 0 in any other case but radio frequency emissions.

This Court granted certiorari on a very limited issue – [w]hether a court should apply *Chevron* to review an agency's determination of its own jurisdiction? As stated previously, *Chevron* Step 0 has the benefit of providing a definitive answer to the question posed by this Court. It also, however, has the added benefit of dispensing with the less than stellar rationale, for mechanically applying *Chevron* as the default where there is some perceived ambiguity in the statute and/or congressional intent. As seen below, this rationale leaves much to be desired and does not provide a legitimate basis for the mechanical adoption of *Chevron* where an agency seeks to determine the scope of its own jurisdiction except where Congress has explicitly granted same.

### (B) *Chevron* deference should not be applied in any situation where an agency seeks to determine the scope of its own jurisdiction except where Congress has explicitly granted jurisdiction.

In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation.[31] Agencies have no inherent authority.

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[31] Norman J. Singer, *3 Statutes and Statutory Construction* § 65.2 (2001) ("[T]he general rule applied to statutes granting powers to

They have no more jurisdiction than Congress has clearly provided. Thus, where a statute is silent on the existence of agency jurisdiction, as the Fifth Circuit Panel has claimed here, *Chevron* deference should not be implicated and courts should presume that no jurisdiction exists.[32] This is the *Chevron* Step 0 principle. Statutory ambiguity is no longer, by itself, sufficient evidence of a congressional intent to delegate interpretive responsibility to an agency.[33] Congress is always free to explicitly delegate interpretive authority. Where Congress has not been express, however, courts should only find that Congress has impliedly delegated interpretive power where it has delegated to an agency the authority to adopt regulations or take other actions that bind the public with the force of law. Failure to do so, and rather falling back on *Chevron* deference, could lead to dangerous precedent being created resulting in the diminishing of State and local authority on State and local issues, as well as a diminishing of judicial authority in connection with the interpretation of the law.

As Justice Brennan noted, "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to

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[agencies] is that only those powers are granted which are conferred either expressly or by necessary implication.").

[32] *See Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 8 (2000).

[33] *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

agencies.[34] Courts should not presume that Congress implicitly intended an agency to fill "gaps" in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.[35] Furthermore, where *Chevron* speaks of filling gaps left by Congress, it is misleading because it implies that the agency is operating on the same horizontal plane as Congress when it is actually acting as Congress' agent exercising delegated powers.[36] Proponents of *Chevron* deference, however, cite to agency special expertise as a basis for the deference. This basis has no merit generally, but also is not supported by the facts in this case.

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[34] *Id.*

[35] *Id.; see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-847, 106 S.Ct. 3245, 3252-3255, 92 L.Ed.2d 675 (1986) (citing statutory language and legislative history demonstrating that the agency was delegated broad authority to determine which counterclaims to adjudicate); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829, 104 S.Ct. 1505, 1510, 79 L.Ed.2d 839 (1984) (deferring to agency interpretation of statute defining the scope of employees' right to engage in concerted activities under the National Labor Relations Act). It is thus not surprising that this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.

[36] *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 230-31 (2001).

### (1) Agencies can claim no special expertise in interpreting a statute confining its jurisdiction.

One rationale for *Chevron* deference is the notion that agencies have more familiarity with and expertise in the statute in question and its subject matter. The implication is that federal courts are legal generalists, but agency officials are so-called specialists. *See Chevron*, 467 U.S. at 865 ( "Judges are not experts in the field, and are not part of either political branch of Government."). Proponents of *Chevron* deference assert that while courts may be asked to interpret a particular provision infrequently, agency officials can be expected to deal with their implementing legislation every day.[37] Additionally, agencies are sometimes responsible for drafting and pressing the legislative proposals they are later charged to implement, which suggest that the agencies know what the statutes were intended to authorize and accomplish.

This rationale, however, has a fatal flaw. It is based solely on supposition and conjecture. As Justice Brennan pointed out in his dissent in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), "agencies can claim no special expertise in interpreting a statute confining its jurisdiction."[38] Whatever expertise agencies *may* have at answering

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[37] *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009).

[38] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

technical or policy questions, no one would assert that agencies have an institutional advantage over courts in resolving jurisdictional disputes. Jurisdiction is not the sort of question about which an agency could be expected to have expertise as a general matter. It is not a policy question, but rather one of statutory intent. Courts, and not agencies, are required to address jurisdictional questions implicating the scope of federal power all the time. An agency may be expert in resolving technical questions within the subject matter of its mission, but it has no special expertise in figuring out when jurisdiction exists.

Furthermore, courts have a competitive advantage at resolving jurisdictional questions in a consistent and predictable fashion. Judicial perspectives do not swing with each change in presidential administration.[39] "However imperfect judicial decisions may be, they are more likely to reflect the faithful application of precedent, applicable legal norms, and canons of construction than equivalent decisions made by agencies headed by executive officials."[40]

There simply is no solid rational basis for any assertion that agencies would have more expertise than courts to determine jurisdiction. In determining the nature of the delegation to an agency, courts are

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[39] *See* Thomas J. Miles & Cass R. Sustein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 824-25 (2006).

[40] *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1536 (2009).

determining the scope of the agency's jurisdiction or power.[41] Handing over the power to decide how much power an agency has inevitably leads to the biggest danger in applying *Chevron* deference and asserting agency special expertise – aggrandizement.

### (2) *Chevron* deference poses the risk of agency aggrandizement.

As Justice Brennan pointed out in *Mississippi Power*, *Chevron* deference poses an unacceptable risk of agency aggrandizement.[42] Specifically, Congress' evident policy "in favor of limiting the agency's jurisdiction" might be frustrated by "the agency's institutional interests in expanding its own power."[43] This unreasonable and unnecessary risk is far too great given the potential outcome of neutering State and local authority in this matter.

Agencies have no inherent regulatory powers. Their power stems solely from that which is delegated by Congress. Since there is a requirement of affirmative legislative action to create agency power, there should not be a presumption of agency authority without *clear* evidence of such congressional intent (*Chevron* Step 0). As such, a presumption against agency authority entails a presumption against the delegation of authority for an agency to determine the scope of its

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[41] *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

[42] *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

[43] *Id.*

own jurisdiction. Absent such a negative presumption, agencies are certainly tempted to expand their power in the broadest sense possible and, in essence, violate the separation of powers by encroaching on the judiciary's interpretive function.

Justice Brennan stated that "statutes confining an agency's jurisdiction do not reflect conflicts between policies that have been committed to the agency's care, . . . but rather reflect policies in favor of limiting the agency's jurisdiction that, by definition, have not been entrusted to the agency and that may indeed conflict not only with the statutory policies the agency has been charged with advancing, but also with the agency's institutional interest in expanding its own power." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 387 (1988).[44] Self-interest on the part of the issuing agency provides a reason to doubt the genuineness of the explanation it offers to justify the interpretation it has adopted. In other words, the fact that the interpretation implicates the agency's self-interest, in and of itself, invites skepticism as to whether the rationale is above board or whether the agency's assertion of jurisdiction/authority is merely a power-grab.[45] This obvious problem resulted in the evisceration of *Chevron* deference in instances where the issue is the limiting of an agency's jurisdiction and Congress has not explicitly granted the agency that authority (*Chevron* Step 0). Rather, an expansive *de*

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[44] *See also City of New York v. FCC*, 486 U.S. 57, 65 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

[45] *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 206 (2004).

*novo* look at the legislative history is required to determine if deference is warranted. In the case at bar, the FCC clearly has an self-interest in facilitating its own policy interests by expanding its jurisdiction. Yet both Petitioners and the FCC agree that Congress intended to limit FCC authority in some respect as seen by the legislative history clearly. Given same, *Chevron* Step 0 is implicated and deference should not be afforded.

**(3) In this particular case, the legislative history dictates that *Chevron* deference not be granted.**

Congress enacted the Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C.A. § 151 *et seq*., "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technologies."[46] Among the technologies addressed by Congress in the Telecommunications Act was wireless communications services. In regard to this technology, Congress found that "siting and zoning decisions by non-federal units of government" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was inhibiting the deployment of wireless communications

[46] Pub.L. No. 104-104, 110 Stat. 56, 56 (1996); *see VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 828-829 (7th Cir. 2003).

services.[47] At the same time, however, Congress recognized that "there are legitimate State and local concerns involved in regulating the siting of such facilities . . . , such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way."[48]

To address the problems created by local zoning decisions, the House version of the Telecommunications Act would have given authority to the FCC to regulate directly the siting of wireless communications towers. The Conference Committee, however, decided against complete federal preemption, opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[49] Thus, § 332(c)(7) struck a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities.[50] Under that section, state and local governments retain the authority to regulate the siting of wireless telecommunications facilities, but

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[47] H.R. Rep. 104-204, at 94 (1995); *see St. Croix County,* 342 F.3d at 828-829.

[48] *Id.*

[49] *See* H.R. Conf. Rep. No. 104-458, at 207-08 (1996); *see St. Croix County,* 342 F.3d at 828-829.

[50] 47 U.S.C.A. § 332(c)(7).

their decisions are subject to certain procedural and substantive limitations.[51]

In particular, 47 U.S.C.A. § 332(c)(7), regarding the regulatory treatment of wireless services, provides, in part that:

> [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.[52]

The only limitations to the local zoning authority are as follows:

(1) Its rules and decisions shall not unreasonably discriminate among providers of functionally equivalent services;

(2) Its rules and decisions shall not prohibit or have the effect of prohibiting the provision of personal wireless services;

(3) Within a reasonable period of time, it shall act on any request for authorization to place, construct, or modify personal wireless service facilities;

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[51] *See* 47 U.S.C.A. § 332(c)(7); *see St. Croix County,* 342 F.3d at 828-829.

[52] 47 U.S.C.A. § 332(c)(7)(A).

(4) Any decision to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence; and

(5) A decision by a governmental body denying a request may not be based upon the environmental effects of radio frequency emissions if the emissions meet FCC guidelines.[53]

Furthermore, any person who is adversely affected by any final action or failure to act by a State or local government may commence an action in court for relief. Thus, allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission).[54]

This is a clear case where *Chevron* Step 0 is implicated and deference should not be afforded. The Fifth Circuit Panel held that § 332(c)(7) is ambiguous with respect to whether the FCC or the courts are empowered to determine the agency's jurisdiction. Thus, it applied *Chevron* deference. This, however, runs afoul of *Mead* and *Chevron* Step 0. Statutory ambiguity is no longer, by itself, sufficient evidence of a congressional intent to delegate interpretive

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[53] 47 U.S.C.A. § 332(c)(7)(B).

[54] 47 U.S.C.A. § 332(c)(7)(B)(v).

responsibility to an agency.[55] Where Congress has not been express, courts should only find that Congress has impliedly delegated interpretive power where it has delegated to an agency the authority to adopt regulations or take other actions that bind the public with the force of law in connection with the statute at issue.

In the case at bar, the FCC ***does not*** administer 47 U.S.C.A. § 332(c)(7). Instead, Congress specifically wanted local government to retain the right to determine how and where towers should be placed.[56] This is of particular import because Justice Brennan pointed out that "[o]ur agency deference cases have always been limited to statutes the agency was "entrusted to administer."[57] Furthermore, unless preemption was the clear and manifest intent of Congress, local zoning laws may not be preempted.[58] Within the Telecommunications Act, Congress clearly did not intend for local zoning laws to be preempted by federal law, except with respect to radio-frequency emissions. In fact, when considering this legislation, Congress decided *against* federal preemption, instead opting to "preserve the authority of State and local

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[55] *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

[56] 47 U.S.C.A. § 151 *et seq.*

[57] *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting).

[58] *See Gregory v. Aschcroft*, 501 U.S. 452, 460-461 (1991).

governments over zoning and land use matters except in limited circumstances."[59]

More importantly, Congress did not want the FCC to develop a uniform policy for the siting of wireless tower sites, but rather, Congress wanted the courts to have exclusive jurisdiction over all disputes regarding the placement, construction, and modification of personal wireless service facilities. Specifically, the legislative history provides that:

> It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) [regarding the effects of radio frequency emissions]. . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile services] facilities shall be terminated.[60]

In fact, even the FCC itself has recognized that the courts have exclusive jurisdiction over zoning disputes, (except in radio-frequency emissions cases), and that "the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation."[61] Thus,

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[59] *See* H.R. Conf. Rep. No. 104-458, at 207-08 (1996); *see St. Croix County,* 342 F.3d at 828-829.

[60] *See* H.R. Conf. Rep. No. 104-458, at 208 (1996).

[61] This information comes directly from the FCC's website. *See* http://wireless.fcc.gov/siting/local-state-gov.html

there is no question that this action is contrary to Congressional intent and legislative history and therefore prohibited by the Telecommunications Act—*i.e.,* the Telecommunications Act shall not modify, impair or supersede local law "unless expressly stated in such Act."[62] Additionally, the case presents the exact situation *Chevron* Step 0 was created to prevent. Congress clearly did not explicitly grant to the FCC the authority to determine the scope of its own jurisdiction. Thus, courts are to look to whether Congress has delegated to an agency the authority to adopt regulations or take other actions that bind the public with the force of law in connection with the statute at issue. The legislative history clearly establishes that Congress did not intend for the FCC to determine the scope of its own jurisdiction in this matter, and thus *Chevron* Step 0 mandates that deference not be applied in this particular circumstance.

**(C) The application of *Chevron* deference where an agency seeks to determine the scope of its own jurisdiction is a violation of the Separation-of-Powers Doctrine except where there has been an explicit delegation by Congress.**

*Chevron* deference essentially establishes that in certain circumstances administrators should decide the scope of their own authority. That principal, however, contradicts the separation-of-powers principles dating

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[62] 47 U.S.C.A. § 601(c)(1).

back to *Marbury v. Madison*[63] and *The Federalist No. 78*.[64] "The case for judicial review depends in part on the proposition that foxes should not guard henhouses - an injunction to which *Chevron* appears deaf." Cass R. Sustein, *Constitutionalism after the new deal*, 101 HARV. L. REV. 421 (1987). This consequence was yet another factor in the evolvement of *Chevron* Step 0. By mechanically applying *Chevron* deference in this matter without performing a *Chevron* Step 0 analysis, the Panel essentially violated the separation-of-powers doctrine.

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[63] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[64] *See The Federalist No. 78* at 525-26 (A. Hamilton) ( C. Van Doren ed. 1945) (But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.).

### (1) *Chevron* Step 0 represents a shift back to the traditional notion of the Separation-of-Powers Doctrine.

Article I of our constitution vests in Congress all legislative powers granted thereunder.[65] Article II gives the Executive the power to enforce the law.[66] Article III establishes that courts are the final arbiters of the meaning of the law.[67] If one would argue that congressional or state interpretations of constitutional provisions should be accepted whenever there is ambiguity in the constitutional text, that person would be met with a plethora of objections on the grounds of a violation of the separation-of-powers doctrine. Yet, the relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies, and there is no outrage regarding mechanically deferring to agencies regarding jurisdiction.[68] In both contexts, an autonomous jurist is required to determine the nature of the limitation and uphold the separation-of-powers doctrine. A strong judiciary in the interpretation of statutes is therefore essential when an agency's self-interest is at issue. An agency can acquire lawmaking authority only to the

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[65] *See* U.S. Const. art. I, § 1.

[66] *See Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

[67] *See Legal Servs. Corp. v. Valazquez*, 531 U.S. 533, 545 (2001).

[68] *See* Monaghan, *Marbury and the Administrative State*, 83 COLUM L. REV. 1, 32-34 (1983) (arguing that the role of judicial review is substantially similar in administrative law and constitutional law).

extent that Congress confers such power on it, and thus the scope of an agency's legal authority is for a court to determine.[69]

The Court has intuitively recognized this principle in later cases where it retreated from the mechanical application of *Chevron* deference and created *Chevron* Step 0. In *Christensen v. Harris County*, the Court refused to give deference to a Department of Labor opinion letter.[70] It cited to the *Skidmore v. Swift & Co.* case wherein the Court announced that courts *may* defer to agency interpretations, but were not required to do so.[71] In Justice Breyer's dissent, joined by Justice Ginsburg, he argued that *Chevron* applies only when Congress has made an express delegation to the agency.

Going even farther, in *United States v. Mead Corp.*, the Court gave purely discretionary deference, rather than *Chevron* deference, to a tariff classification by the United States Custom Service.[72] The *Mead* Court limited *Chevron* to cases where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the

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[69] *See 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.").

[70] *See Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

[71] *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[72] *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). As Justice Scalia recognized, the *Mead* ruling reversed the burden of proof saying that "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary." *Id.* at 239 (Scalia, J., dissenting). Thus, *Chevron* Step 0 was created.

Although these cases do not specifically cite to the separation-of-powers doctrine as the catalyst of their shift from the mechanical application of *Chevron* deference to review an agency's determination of its own jurisdiction, the underlying reality of the cases was a power shift back from the executive under *Chevron* to the judiciary under *Mead*. *Chevron* deference should now only apply when Congress has explicitly left a gap to be filled by the agency whose decision is under review (*Chevron* Step 0). The case at bar is an example of the violation of the separation-of-powers doctrine and certainly does not meet the *Chevron* Step 0 test under *Mead*.

**(2) The Fifth Circuit erred in its mechanical application of *Chevron* deference and presumptively delegating to the FCC the power to interpret a statute limiting its jurisdiction and upsetting Congress' careful jurisdictional balance.**

Under the Fifth Circuit's analysis of whether § 332(c)(7)(A) bars the FCC from using its general authority in the Act to regulate the State and local siting process under § 332(c)(7), *Chevron* deference was adopted in whole and *Mead* (*Chevron* Step 0) was completely ignored. The Panel's automatic application of *Chevron* to the FCC's interpretation of its statutory limit on its authority runs afoul of *Chevron* Step 0, which requires an extensive examination of Congress' intent. As Justice Breyer stated in *NCIA v. Brand X Internet Services,* a determination of whether an agency's generally conferred authority and other statutory circumstances make apparent that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute is of particular import "where an unusually basic legal question is at issue." *NCIA v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring). No where is this more important than in instances where a statute narrows federal authority and preserves the authority of State and local governments, and § 332(c)(7) seeks to do just that – even the FCC acknowledges this fact.

Given same, the case of *Louisiana Public Service Commission v. FCC* is certainly persuasive. It involved a similar preservation clause stating that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters. 476 U.S. 355, 370 (1986). In denying deference, the Court stated that the statute constituted a denial of power to the FCC.[73] It stressed the point by

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[73] *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986)

stating that "[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are unwilling and unable to do." *Id.* at 374-75.

Similarly, all parties, even the FCC, acknowledge that at the very least § 332(c)(7) precludes the FCC from imposing additional limitations on State and local government authority over the wireless facility zoning process. Just as in *Louisiana PSC,* Congress decided *against* federal preemption, instead opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[74] Congress intended the determination of what is reasonable under a given situation to remain with the courts, not with the FCC. The legislative history supports the fact that the reasonableness of review time of siting applications is to be determined by the courts. Specifically, the legislative history provides:

> It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) [regarding the effects of radio frequency emissions] . . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of

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[74] *See* H.R. Conf. Rep. No. 104-458, at 207-08 (1996); *see St. Croix County,* 342 F.3d at 828-829.

> [commercial mobile services] facilities shall be terminated.[75]

Now that the FCC has imposed the 90 and 150 day time frames, this exclusive jurisdiction of the courts has been removed. If an application is not reviewed within these time frames, the State or local government will be considered to have "failed to act" under the statute. Thus, the Fifth Circuit Panel has allowed the FCC to encroach on not only matters Congress intended to be left to State and local governments, but also on the separation-of-powers doctrine. Had it conducted a *Chevron* Step 0 analysis and applied the traditional tools of statutory construction, it would not have run afoul of the separation-of-powers doctrine and would have found that Congress did not intend for the FCC to make policy affecting State and local authority.

**(D) The application of *Chevron* deference where an agency seeks to determine the scope of its own jurisdiction is a violation of the Administrative Procedure Act except where there has been an explicit delegation by Congress**.

Congress has made clear its intention to leave jurisdictional questions in the hands of the courts. The Administrative Procedure Act (APA) is the basic charter governing judicial review. Under Section 706 of the APA, reviewing courts are to decide "all relevant questions of law." 5 U.S.C.A. § 706 (2006).

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[75] See H.R. Conf. Rep. No. 104-458, at 208 (1996).

"Determining the existence or scope of agency authority, unlike answering a complex technical or scientific question or making a policy judgment about how best to implement a regulatory regime, requires answering a question of law about whether Congress delegated authority to a given regulatory agency." Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1537 (2009).

### (1) The Fifth Circuit's mechanical application of *Chevron* deference is a violation of the Administrative Procedure Act.

The APA recognizes jurisdiction as a distinct legal inquiry.[76] An agency only has authority to implement and enforce a law or regulation when the underlying jurisdiction exists. Thus, as all agency power comes from Congress, agencies only have authority to engage in interpretation and exercise interpretive discretion when Congress has already delegated such authority. The APA acknowledges this fact as it provides that courts are to invalidate and set aside those agency actions determined to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C.A. § 706(2)(C).

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[76] *See* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM & MARY L. REV. 1463, 1524 (2000).

The Panel's mechanical application of *Chevron* deference, however, violates this principle. It necessarily shifts the responsibility/authority for answering certain legal questions – in particular jurisdictional issues – from the courts to the administrative agency. This move is clearly contrary to the language of the APA.

**(2) The FCC's usurpation of Court authority violated the Administrative Procedure Act.**

The Fifth Circuit Panel reasoned that its interpretation of §§ 332(c)(7)(A) and (B)(v) determined its application of *Chevron* deference. Section 332(c)(7)(A) provides that State and local authority shall not be limited or affected except as provided within that paragraph. Section 332(c)(7)(B)(v) provided a judicial remedy for persons adversely affected by State or local action. The Panel concluded that § 332(c)(7) is ambiguous with respect to the FCC's authority to establish a 90 and 150 day deadline for municipalities to act on an application regarding the placement and construction of wireless communications facilities. Specifically, the Panel reasoned that "[a]lthough the statute clearly bars the FCC from using its general rulemaking powers under the Communications Act to create additional limitations on state and local governments beyond those the statute provides in § 332(c)(7)(B), the statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement

§ 332(c)(7)(B)'s limitations."[77] This conclusion led to the Panel apparently summarily dispensing with *Chevron* Step 0 and moving directly to applying *Chevron* deference. However, this incomprehensive analysis not only ignores *Mead* and *Chevron* Step 0, it also legitimized the FCC's violation of the APA.

The Panel utilized *Chevron* deference wherein the Court recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formation of a policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[78] Thus, the Panel acknowledges that the question is one of law, but it ignores the APA directive that reviewing courts are to decide all relevant questions of law. Even the *Chevron* Court recognized that in determining whether a gap has *actually* been left by Congress, a *court* must employ the traditional tools of statutory construction.[79] The Panel, however, dispensed with this directive and rather simply and mechanically applied *Chevron* deference.

In following the APA, the Panel should have begun with the premise that a statute is only ambiguous if it is reasonably susceptible of more than one accepted

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[77] *See* Pet. App. 4 at page 34.

[78] *Chevron, USA, Inc. v. Natural Res. Def. Counsel, Inc., et al.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

[79] *See Chevron* at 843 (footnote 9).

meaning.[80] In interpreting a statute, a court must begin with its plain language.[81] In doing so, courts look not only to "the particular statutory language at issue," but also to "the language and design of the statute as a whole."[82] Additionally, a statute's legislative history can be crucial in this analysis.[83] It is only when these traditional methods of statutory construction fail to reveal a provision's meaning that a court may conclude that the statute is ambiguous.[84]

There is no question that § 332(c)(7)(B)(v) establishes sole jurisdiction in the courts over all disputes arising under § 332(c)(7)(B)(ii). Even the Panel acknowledged this fact in its opinion.[85] Yet, it side-steped the actual language of the statute and tries to create an ambiguity not in what the statute says, but

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[80] *See United Servs. Auto Ass'n v. Perry*, 102 F.3d 144 (5th Cir. 1996); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); Norman J. Singer, 2A Sutherland Statutory Construction § 45.02 (5th ed. 1992).

[81] *See White v. INS*, 75 F.3d 213, 215 (5th Cir. 1996); *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990).

[82] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986).

[83] *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011).

[84] *See Chevron*, 467 U.S. at 843 & n. 9.

[85] *See* Pet. App. 4 at pg. 32.

in what it does not say. The entirety of the Panel's analysis is essentially summed up as follows:

> The cities contend that, by establishing jurisdiction in the courts over specific disputes arising under § 332 (c)(7)(B)(ii), Congress indicated its intent to remove that provision from the scope of the FCC's general authority to administer the Communications Act. The cities read too much into § 332 (c)(7)(B)(v)'s terms, however. Although § 332 (c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under § 332 (c)(7)(B)(ii), the provision does not address the FCC's power to administer § 332 (c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act. Accordingly, one could read § 332 (c)(7) as a whole as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332 (c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.[86]

This analysis would no-doubt be rational, but for the last sentence of § 332(c)(7)(B)(v). In that last sentence, Congress specifically stated what power and

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[86] *See* Pet. App. 4 at pg. 32.

jurisdiction was enumerated to the FCC, and it ***did not*** include the ability to, in any way, administer § 332(c)(7) except as articulated, including providing *guidance* to the courts relative to disputes under the provision. In other words, the Panel's analysis is faulty and unreasonable because it focuses solely on what the statute does not say and interprets that as a gap, rather than focusing on what the statute *does* say. This analysis should not have taken place at all under *Chevron* Step 0, as Congress did not specifically grant jurisdiction to the FCC.[87] The Panel should have focused on the plain language of the statute. The plain language of the statute granted very limited power and jurisdiction to the FCC. If a statute delegates

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[87] It should be noted that the FCC has never been granted or even attempted to try to exert such power. The FCC has made a power-grab and created a finite determination of reasonableness where Congress certainly did not intend. The FCC's imposition of a 90 and 150 day time frame for the review of siting applications is an additional limitation on the specifically reserved State and local powers pursuant to zoning, as Congress clearly intended for such requests to be acted on within "a reasonable period of time . . . taking into account the nature and scope of such request." 47 U.S.C.A. § 332(c)(7)(B)(ii). Whereas State and local authorities previously had to act upon a request within a reasonable period of time depending on the circumstances, they now must act within a *definite* time frame or be found to have failed to act at all. This is clearly an additional limitation and an improper usurpation of the State and local authority. Furthermore, the statute contemplated the *courts* deciding on a case by case basis whether a State of local municipality was being reasonable in connection with applications. This ensures a detailed an fair result *on a case by case* basis. The FCC's usurpation of court authority on this issue not only eliminates the case by case analysis, but also forces upon State and local municipalities finite terms that were not intended by Congress.

regulatory authority to an agency to address some matters but not others, then it would be inappropriate to presume that Congress has delegated further authority to an agency to assert further authority on its own initiative.[88]

Disregarding *Chevron* Step 0, the Panel interprets the lack of some specific general admonition against FCC jurisdiction as an ambiguity and concludes that the ambiguity necessarily results in *Chevron* deference. Specifically, it stated that "[h]ad Congress intended to insulate § 32(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC."[89] However, the requirement of a general admonition is unreasonable and unnecessary. There was no need to tell the FCC specifically what it could not do, because Congress *specifically* told the FCC all it *could* do. Thus, by only granting to the FCC specific power and jurisdiction, the only reasonable interpretation is that Congress *specifically did not* grant to the FCC any other power and jurisdiction, including the power to create a time line by which municipalities must abide. As such, *Chevron* Step 0 dictates that deference not be granted and the courts make a *de novo* review.

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[88] *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1531 (2009)

[89] *See* Pet. App. 4 at pg. 31.

The Panel's decision, therefore, conflicts with *Chevron* Step 0, the APA, and *Chevron* itself, as it does not analyze the plain language of the statute. Rather, it ignores language in the statute and creates an ambiguity, which is unreasonable if applied with the language it chose to ignore.

## CONCLUSION

This Court granted certiorari on the issue of whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction. Pursuant to *Chevron* Step 0, unless Congress has indicated otherwise the answer is a resounding "no." *Chevron* Step 0 requires some affirmative indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency. Only with this affirmative indication of congressional delegation of administrative authority is *Chevron* implicated at all. If a court finds affirmative evidence, from the agency's generally conferred authority and other statutory circumstances, that Congress intended to delegate final interpretive power to the agency, it then will move to *Chevron* Step 1 and Step 2. Even then, however, *Chevron* deference is not automatic. Step 1 is a determination of whether Congress eliminated the agency's discretion over the precise subject matter addressed by clearly resolving the specific question at issue. If not, only then will Step 2 apply and deference will be given to the agency's determination of its own jurisdiction unless it is determined that the agency's rationale is arbitrary and/or unreasonable.

In the case at bar, the Fifth Circuit should not have mechanically applied *Chevron* deference to review the

FCC's interpretation of its own statutory jurisdiction. Rather, it should have performed a *Chevron* Step 0 analysis, *de novo*, on the issue of whether Congress specifically delegated final interpretive authority over § 332(c)(7) of the Telecommunications Act of 1996. Had such an analysis been done, the Fifth Circuit would have been required to apply the traditional methods of statutory construction and apply the presumption that Congress did not intend to expand the FCC's jurisdiction into an area of traditional State and local regulation.

Petitioner prays that this Court should apply *Chevron* Step 0 to facts and circumstances of this case, reverse the Fifth Circuit Judgment, and find that the FCC did not have authority to implement the 90 and 150 day time frames. Alternatively, Petitioner prays that this Court remand the matter back to the Fifth Circuit with instructions that it properly apply the *Chevron* Step 0 analysis and the aforementioned presumptions to the facts and circumstances of this case.

Respectfully submitted,

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