

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x

3   CITY OF ARLINGTON, TEXAS, ET AL.,       :

4                   Petitioners                       :   No. 11-1545

5                   v.                                       :

6   FEDERAL COMMUNICATIONS                       :

7   COMMISSION, ET AL.                           :

8   - - - - -x

9   and

10   - - - - -x

11   CABLE, TELECOMMUNICATIONS, AND           :

12   TECHNOLOGY COMMITTEE OF THE               :

13   NEW ORLEANS CITY COUNCIL,                 :   No. 11-1547

14                   Petitioner                       :

15                   v.                                       :

16   FEDERAL COMMUNICATIONS                       :

17   COMMISSION, ET AL.                           :

18   - - - - -x

19   Washington, D.C.

20   Wednesday, January 16, 2013

21

22                   The above-entitled matter came on for oral

23   argument before the Supreme Court of the United States

24   at 10:03 a.m.

25   APPEARANCES:

1 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf  
2 of Petitioners.

3 DONALD B. VERRILLI, JR., ESQ., Solicitor General,  
4 Department of Justice, Washington, D.C.; on behalf  
5 of Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 11-1545, City of Arlington,  
5 Texas v. The Federal Communications Commission and the  
6 consolidated case.

7 Mr. Goldstein?

8 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

9 ON BEHALF OF THE PETITIONERS

10 MR. GOLDSTEIN: Mr. Chief Justice, thank you  
11 very much. May it please the Court:

12 This case can get complicated, quickly,  
13 because the word "jurisdiction" means a lot of different  
14 things to a lot of different people, in a lot of  
15 different contexts, and the parties have advanced both  
16 broad and narrow theories for resolving the case. So  
17 the thing I can do, most helpfully, at the beginning, I  
18 think, is to frame where I believe the real dispute in  
19 the case lies.

20 The FCC claims the authority to interpret  
21 Section 332(c)(7) of the Communications Act with the  
22 force of law. And my argument today is limited to the  
23 question -- that threshold jurisdictional question,  
24 which we call interpretive jurisdiction, Iowa Utilities  
25 called it underlying jurisdiction, law professors like

1 to call it Chevron Step Zero, but that's what I'm  
2 focused on.

3 And the Fifth Circuit said that, on that  
4 question, the FCC gets Chevron deference. And that is  
5 it gets to decide whether it has the authority to  
6 interpret the --

7 JUSTICE GINSBURG: Mr. Goldstein, this case  
8 has been presented in a very complicated way, but it  
9 seems to me that what we're dealing with is a rule  
10 adopted by the Commission, and the Commission's  
11 rule-making power, as you know, is very broad.

12 They have power to make the rules needed to  
13 carry out the provisions of the Act. And 332 is --  
14 counts as a provision of the Act. So why isn't it just  
15 a proper implementation of that rule-making authority?

16 MR. GOLDSTEIN: Well, Justice Ginsburg, the  
17 question on which you granted certiorari was how to  
18 decide that question, not what is the answer to that  
19 question.

20 What the Fifth Circuit did, acknowledging a  
21 circuit conflict, was decided that the FCC's assertion  
22 that you are right is, itself, entitled to Chevron  
23 deference.

24 JUSTICE BREYER: All right. Suppose you win  
25 on that, okay?

1 MR. GOLDSTEIN: Yes.

2 JUSTICE BREYER: Or I -- I grant you, I  
3 don't see any reason for that. The question is just  
4 whether Congress intended them to have a degree of  
5 discretionary power, but all the arguments that we hear  
6 still count against you. So -- so if you want to go  
7 into the Chevron Step Zero or Step Minus Alpha 13.6, I  
8 mean, fine.

9 (Laughter.)

10 JUSTICE BREYER: But, I mean, at some point,  
11 I will hope you -- I hope you will go into what I'd call  
12 the question of we have a statute, just as  
13 Justice Ginsburg said, it's an expert statute. It is a  
14 statute in an agency that has all kinds of discretionary  
15 authority. It includes an important substantive  
16 question about what the relation is with the cable  
17 television in this area -- post -- not cable, but -- you  
18 know, the broadcast posts.

19 And so all these factors here, which  
20 suggest, of course, Congress, which is not expert, would  
21 have wanted the FCC to figure this one out.

22 MR. GOLDSTEIN: Okay. I --

23 JUSTICE BREYER: That -- that -- at some  
24 point -- you don't have to go into it at all, if you  
25 don't want to, but I just want to put that on the table.

1 (Laughter.)

2 MR. GOLDSTEIN: Justice Breyer, I do want to  
3 talk about it. I do hope --

4 JUSTICE BREYER: You don't have to talk  
5 about it now, but you can talk about it whenever you  
6 want.

7 (Laughter.)

8 MR. GOLDSTEIN: I appreciate it. But I'd  
9 like to talk about the things you want to hear me talk  
10 about.

11 I am very conscious of the fact, let me say,  
12 that the Court limited this grant of certiorari to the  
13 first question presented, which was the abstract Chevron  
14 question, and so I just don't want to jump the gun --

15 JUSTICE GINSBURG: But if the abstract  
16 question really isn't presented -- I mean, just to  
17 follow on what I asked you first, here is a phrase, "a  
18 reasonable time." And the Commission interprets that  
19 phrase in a reasonable way.

20 Why is this case any more complicated than  
21 that? Why doesn't the FCC have the authority to  
22 interpret that term, within a reasonable time?

23 MR. GOLDSTEIN: Justice Ginsburg, you -- you  
24 and Justice Breyer have both asked me to turn to that  
25 question, so I'm going to do it. The only point I'm

1 making is that all of these questions assume that we are  
2 right on the question presented, which I think we  
3 obviously are. So I'm happy to move on, but I just did  
4 not want to hurry past the legal question on which you  
5 granted certiorari.

6 JUSTICE SCALIA: Well, don't, because I  
7 don't -- I don't think it's so clear.

8 (Laughter.)

9 MR. GOLDSTEIN: Okay.

10 JUSTICE SCALIA: Look, what you've told us  
11 is jurisdiction means a lot of things, but what you mean  
12 by it is real jurisdiction, right?

13 MR. GOLDSTEIN: I mean -- what I mean by  
14 it --

15 JUSTICE SCALIA: Chevron Step Zero  
16 jurisdiction. That doesn't clarify things very much for  
17 me. What if -- what if the statute in this case said,  
18 the FCC shall have no jurisdiction to establish time  
19 limits within which the States must act?

20 MR. GOLDSTEIN: Yes.

21 JUSTICE SCALIA: Okay? Would that be a  
22 jurisdictional question?

23 MR. GOLDSTEIN: That would. That would  
24 be --

25 JUSTICE SCALIA: Okay. What if the statute



1 just said, the FCC shall not establish time limits  
2 within which the States must act. Is that  
3 jurisdictional?

4 MR. GOLDSTEIN: That is a different kind of  
5 jurisdictional question. It is a jurisdictional  
6 question.

7 Justice Scalia, so maybe I can help you,  
8 just on the question of what I'm talking about and  
9 whether I can draw -- whether I can draw my line or  
10 whether it's just malleable and every court's going to  
11 get drawn into it, which I suspect you may be concerned  
12 about. Okay?

13 The kind of jurisdiction I'm talking about  
14 is what you called, in your Iowa Utilities opinion for  
15 the Court, "underlying jurisdiction." And, in Iowa  
16 Utilities, in the discussion of the FCC's underlying  
17 jurisdiction, you undertook the judicial task of looking  
18 at the words of the statute and figuring out that  
19 Congress did intend, along the lines of the theory that  
20 Justice Ginsburg just articulated, that the FCC did have  
21 the power to implement those provisions of the '96 Act.

22 And in -- as we have rehearsed, to be  
23 honest, every one of your Chevron opinions deals with  
24 this question: Just did the agency have the power to  
25 interpret this statutory provision with the force of

1 law? You and the -- all of your colleagues on the Court  
2 have always decided that question de novo.

3 JUSTICE SCALIA: I -- I don't think so. In  
4 fact, I think we have said in -- in a number of  
5 opinions -- and, certainly, I have said in a  
6 concurrence -- that the jurisdictional question, like  
7 any other question -- an alleged jurisdictional  
8 question, like any other one, is to be decided with  
9 deference to the agency.

10 Now, if you -- if you talk -- if you want to  
11 limit your proposal --

12 MR. GOLDSTEIN: I do.

13 JUSTICE SCALIA: -- to the -- to the entry  
14 question --

15 MR. GOLDSTEIN: I do.

16 JUSTICE SCALIA: -- of whether the FCC has  
17 jurisdiction to administer the Federal  
18 Communications Act, I agree with you. I will decide  
19 that without listening to the FCC. But that's -- that's  
20 a good deal short of whether, given that it does have  
21 jurisdiction to administer the Federal Communications  
22 Act, its implementation of this particular provision  
23 goes beyond what its authority is.

24 That seems, to me, a question of -- you can  
25 call everything that's ultra vires in excess of the

1 agency's jurisdiction, you can. But that's not --  
2 that's not what we mean by the entry jurisdictional  
3 question, does the agency have authority to administer  
4 this Act.

5 MR. GOLDSTEIN: Okay. Justice Scalia, the  
6 place where -- I do limit myself to the entry point and  
7 the place where you and I are going to disagree is  
8 whether the entry point is just the generic question,  
9 does the FCC administer the whole Act or the somewhat  
10 more narrow question, does the FCC administer this  
11 statutory provision?

12 JUSTICE KENNEDY: Are there some statutes  
13 where parts of the statute are subject to the agency's  
14 Chevron rule-making authority and its zero plus one  
15 jurisdiction and other parts are not? You just  
16 mentioned the case by Justice Scalia -- and I'm not sure  
17 that that involved that because it does seem to me, just  
18 reading through, that "reasonable time," that sounds  
19 like something that -- where we can have a specific  
20 elaboration of what it means.

21 And to say that the jurisdiction of the  
22 agency or the authority of the agency does not extend to  
23 rules seems a little odd at first. I recognize the  
24 federalism problems and so forth.

25 MR. GOLDSTEIN: Yes. Okay. The answer to

1 your question is yes, and the best example is this  
2 statute. It is uncontested and incontestable that  
3 the -- the FCC does not administer all of the  
4 Communications Act. This Court so held, squarely, in  
5 the Louisiana Public Service Commission case, in which,  
6 there, Congress added to the Communications Act Sections  
7 251 and 252.

8 And there was a provision in that statute  
9 that said -- that limited the scope of the FCC's power,  
10 as we say Section 332(c)(7) does. We will have to go  
11 through that and debate that. But the Communications  
12 Act is plainly -- and there are other provisions as  
13 well. But the best example is the Louisiana PSC case.

14 And so --

15 CHIEF JUSTICE ROBERTS: So your  
16 understanding of jurisdiction and what you're arguing  
17 for today is nothing more or less than this is a  
18 provision as to which Congress did not give the agency  
19 law-making authority. You do not defer to the agency  
20 with respect to this provision because it's outside its  
21 jurisdiction in the sense that it gets deference.

22 MR. GOLDSTEIN: That is correct. I would  
23 only caveat it in the following way: And there's --  
24 the question on which you granted certiorari is does the  
25 FCC get Chevron deference in its assertion that it gets

1 to interpret 332(c)(7) with the force of law. I  
2 think --

3 CHIEF JUSTICE ROBERTS: Right. Now, the  
4 reason -- the reason we are hearing all about  
5 jurisdiction and it's kind of dressed up --

6 MR. GOLDSTEIN: Yes.

7 CHIEF JUSTICE ROBERTS: -- is simply because  
8 the means by which Congress made clear it was not giving  
9 the FCC authority to get deference, however that is  
10 phrased, is this 7(a), which speaks about nothing will  
11 limit the authority of the States.

12 MR. GOLDSTEIN: It's that --

13 CHIEF JUSTICE ROBERTS: If it weren't for  
14 that, if it were some other type of provision, that --  
15 we wouldn't call it jurisdiction, but we would just say,  
16 the FCC doesn't get deference to it.

17 MR. GOLDSTEIN: It would be a very easy  
18 jurisdictional question. We rely on two provisions of  
19 332(c)(7) to establish the proposition that Congress did  
20 not intend the general rule-making authority in Section  
21 201(b) of the Communications Act to extend to 332(c)(7).  
22 And those are --

23 JUSTICE SCALIA: That's -- that's no  
24 different from our holding in any case that the agency  
25 has no authority to issue this rule. It has rule-making

1 authority, but this rule goes too far, which is to say  
2 Congress did not give the agency authority to go this  
3 far.

4 MR. GOLDSTEIN: Justice Scalia --

5 JUSTICE SCALIA: It's -- it's always a  
6 question of how much authority Congress gave the agency.

7 MR. GOLDSTEIN: We disagree. And I  
8 understand that you have a vision of how Chevron  
9 deference operates. We disagree with it in this  
10 respect, respectfully, and that is we believe that every  
11 one of this Court's Chevron precedents has started --  
12 sometimes, only in a sentence, because, often, it's very  
13 simple -- often, it's uncontestable -- that it's a  
14 provision of the Communications Act that does fall  
15 within, for example, the FCC's 201(b) authority.

16 But it is always as -- you have always  
17 approached that question as judges. First, we decide  
18 does the FCC have the power to implement this statute?

19 JUSTICE KAGAN: Well, Mr. Goldstein, at one  
20 level, you are right. It's just a level that doesn't  
21 help you very much. I mean, it's -- it's true that,  
22 always, there is an initial question of whether an  
23 agency is entitled to Chevron deference. But, usually,  
24 the way we answer that question is just this: We say is  
25 this the agency's organic statute? Yes.

1                   Does that organic statute provide the agency  
2   with lawmaking power? Yes. Has the agency acted in  
3   accordance with that lawmaking-- under that lawmaking  
4   power? Yes. Well, then, the agency gets deference. We  
5   go on to the next thing, which is Step One and Step Two.

6                   So -- you know, we don't -- what we don't do  
7   is this sort of provision by provision, subsection by  
8   subsection, did Congress have a special intent as to  
9   this subject matter or that subject matter or the other  
10  subject matter? We've just had some very simple rules  
11  about what gets you into the box where an agency is  
12  entitled to deference.

13                  MR. GOLDSTEIN: Justice Kagan, I disagree.  
14  I honestly disagree. I'm going to give you three cases  
15  that I think show that I am right and that your  
16  articulation of your -- that approach is not correct.  
17  And I encourage you to ask the Solicitor General what  
18  his best case is. It may be he thinks American  
19  Hospital, which I'll talk about.

20                  Here are my three cases:

21                  Louisiana Public Service Commission,  
22  provision by provision, the Court looked de novo at the  
23  question of whether Sections 251 and 252 of the  
24  Communications Act were subject to the general  
25  rule-making power. It said no.

1           Adams Fruit, another case where the  
2   Secretary of Labor had general rule-making authority  
3   over the agricultural worker protection statute. And  
4   the Court looked specifically at the private right of  
5   action and said, your authority doesn't extend here.

6           And the last one is Meade, where the Customs  
7   Service has the general authority to administer that  
8   statute. And, instead, the Court looked at the specific  
9   provision involved, and it said, do you have lawmaking  
10  authority with the respect to these interpretive rulings?

11           And so it has always done some --

12           JUSTICE SCALIA: Did -- did it say, in all  
13  of those cases, we give no deference to the agency's  
14  contrary determination because this is a jurisdictional  
15  question? Did it say anything like that?

16           MR. GOLDSTEIN: It did not. I have not --

17           JUSTICE SCALIA: I didn't think so.

18           MR. GOLDSTEIN: Justice Scalia, I will tell  
19  you this: I am not overclaiming the cases. I am  
20  describing what happened in them, particularly on the  
21  axis of whether the Court went provision by provision.

22           JUSTICE SCALIA: Very -- very often, I could  
23  decide a case -- you know, the lower courts are running  
24  away from the question of deference vel non because  
25  things have been so confused by Meade. So they simply



1     decide the question assuming no deference to the agency.  
2     That doesn't prove that, in that particular case, the  
3     agency wouldn't have been entitled to deference.

4                 MR. GOLDSTEIN:   Justice Scalia, let me tell  
5     you why --

6                 JUSTICE SCALIA:   Whether it was or not, it  
7     would have come out this way.   So those three cases  
8     don't -- don't prove what you say they prove.

9                 MR. GOLDSTEIN:   Justice Scalia, here's why I  
10    disagree:   I picked three cases for a very specific  
11    reason, in that each of those three cases rejected the  
12    assertion of jurisdiction.   And so that, if Chevron were  
13    applying, the Court would have had to find that the  
14    statute was unambiguous.   And it didn't do that in any  
15    of those cases.

16                JUSTICE KENNEDY:   And could you add that, in  
17    those three cases -- or at least Meade, some respect was  
18    given to the agency's due?

19                MR. GOLDSTEIN:   Yes, absolutely.

20                JUSTICE KENNEDY:   It was just not the sort  
21    of deference that's so wooden under Chevron.

22                MR. GOLDSTEIN:   Absolutely, Justice --

23                JUSTICE KAGAN:   But take Meade, Mr. -- I'm  
24    sorry.   Did --

25                MR. GOLDSTEIN:   I did.   I agreed with

1 Justice Kennedy vociferously. That was -- that was the  
2 end of my answer.

3 (Laughter.)

4 JUSTICE KAGAN: And Meade presented --  
5 whatever you think of Meade, it's a very different  
6 question from this because what the majority in Meade  
7 said was that the agency wasn't entitled to deference  
8 because it was acting by way of these opinion letters  
9 that weren't -- that didn't have the force of law. So  
10 that's the threshold question, is does the agency have  
11 power to make rules with the force of law, and is the  
12 agency exercising that power?

13 That is a threshold question that has been  
14 set by this Court. It's a very different kind of  
15 question from provision by provision, subsection by  
16 subsection, did -- did Congress think that the agency  
17 had authority over this particular subject matter or  
18 not.

19 MR. GOLDSTEIN: Okay. I have two -- I have  
20 three answers. They will be brief. Louisiana Public  
21 Service Commission and Adams Fruit are as I described  
22 them. The reason that Meade is helpful to me is on a  
23 different axis than you've described. And that is that  
24 the agency there had a general -- generally applicable  
25 authority in which it could have urged that its

1 authority to issue those rule-makings, that it was  
2 entitled to deference on its view of its power to issue  
3 rulings with the force of law.

4 But the third thing that I want to say  
5 is let me just take --

6 JUSTICE SCALIA: Before you get to that, I'm  
7 really surprised at your response to Justice Kennedy,  
8 that you agree that, even where the agency has no  
9 jurisdiction, although you won't give Chevron deference,  
10 you will give whatever the other kind of deference.

11 MR. GOLDSTEIN: Skidmore.

12 JUSTICE SCALIA: Why would you give Skidmore  
13 deference, if some non-jurisdictional agency comes in  
14 and says, hey, by the way, court -- you know, I think  
15 this is the right answer? Oh, we will listen to that  
16 respectfully. We won't necessarily give you Chevron --  
17 why would you give it any deference at all, if there is  
18 no jurisdiction?

19 MR. GOLDSTEIN: Because, Justice Scalia,  
20 Skidmore deference is, as you know, of course -- and you  
21 have been a very -- a very powerful critic of it,  
22 obviously, in your opinions -- that it is the -- you  
23 give the agency the respect of the persuasiveness of its  
24 opinion. And I took -- or I -- the part of the comment  
25 that I was agreeing with Justice Kennedy was -- is, as

1 Justice Ginsburg has suggested, the FCC understands the  
2 Communications Act.

3 JUSTICE KENNEDY: And you might also have  
4 said, it seems to me, that that assumes the issue --  
5 assumes the premise.

6 MR. GOLDSTEIN: Yes.

7 JUSTICE KENNEDY: The question is, is there  
8 jurisdiction or not?

9 MR. GOLDSTEIN: And that -- that --

10 JUSTICE KENNEDY: If you say, when there is  
11 no jurisdiction, why do you give deference, that -- that  
12 assumes the very step -- the very question we are trying  
13 to resolve.

14 JUSTICE SCALIA: And that's all you think  
15 that Skidmore deference means? You will listen to  
16 opinions that make sense, right?

17 MR. GOLDSTEIN: We -- the Court has -- I am  
18 quoting the Court.

19 JUSTICE SCALIA: But just to agency  
20 opinions, it makes sense, not to --

21 MR. GOLDSTEIN: It more than makes sense,  
22 Justice Scalia. I think that there -- there is a  
23 common-sense element to this, and that is that the FCC,  
24 we recognize that it has its expertise. The question is  
25 do we have to -- when the statute is ambiguous, as it

1 will often be, do we have to accept, as a matter of law,  
2 their view that they do have jurisdiction?

3 I do want to --

4 JUSTICE GINSBURG: Mr. Goldstein, in  
5 following that, it seems to me you -- you are basing  
6 your argument on what is said in 7(a). And that  
7 preserves the authority of the local governments. But  
8 the provision that we are talking about is (b), and (b)  
9 says limitations, authority that the local governments  
10 do not have, and among those limitations is that they  
11 have to act within a reasonable time.

12 MR. GOLDSTEIN: Yes. Okay.

13 JUSTICE GINSBURG: I just don't understand  
14 how the FCC's general rule-making authority is removed  
15 as to a provision that limits what the State and local  
16 governments can do.

17 MR. GOLDSTEIN: All right. You and  
18 Justice Breyer have encouraged me to get to the merits  
19 question, so let me turn the corner, if I might, to how  
20 we think a court would look at this question de novo.

21 We have two points. One is the statutory  
22 provision, and this is going to be at pages 1 and 2 of  
23 the cert petition, if you have that copy in front of  
24 you.

25 The statute -- and so, Justice Ginsburg, I

1 am going to answer your question, but I want to make a  
2 couple of quick points about our offensive argument  
3 about why it is Congress didn't intend the FCC to  
4 implement the statute with the force of law.

5           It begins with preservation of local zoning  
6 authority. Subsection (a) says, "Except as provided in  
7 this paragraph, nothing in this Act" -- which includes  
8 Section 201(b) -- "shall limit or affect the authority  
9 of a State or local government with respect to this  
10 subject matter."

11           Then, in Subsection (b)(5) --  
12 Justice Ginsburg, you said the essence of the statute is  
13 (b). In subsection (b)(5), Congress located the  
14 enforcement power of this statute in the courts.  
15 "Any" -- and this is it at the bottom of 2, "Any person  
16 adversely affected by any final action or failure to act  
17 by a State or local government or any instrumentality  
18 thereof" --

19           JUSTICE GINSBURG: But you are -- you are  
20 skipping over (2), which is the phrase "reasonable  
21 time."

22           MR. GOLDSTEIN: I -- I could read the whole  
23 thing, Justice Ginsburg. My point is going to be that  
24 that "reasonable period of time" phrase is enforced  
25 through the courts. Now, Congress --

1 JUSTICE GINSBURG: Just -- just on a  
2 practical level --

3 MR. GOLDSTEIN: Yes.

4 JUSTICE GINSBURG: -- what sense does it  
5 make to read this to say that each time there is a  
6 dispute that comes to the Court, the Court will decide  
7 in that particular case, with no guide at all, what the  
8 reasonable time is?

9 MR. GOLDSTEIN: I -- I will, now, turn to  
10 that question. It makes enormous sense, and it was  
11 explained by the conferees in the conference report at  
12 page 209 of the petition appendix. And what happened  
13 here is that -- that the House version of the bill  
14 instructed the FCC to conduct a rule-making and the  
15 rule-making would set standards for establishing a  
16 reasonable period of time.

17 The Senate came along, which had no such  
18 provision and said, no, we are going to have a provision  
19 that, instead, says that nothing else in the Act will  
20 apply to this question; that you will go to the courts,  
21 rather than to have a rule-making, the rule-making must  
22 be canceled, and then explained its intent. And so if I  
23 could just read that to you, very quickly --

24 JUSTICE SCALIA: Suppose I didn't know that,  
25 and I'm just looking at the text, okay?

1 MR. GOLDSTEIN: Yes.

2 JUSTICE SCALIA: There are innumerable  
3 statutes which, after giving of the agency rule-making  
4 authority, provide judicial -- you know, review under  
5 this statute shall be held in such-and-such a court.

6 There is no conflict whatever between a  
7 statement that any person affected can sue in Federal  
8 court and the possession by an agency of rule-making  
9 authority. The -- the two simply don't conflict.

10 MR. GOLDSTEIN: Justice Scalia, I -- my  
11 point is that it is a point in our favor, particularly  
12 when you compare -- (b)(5) has two parts, in addition to  
13 the statutory history, which was -- told the FCC to  
14 cancel the rule-making on this point. Subsection (b)(5)  
15 says, you go -- on the reasonable period of time  
16 provision, you go to the courts; and, on questions  
17 related to radio frequency emissions, which is also  
18 covered by (c)(7)(A), you go to the FCC.

19 And what the conferees explained, quite  
20 clearly, Justice Ginsburg, is that you can have two  
21 different visions of what reasonable period of time is.  
22 And that is a general -- this is -- the first one is  
23 what the FCC you would expect to implement, and that is  
24 a reasonable period of time is a general national  
25 standard, a kind of baseline.



1           What they said is a presumption of 90 or  
2   150 days. And that's what we think, generally, the FCC  
3   will decide how long it takes to act on a wireless  
4   application. Or you could think about reasonable period  
5   of time as within the locality, and that is, is the  
6   locality following its ordinary standards for resolving  
7   siting applications and not discriminating against  
8   wireless applications.

9           And that -- the latter is what Congress  
10   intended. And it makes every sense in the world, in the  
11   context of this statute, that Congress wanted that  
12   because, first, it has always been the case that State  
13   and local -- that wireless siting and all siting  
14   decisions are decided by localities, not by the Federal  
15   government --

16           JUSTICE GINSBURG: How do you know -- how do  
17   you know when it's 30 days after a failure to act?

18           MR. GOLDSTEIN: That, Justice Ginsburg --  
19   just to put this in context, the government says that  
20   the FCC was concerned that the wireless companies  
21   wouldn't know when to go to court. They cite no case in  
22   which that was ever an issue, neither the wireless  
23   companies, nor them. And --

24           JUSTICE KENNEDY: Well, I wouldn't know when  
25   to go to court.

1                   MR. GOLDSTEIN: Because it's a continuing  
2 violation.

3                   JUSTICE KENNEDY: Let me -- let me ask you  
4 this: Suppose there is a provision of this statute  
5 which is very difficult to understand.

6                   MR. GOLDSTEIN: Yes.

7                   JUSTICE KENNEDY: Does that bear on the  
8 Chevron Step Zero analysis on the question of what you  
9 call jurisdiction?

10                  MR. GOLDSTEIN: It does, Justice Kennedy.

11                  JUSTICE KENNEDY: All right. It seems, to  
12 me, that Justice Ginsburg identifies a real point. I  
13 was looking at this statute, and I say -- you know, how  
14 do I know when this agency has failed to act? I  
15 don't -- that's a very obscure data point.

16                  MR. GOLDSTEIN: Okay. Two things, Justice  
17 Kennedy. First is I will tell you that Congress  
18 consciously used phrases, "reasonable period of time"  
19 and "substantial evidence contained in a written  
20 record" -- those are the subdivisions of subparagraph  
21 (b), which Justice Ginsburg was pointing to, because  
22 those are judicially administered standards.

23                  And I will just read you one sentence from  
24 the conference report. "The phrase 'substantial  
25 evidence contained in a written record' is the

1 actions," the agency here being the locality.

2 And, Justice Kennedy, on your  
3 question and --

4 JUSTICE GINSBURG: Where does that say  
5 anything about what you just read about what is a  
6 reasonable time?

7 MR. GOLDSTEIN: Yes.

8 JUSTICE KENNEDY: Was that at 209?

9 MR. GOLDSTEIN: That was at 210,  
10 Justice Kennedy.

11 There is a similar passage relating to  
12 "reasonable period of time." It's quite clear. I  
13 believe -- the conference report is four or five pages  
14 long.

15 When you have the opportunity to read it  
16 again, I think you will see that Congress was adopting  
17 local standards, local -- a local approach to deciding  
18 this question, against a broader framework.

19 Can I just answer Justice Kennedy's --

20 JUSTICE SOTOMAYOR: Mr. Goldstein, could you  
21 go back to the question presented?

22 MR. GOLDSTEIN: Sure.

23 JUSTICE SOTOMAYOR: I have read a lot of  
24 briefs in this case, and I don't have any idea what to  
25 tell a lower court.

1 MR. GOLDSTEIN: Yes.

2 JUSTICE SOTOMAYOR: How to articulate the  
3 tests or how to apply it.

4 MR. GOLDSTEIN: Yes.

5 JUSTICE SOTOMAYOR: Given that you started  
6 with saying, it's almost impossible to talk about what's  
7 jurisdictional and what's an application of  
8 jurisdiction. So articulate the test, and tell me what  
9 I tell the lower courts.

10 MR. GOLDSTEIN: The lower courts decide de  
11 novo whether the agency was given the power to interpret  
12 a particular provision with the force of law. That's  
13 the entry point question -- the threshold question. All  
14 of this works --

15 JUSTICE SOTOMAYOR: So that's what the court  
16 here did. It looked at the Communications Act. It  
17 said, it has the power --

18 MR. GOLDSTEIN: It did not --

19 JUSTICE SOTOMAYOR: -- to pass regulations  
20 with respect to this Act. There is no clear exception.

21 I -- I still haven't quite understood, other  
22 than in the academic literature, what the difference  
23 between Step Zero and Step One is. And so there is an  
24 ambiguity, and, now, the agency is given deference.

25 So where in this conversation is there --

1                   MR. GOLDSTEIN: Here's where it went  
2 wrong -- here's where it went wrong: It looked at the  
3 statute. It found the relationship between 332(c)(7)  
4 and 201(b) ambiguous. And, when it found ambiguity,  
5 then it said it was compelled to accept the FCC's  
6 reading. It did not resolve that ambiguity itself, as  
7 it would in any other case involving statutory  
8 construction.

9                   Before I sit down, Justice Kennedy and  
10 Justice Ginsburg have raised the point that the  
11 government did, that when does someone know when to go  
12 to court? AND the only part of my answer  
13 I got in was that there are no cases identifying that as  
14 a problem, and the reason is that it's a continuing  
15 violation.

16                  No communications provider, so far as we are  
17 aware, was ever thrown out of court for coming in too  
18 late, for a failure to act, because every day the State  
19 and locality didn't act is regarded as an alleged  
20 violation, and it doesn't take away from jurisdiction to  
21 go to court. There are no cases that support their  
22 concern.

23                  If I could reserve the remainder of my time?

24                  CHIEF JUSTICE ROBERTS: Thank you, counsel.

25                  General Verrilli?

1 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

2 ON BEHALF OF THE RESPONDENTS

3 GENERAL VERRILLI: Mr. Chief Justice, and  
4 may it please the Court:

5 Let me start with a central point that I  
6 think cuts through most of the arguments that Petitioner  
7 has made this morning.

8 Chevron does apply to a court's review of an  
9 agency's determination of ITS jurisdiction, but only  
10 after a court concludes that Congress has delegated to  
11 the agency, generally, the authority to make rules  
12 carrying the force of law and that the rule in question  
13 was promulgated in exercise of that authority.

14 JUSTICE KENNEDY: As -- as to that specific  
15 provision?

16 GENERAL VERRILLI: No, in general. I think  
17 that the language this Court used, taken from Meade,  
18 last term in Astrue, in the unanimous opinion for the  
19 Court in Mayo the term before, was is the authority --  
20 is -- is the agency vested with authority, generally, to  
21 make rules with the force of law.

22 CHIEF JUSTICE ROBERTS: Well, that's right,  
23 but your argument it seems, to me, can't be -- let's say  
24 you have a general statute, and you've got a provision  
25 at the beginning that says this is -- authority to

1 interpret this is delegated to the agency.

2 And you go along, but then, all of a sudden,  
3 in -- you know, Section 123, it says it doesn't get any  
4 deference interpreting this provision. Now, you would  
5 not say that the first general one controls the specific  
6 withdrawal of deference, would you?

7 GENERAL VERRILLI: I would not,  
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: No. You would say  
10 you don't get deference on 123. And, as I understand  
11 the case -- and that's why I persist in thinking there's  
12 no great disagreement here, your friend on the other  
13 side is saying that, particularly given 7(a) and some  
14 other things, you should read 7(b)(2) as if Congress had  
15 said, Agency, you don't get any deference here.

16 You can read it that way, they say, because  
17 7(a) says nothing shall limit what the State can do,  
18 other than what's here in the statute. And, if you let  
19 the FCC -- if you give them deference, you're letting  
20 something else limit what the State can do.

21 So why -- and then you dispute, it seems to  
22 me, just whether that you should call that jurisdiction  
23 or not because people think of jurisdiction as meaning,  
24 oh, you don't get through the door. But, if what they  
25 mean by jurisdiction is simply that the agency gets no

1 deference on this point, then it seems to me everybody's  
2 saying the same thing.

3 GENERAL VERRILLI: Well, I'm not sure I  
4 agree with that, Mr. Chief Justice, because I think the  
5 point here is that to the extent -- once you've  
6 satisfied that general threshold that I identified, then  
7 to the extent there is ambiguity -- if the statute is  
8 clear -- and in Your Honor's hypothetical I'd submit the  
9 statute is clear at that point, that the agency -- that  
10 the agency's authority has been carved out with respect  
11 to that particular provision.

12 If it's clear, you don't get to the question  
13 of whether there's any deference due. The issue arises  
14 when there's ambiguity. And our position is --

15 CHIEF JUSTICE ROBERTS: Ambiguity in the  
16 provision that says, Agency, you get no deference? Or  
17 ambiguity in the substantive provision at issue?

18 GENERAL VERRILLI: Either one because --

19 CHIEF JUSTICE ROBERTS: Well, but, if  
20 there's no ambiguity on the provision that says you get  
21 no deference, then it doesn't matter whether there's  
22 ambiguity on the subsidiary one, right?

23 GENERAL VERRILLI: That -- that's correct.

24 CHIEF JUSTICE ROBERTS: Okay.

25 GENERAL VERRILLI: But if there is ambiguity



1 on the first, our position is that Chevron applies and  
2 that the agency gets deference, so long as it's a  
3 permissible construction of the statute. And that's  
4 true whether you call it jurisdiction and -- or whether  
5 you call it substance.

6 And one reason for that, Mr. Chief Justice,  
7 is that I don't think there is -- I do think this is  
8 really a Pandora's Box situation. I do not think there  
9 is a clear, neat dividing line between what my friend,  
10 Mr. Goldstein, describes as a jurisdictional issue, an  
11 issue of interpretive authority, and a question of  
12 substance.

13 And I think you can see that in the briefing  
14 in this case. Mr. Goldstein has tried to define  
15 jurisdiction in a particular way; the IMLA has defined  
16 it in a very different way. They say any question that  
17 goes to the who, what, when, or where of an agency's  
18 assertion of authority is a jurisdictional question, as  
19 to which agencies get no Chevron deference in the course  
20 of ambiguity.

21 And the reason that IMLA gives for stating  
22 that position is exactly the same reason that Mr.  
23 Goldstein gives for stating his position, which is that  
24 you're talking about an agency action in excess of the  
25 scope of its delegated authority, and, once you say

1     that, there's no Chevron deference.

2                     And I would respectfully submit, once you  
3     have got a situation in which it is clear that the  
4     agency has general authority to implement and the  
5     argument is whether its authority to implement has, with  
6     respect to a particular provision, has been carved out,  
7     at that point, Chevron deference is appropriate, and  
8     that is the practice of this Court in repeated numbers  
9     of cases.

10                    American Hospital Association is certainly  
11     one such case where the -- the NLRB had general  
12     rule-making authority. There was a statutory provision  
13     that said bargaining units needed to be determined by  
14     the NLRB in each case. And the argument was made that  
15     that ought to be understood as a carveout from the  
16     NLRB's general authority requiring case-by-case  
17     decisionmaking with respect to bargaining units.

18                    And the Court rejected that argument, saying  
19     that -- that, in that case, whatever ambiguity there was  
20     in the statute ought to be resolved under Chevron in  
21     favor of the agency.

22                    Schor -- CFTC v. Schor is a comparable case.  
23     And I would submit Iowa Utilities Board is a case --

24                    JUSTICE SOTOMAYOR: All right. General,  
25     let's go back to the question presented and break down

1 your argument.

2 Is it your position that what the Court asks  
3 first is whether Congress has spoken clearly on the  
4 agency having authority or not? Is that subject to de  
5 novo review?

6 GENERAL VERRILLI: Our position -- let me  
7 walk through the steps of our position and how we answer  
8 the question presented.

9 JUSTICE SOTOMAYOR: All right. But tell me  
10 what -- what gets deference when and what's subject to  
11 de novo review.

12 GENERAL VERRILLI: Here's our answer to the  
13 question presented, Justice Sotomayor: That there is de  
14 novo review of the question of whether Congress has  
15 delegated authority to the agency, generally, to act  
16 with the force of law and whether the interpretation  
17 claiming deference is an exercise of that delegated  
18 authority.

19 Once that is satisfied under de novo review,  
20 Chevron kicks in. Now, Step One of Chevron is, of  
21 course, de novo review using the normal tools of  
22 statutory construction to answer the question whether  
23 Congress has spoken clearly on the issue of whether the  
24 agency has authority. If the answer is that Congress  
25 has, then that disposes of the case.

1                   If Congress hasn't, then one moves to Step  
2 Two of Chevron and asks whether the agency's  
3 interpretation of the provision at issue, whether you  
4 call it substantive or whether you call it jurisdiction,  
5 is a permissible construction. Is it within the bounds  
6 of what the language can reasonably accommodate it?  
7 And, if it is, the agency is upheld.

8                   That's the way we think the issue in this  
9 case should be analyzed. That's the way we think every  
10 issue should be analyzed under Chevron. We think that's  
11 what this case is -- this Court's cases say. We think  
12 this is what the Court uniformly and routinely does in  
13 analyzing these questions. I think --

14                   JUSTICE SOTOMAYOR: So deal with the three  
15 cases he mentioned.

16                   GENERAL VERRILLI: Louisiana Public Service  
17 Commission, a little bit of confusion, I think, about  
18 that case. That case was decided in 1986. Congress  
19 added the sections Mr. Goldstein referred to, 251 and  
20 252 of -- of the Communications Act, in 1996. And what  
21 Louisiana Public Service Commission did was define the  
22 outer limits of the Commission's authority.

23                   It said nothing shall be -- nothing in this  
24 Act shall give or -- shall be construed to give the  
25 commission authority or jurisdiction over intrastate

1 communications, so it was an express carveout.

2 That seems, to me, had you had run that  
3 through the Chevron analysis, it'd be a pretty  
4 straightforward Chevron Step One case.

5 Adams Fruit, the - the Court held  
6 specifically in Adams Fruit that the plain meaning of  
7 the statutory provision at issue foreclosed the agency's  
8 interpretation. And that's at 494 U.S., at page 646.  
9 So that was a Chevron Step One case.

10 It then did go on to say, with respect to  
11 Chevron Step Two, that, even if we were going to think  
12 about granting the agency deference here, they wouldn't  
13 get it.

14 But I think the reasons -- if you map the  
15 reasoning of Adams Fruit onto this case, it supports our  
16 position and not Mr. Goldstein's. What the Court said  
17 in Adams Fruit was that the Department of Labor did have  
18 the authority to implement the substantive provisions of  
19 the Agricultural Workers Protection Act, including the  
20 substantive provisions governing motor vehicle safety.

21 What it didn't have was the authority to  
22 restrict judicial remedies available for the private  
23 cause of action created under the statute.

24 Well, if you map that onto here, what the  
25 FCC has done here with respect to the reasonable time

1 provision in 332(c)(7)(B) of the statute was to provide  
2 a rule of decision for the substantive provision of the  
3 Act, leaving to the courts the decision of what remedy,  
4 if any, there would be for a violation of those  
5 substantive provisions.

6 And so it's -- it totally maps onto -- to  
7 the FCC's interpretation of the right way to think about  
8 statutory authority in this case. And if I -- I'm  
9 sorry, Justice Breyer.

10 JUSTICE BREYER: Well, what worries me about  
11 it is you -- you and I both have, in our offices,  
12 thousands of words which are in the U.S. Code, and there  
13 are hundreds of thousands -- or millions of employees,  
14 in millions of different kinds of agencies, and, if we  
15 turn Chevron into the tax code, it's going to be a  
16 nightmare -- in my opinion, not necessarily in that of  
17 my colleagues.

18 So, as you know, I've written somewhat a  
19 different approach. And it says, let's not do this.  
20 But just so, who would win here? Suppose you just said,  
21 look, what we're interested in is just one question,  
22 whether Congress wanted a court to give, in this kind of  
23 situation, deference to the agency. And the answer will  
24 be, it depends. Chevron is a good rule of thumb, but it  
25 isn't a straightjacket.

1           So what you'd look at here is it's the FCC  
2   that is in charge of national communications, of which  
3   this is part. There is a specific provision, as your  
4   colleague points out, that says, "but don't interfere  
5   with the States when they are citing stuff."

6           But then there is a limitation to that  
7   specific provision, which consists of six or seven  
8   parts, all of which maintain a lot of authority in the  
9   FCC or rules about what they are not supposed to do.  
10   And then, here, it uses the word "reasonable."

11           So where you have a Federal agency with  
12   expertise that's in charge of this kind of area and they  
13   have rule-making authority, and you have a statute like  
14   this, which is a little bit ambiguous, but not too, in  
15   respect to the point about whether they do  
16   interpretation, you'd add up those factors and make a  
17   decision.

18           GENERAL VERRILLI: So --

19           JUSTICE BREYER: I mean, that's such a  
20   simple -- I mean, that's Louis Jaffe. That -- that's  
21   the founders of administrative law. That's everybody  
22   until we get into a straightjacket. And it isn't --  
23   even Chevron doesn't go against us, if you don't think  
24   of it as a straightjacket.

25           GENERAL VERRILLI: Two points. First,

1 applying that approach, I think it's pretty clear that  
2 one would uphold the FCC's judgment here.

3 Second, I understand that that's Your  
4 Honor's approach. I don't --

5 JUSTICE BREYER: I didn't make it up. It  
6 was Louis Jaffe.

7 GENERAL VERRILLI: I understand that Your  
8 Honor is the most recent proponent of this approach.

9 JUSTICE SCALIA: That -- that's no better.  
10 Louis Jaffe isn't even a member of the Court.

11 (Laughter.)

12 GENERAL VERRILLI: But -- but I think the  
13 Court is in a different place. And I think the Court is  
14 in a different place for a good reason because I think  
15 it's our interpretation of Chevron that avoids turning  
16 it into the complexity of the Internal Revenue Code  
17 because I think, if you think about what my friends on  
18 the other side are proposing here, what they're  
19 suggesting is that, once you've cleared that initial  
20 hurdle of deciding the agency has general authority to  
21 implement the statute with the force of law and that  
22 this is an exercise of that general authority and,  
23 therefore, not --

24 JUSTICE BREYER: I mean, I think you can  
25 show, which I will spare you at the moment, all the



1 cases like Meade are consistent with what I said. And  
2 cases that are not consistent are consistent with what  
3 Judge Friendly said years ago, where he said there is no  
4 coherence to the Supreme Court's cases in this area;  
5 when they like a result, they say they have deference,  
6 and, when they don't like it, they say they don't.

7 GENERAL VERRILLI: I guess I would beg to  
8 differ about that. I think our -- our view is that  
9 Chevron does provide a stable framework for the  
10 development of administrative law.

11 JUSTICE SCALIA: Justice Breyer would  
12 replace that with a rule, where they like the agency to  
13 have authority, it has it, and, where they don't like it  
14 to have authority, it doesn't. I'm not sure that's any  
15 better than --

16 GENERAL VERRILLI: I guess -- I guess --

17 JUSTICE SCALIA: -- a description of the  
18 Chevron --

19 JUSTICE BREYER: You don't have to -- I'm  
20 sorry I brought this up.

21 (Laughter.)

22 GENERAL VERRILLI: With respect to the  
23 issue -- with respect to the issue that's in front of  
24 the Court now, I think the -- I think the -- what my  
25 friends on the other side are asking is, actually, for

1 an additional layer of complexity in the analysis, even  
2 after the general authority is established to -- to make  
3 rules with the force of law and even after it's  
4 established that the rule at issue is -- has been done  
5 in the exercise of that, what my friend on the other  
6 side suggests is there is another layer of de novo  
7 review there to answer the question of whether this  
8 particular provision --

9 CHIEF JUSTICE ROBERTS: Right. Well --

10 GENERAL VERRILLI: -- gives authority to act  
11 with the force of law.

12 CHIEF JUSTICE ROBERTS: Your friend on the  
13 other side has another set of arguments about why you  
14 should treat this particular provision differently, and  
15 that is because it concerns the authority, or lack  
16 thereof, of State and local government agencies.

17 Now, does that play any role at all in your  
18 analysis.

19 GENERAL VERRILLI: Yes.

20 CHIEF JUSTICE ROBERTS: We are not -- you  
21 know, obviously, the dividing line between State  
22 authority and Federal authority is a more significant  
23 one than some of the other questions as to which  
24 agencies get deference, which is whether rates are  
25 reasonable or not reasonable. And this provision is

1 written in terms of a preservation of State authority.

2 And your view would give the Federal agency  
3 deference under Chevron -- very considerable deference  
4 in defining when there should be Federal authority and  
5 when there should be State. Is that, at all, a  
6 pertinent consideration?

7 GENERAL VERRILLI: It is definitely a  
8 pertinent consideration, Mr. Chief Justice. And let me  
9 talk about that in general and then move to the  
10 specifics in this case.

11 In general, it's a pertinent consideration  
12 that is accommodated within the Chevron framework. At  
13 Chevron Step One, the Court applies the normal tools of  
14 statutory construction. The normal tools of statutory  
15 construction include a clear statement rule, they  
16 include the presumption against preemption. And this  
17 Court -- I -- one point --

18 CHIEF JUSTICE ROBERTS: Normal -- I'm sorry  
19 I interrupt you, but the normal rules of statutory  
20 construction include a clear statement rule?

21 GENERAL VERRILLI: Well, when the question  
22 is whether Congress -- and let me try to view this with  
23 a specific case, the Solid Waste of Cook County case.  
24 That's a case in which the Court declined -- it didn't  
25 say that that issue there was exempt from Chevron

1 analysis. It applied the Chevron framework.

2 And it said it's Step One of Chevron because  
3 the Migratory Bird Rule pushed to the very outer limits  
4 of Congress's commerce clause authority, that the Court  
5 was going to apply a clear statement rule in that  
6 situation before assuming that --

7 CHIEF JUSTICE ROBERTS: Who has to -- who  
8 has to be clear on their statement? Which way?

9 GENERAL VERRILLI: Congress has to be clear  
10 in its --

11 CHIEF JUSTICE ROBERTS: That it intended to  
12 intrude upon State authority?

13 GENERAL VERRILLI: That it intended to give  
14 that authority to that extent -- exactly.

15 JUSTICE KENNEDY: But the -- the agencies  
16 have no historic responsibility or tradition, quite  
17 unlike Article III courts, of safeguarding the Federal  
18 balance.

19 GENERAL VERRILLI: But -- but Chevron Step  
20 One is, of course, applied by the courts,  
21 Justice Kennedy, and that's where the protection comes  
22 in. And with respect to this particular --

23 JUSTICE SCALIA: I don't understand the  
24 question, to tell you the truth. This matter is not  
25 left with the States. It's going to be decided by a

1 Federal instrumentality, right? Either by the agency,  
2 which says, 30 days is the rule, or by Federal courts,  
3 which perhaps could issue opinions that say, 30 days is  
4 the rule.

5 I mean, this -- you know, it's an  
6 interesting separation of powers question within the  
7 Federal government, but I don't see how it's a question  
8 of whether it's the States or the Federal government  
9 that's -- that's going to call the tune here. It's  
10 going to be the Federal government, isn't it?

11 GENERAL VERRILLI: That is the -- was going  
12 to be my specific point in response to your question,  
13 Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: No, it wasn't going  
15 to be that. That -- the idea that there is no  
16 difference between the Federal judiciary defining the  
17 limits between the State and Federal power and having an  
18 agency of unelected bureaucrats responsible to the  
19 executive saying when the State controls and when the  
20 Federal controls, those are vastly different  
21 propositions.

22 GENERAL VERRILLI: Yes, but there is a third  
23 variable here, and that's what's key, which is, in this  
24 situation -- in 332(c)(7)(B), the limitations provision,  
25 Congress has spoken, unambiguously, and said that the

1 following limitations on local zoning authority must be  
2 respected.

3 CHIEF JUSTICE ROBERTS: Yes.

4 GENERAL VERRILLI: And no one has suggested  
5 that that was at the outer limit of Congress's Commerce  
6 Clause authority or anywhere close to it. And --

7 CHIEF JUSTICE ROBERTS: But they have also  
8 said -- they have also said, in (7)(a), that those are  
9 the only limits, not add on to this any limits that  
10 unelected bureaucrats might decide to impose, and will  
11 give them -- and the courts must give them vast  
12 deference in enforcing those limits.

13 JUSTICE KENNEDY: Unelected Federal  
14 bureaucrats.

15 (Laughter.)

16 GENERAL VERRILLI: But I -- but I do  
17 think -- I do think that what Justice Scalia said is  
18 correct, that the question here is not whether the  
19 States will decide. The question, at the end of the  
20 day, is whether the agency will be able to exercise its  
21 usual authority to interpret reasonable --

22 JUSTICE SCALIA: Don't -- don't you think  
23 that the --

24 GENERAL VERRILLI: -- whether Federal courts  
25 will make those decisions on a case-by-case basis upon

1 de novo review.

2 JUSTICE SCALIA: Don't you -- don't you  
3 think that the issue of whether unelected Federal  
4 bureaucrats should decide it or unelected Federal judges  
5 should decide it is an issue of separation of powers,  
6 rather than an issue of -- of Federal/State relations?

7 GENERAL VERRILLI: I do think -- in that --  
8 in that respect, I think this case is really just like  
9 Iowa Utilities Board, in that the argument there --

10 CHIEF JUSTICE ROBERTS: I'm sorry. Is it  
11 AT&T v. --

12 GENERAL VERRILLI: Yes.

13 CHIEF JUSTICE ROBERTS: Okay.

14 GENERAL VERRILLI: In that -- in that -- the  
15 argument there was that you ought not interpret the  
16 FCC to have authority to implement particular rules  
17 because Congress gave to State public utility  
18 commissions the responsibility to carry out and execute  
19 the rules and then, to Federal courts, the power to  
20 review them and cut the FCC out.

21 And the argument there was that respect for  
22 States ought to lead you to conclude not to apply  
23 Chevron deference to the agency --

24 JUSTICE BREYER: Okay. Now --

25 CHIEF JUSTICE ROBERTS: But, in rejecting

1 that argument in Section 2 of the opinion, the author of  
2 that opinion in nowhere, in no place, applied Chevron  
3 deference in answering that question.

4 It was entirely de novo, unlike in Section  
5 3, when it was finally decided, okay, we've got the  
6 answer here, and, now, we will defer to the agency on  
7 the substance of the determination.

8 GENERAL VERRILLI: I -- I understand that  
9 the Petitioners made that argument, Mr. Chief Justice.  
10 I read the opinion differently, and, if I could, I'll  
11 explain why.

12 In Section 2 and looking at pages 384 and  
13 385 of the opinion, after the Court had established that  
14 there was general authority, under Section 201(b), to  
15 implement the provisions of the Act, which I do think  
16 the Court established de novo, and we would agree that  
17 that's appropriate, the Court then moved on to consider  
18 these specific jurisdictional questions.

19 And -- and the Court looked at the provision  
20 of the statute which gave authority to the State  
21 commissions and then considered the -- the argument that  
22 one ought to infer from that, that the FCC's cut out of  
23 the process.

24 And the -- the opinion of the Court says,  
25 "We think this attributes to that task a greater degree



1 of autonomy than the phrase 'establish any rates'  
2 necessarily implies."

3 It seems to me what the Court was saying  
4 there -- and then, on the next page, says something very  
5 similar about the next argument that the -- that the  
6 challengers were making in that case. And I think --

7 CHIEF JUSTICE ROBERTS: Does it cite --

8 GENERAL VERRILLI: It does not.

9 CHIEF JUSTICE ROBERTS: -- in Part 2, which  
10 is --

11 GENERAL VERRILLI: It does not, Mr. Chief  
12 Justice, but --

13 CHIEF JUSTICE ROBERTS: -- one, two, three,  
14 four, five, six, seven, eight, nine, 10 pages of  
15 analysis of the Chevron case?

16 GENERAL VERRILLI: It does not.

17 CHIEF JUSTICE ROBERTS: Does it say they are  
18 applying Chevron deference?

19 GENERAL VERRILLI: It does not. But the  
20 conclusion -- I think my -- my friend has suggested that  
21 we weren't accurate in our discussion of the -- the  
22 concluding paragraph of this phrase. But I would like  
23 to turn the Court's attention to that because I think we  
24 were. This is at page 397 of the opinion.

25 CHIEF JUSTICE ROBERTS: Okay.

1                   GENERAL VERRILLI:  There is a sentence that  
2   starts, "The 1996 Act can be read to grant most  
3   promiscuous rights to the FCC vis-a-vis the State  
4   commissions and to competing carriers vis-a-vis the  
5   incumbents, and the Commission has chosen, in some  
6   instances, to read it that way, but Congress is well  
7   aware that the ambiguities it chooses to produce in the  
8   statute will be resolved by the implementing agency.  We  
9   can only enforce the clear limits that the 1996 Act  
10  contains, which, in the present case, invalidate only  
11  Rule 319."

12                   Now, the jurisdictional dispute was the  
13  dispute between the FCC -- the FCC vis-a-vis the State  
14  commissions over who had the authority to implement the  
15  rules.

16                   So, while I -- I agree, Mr. Chief Justice,  
17  that Chevron is not cited in that Section 2 of the  
18  opinion, the tenor of that discussion does seem to me to  
19  say that the Court was looking, once it had established  
20  general authority, for clear evidence that Congress had  
21  intended to carve out, from that general authority, the  
22  particular provisions at issue and because the -- the  
23  provisions to which the challengers pointed did not  
24  necessarily imply an intent on the part of Congress to  
25  carve it out, that the Court wasn't going to find a

1 carveout.

2 So I do think that, really, the analysis in  
3 Iowa Utilities Board is quite consistent with that --

4 JUSTICE BREYER: I -- I dissented in that, I  
5 think.

6 GENERAL VERRILLI: Yes, you had a different  
7 view.

8 JUSTICE BREYER: Right. And so I agree with  
9 you, this flows a fortiori from the majority.

10 But I didn't think -- and this is what I  
11 wonder -- is -- you say unelected Federal bureaucrats.  
12 Administrative law is about Federal administration.  
13 That is Federal administrative law.

14 And I've heard, here, people say we're  
15 talking about them adding something. I didn't think  
16 that's what was at issue. I thought that there is a  
17 word in the statute, "reasonable," and what the  
18 administrators did at the FCC was to interpret that  
19 word. Am I right or wrong?

20 GENERAL VERRILLI: That -- that's certainly  
21 how we understand the situation, Justice Breyer, that  
22 the agency does what agencies do.

23 JUSTICE BREYER: What was added? What was  
24 added?

25 GENERAL VERRILLI: It interpreted the

1 meaning of the language "reasonable time," to give it  
2 more precise content, to allow -- to deal with the  
3 failure to act situation --

4 JUSTICE GINSBURG: Can you -- can you tell  
5 me, what is -- what is the ambiguity? Because I looked  
6 at (b). (B) is limitations. Limitations is on the  
7 State, and then it uses the phrase of what the State  
8 cannot do. The State has to conform to a reasonable  
9 time. What is ambiguous about this?

10 GENERAL VERRILLI: Well, our view, Justice  
11 Ginsburg, is that there isn't any ambiguity, that  
12 the -- that the rule ought to be upheld, no matter what  
13 standard of review applies, in fairness to my friends on  
14 the other side. But I do think this points up the  
15 problems going down the road they are suggesting is --

16 JUSTICE SCALIA: Well, I -- I thought  
17 "reasonable" was what people were talking about as being  
18 ambiguous, although I think -- I don't think "ambiguous"  
19 is the proper word. "Reasonable" is vague. You don't  
20 know exactly what it means, right?

21 GENERAL VERRILLI: I took that -- I think  
22 that's it's -- it's, certainly, susceptible to further  
23 elaboration in that sense. But I took Justice Ginsburg  
24 to be asking me about the ambiguity with respect to the  
25 authority of the (7)(A) --

1 JUSTICE BREYER: Reasonable -- reasonable is  
2 uncertain who. Who has -- it doesn't tell us who had  
3 the authority.

4 GENERAL VERRILLI: Right. And, in fairness  
5 to my friends and as the Chief Justice has just  
6 indicated, it's an inference from (7)(A), and I suppose  
7 an inference from (7)(B)(v), and that -- and that the  
8 courts are in the process.

9 But I do think this points up the difficulty  
10 is that, if you -- if you look at the provision that the  
11 FCC's actually implementing here, it's not a  
12 jurisdictional provision; it's a normal substantive  
13 standard. The FCC is giving it more precise content.  
14 That's what an agency's job is. It's doing its job  
15 here.

16 CHIEF JUSTICE ROBERTS: You're talking about  
17 (7)(B)?

18 GENERAL VERRILLI: Yes, (7)(B)(ii), right,  
19 exactly.

20 CHIEF JUSTICE ROBERTS: Okay. What is there  
21 about (7)(A) that you think is ambiguous?

22 GENERAL VERRILLI: We think it's -- it's  
23 clear that the FCC has authority, given (7)(A), because  
24 of the "except as provided in this paragraph" argument.  
25 It's, I think, our friends on the other side who say

1     that it's (7)(A) that creates uncertainty about whether  
2     the FCC has the authority to implement the reasonable  
3     time provision in (7)(B)(ii) -- and I think that points  
4     up the problem of adding this additional step to the  
5     analysis.

6                 Once the Court has satisfied itself that the  
7     agency has general rule-making authority, it's not going  
8     to be hard to cobble together inferences to make  
9     arguments on de novo review that the -- that the agency  
10    lacked the authority to implement a particular provision  
11    with the force of law.

12                And I think you're adding needless  
13    complexity, and I do think -- the reason I suggested,  
14    earlier, that I think this is a Pandora's Box is because  
15    I do not think there's, at the end of the day, a  
16    principled line that can be drawn between what my friend  
17    describes as interpretive authority questions and the  
18    kind of who, what, when, where substantive questions --  
19    substantive jurisdictional questions that Respondent  
20    IMLA is focused on.

21                In each of those situations, the argument is  
22    that the agency has acted in excess of its statutory  
23    authority. And, if that's sufficient to justify de novo  
24    review in the first instance, it's sufficient to justify  
25    de novo review in the second instance.

1           And, if that's the case, then I would submit  
2   that you have really unravelled Chevron.  The -- the  
3   good work that that -- that that doctrine does to  
4   stabilize the development of administrative law is gone.

5           There will be an argument in every case  
6   that -- that de novo review is required, and, in every  
7   case in which a court agrees that de novo review is  
8   required, once the court has interpreted the statute as  
9   a matter of de novo review, then you have ossification  
10  of the administrative process because that  
11  interpretation is locked in.

12           CHIEF JUSTICE ROBERTS:  Well, but, I mean,  
13  your argument there is basically saying, when the  
14  statute says something is reasonable, it means that the  
15  Commission doesn't have -- it's a jurisdictional  
16  question whether it's reasonable or unreasonable.

17           But it seems to me that this provision is  
18  quite a bit different.  It talks about the authority of  
19  a State.  And, usually, when we are talking about the  
20  authority of which entity can -- can govern, we view  
21  that as jurisdictional.

22           There may well be cases at the margin that  
23  are -- that are difficult.  But -- but your argument is,  
24  basically, reasonable or unreasonable is the same as  
25  State or Federal.

1                   GENERAL VERRILLI: No, I don't think it is,  
2 Mr. Chief Justice. I think the -- the federalism values  
3 are important, but I do think, as the -- as the --

4                   CHIEF JUSTICE ROBERTS: No, no. I'm not  
5 talking about the federalism values. I'm talking about  
6 your argument that, oh, once you say you can draw a  
7 jurisdictional line here, people will argue you can draw  
8 it everywhere.

9                   GENERAL VERRILLI: Well, I do -- I do think  
10 that's true, and I think that the arguments that are  
11 being made by my friends on the other side demonstrate  
12 that. But I guess what I would say, in this situation,  
13 in particular, is that -- that we're really not -- the  
14 fact that it does involve the Federal and State  
15 authorities doesn't change the analysis because,  
16 applying Chevron in the normal way, one would not  
17 conclude that Congress has spoken clearly and -- and  
18 restricted the agency's authority.

19                   And there is no means -- there's no basis to  
20 apply a clear statement rule here because Congress,  
21 clearly, had the authority to impose the limitations  
22 that it imposed in Subsection (B). And those are direct  
23 limitations on the State authority, and Congress made  
24 that judgment.

25                   It isn't the agency wading on -- in on its



1 own to decide that State or local authorities should be  
2 subject to limitations.

3           These are judgments that Congress made, and  
4 the agency is implementing them in very much the same  
5 way that the Court found it was appropriate for the  
6 agency to implement the preemptive scope of the word  
7 "interest" in the National Bank Act in the Smiley case.

8           JUSTICE SCALIA: Mr. Verrilli, why isn't it  
9 an easy answer to the whole case to read (7)(A), except  
10 as provided in this paragraph, nothing in this chapter  
11 shall limit or affect the authority of State or local  
12 government? Okay? "Except as provided in this  
13 paragraph."

14           And then later, in the paragraph, in the  
15 subsection entitled, "limitations," it says, "A State or  
16 local government shall act on any request for  
17 authorization within a reasonable period of time."

18           GENERAL VERRILLI: That's why -- that's  
19 why -- that's our --

20           JUSTICE SCALIA: That's -- that's a  
21 limitation.

22           CHIEF JUSTICE ROBERTS: Yes, that's exactly  
23 right. That limits it. And -- and the question then  
24 is, of course, whether that's enforced in court --  
25 enforced in court or before the agency; right?

1                   GENERAL VERRILLI: No. I think the question  
2 is whether the agency has the authority to flesh out the  
3 substantive standard that the court will subsequently  
4 apply --

5                   CHIEF JUSTICE ROBERTS: Well, whether the --  
6 whether the standard is defined in -- by -- through  
7 direct judicial review or by the agency, with deference  
8 to the agency.

9                   GENERAL VERRILLI: I agree with  
10 Justice Scalia because -- because I do think that, no  
11 matter what view of the matter the Court takes, the  
12 FCC's rule ought to be upheld. But I do think that  
13 the -- the position my friends on the other side are  
14 advocating threaten to unravel the -- the Chevron  
15 framework and destabilize administrative law.

16                   And I would urge the Court not to do it.

17                   JUSTICE SOTOMAYOR: General, if the -- if  
18 the agency had said reasonable is 30 days, period, and  
19 not done what it did, which was create a rebuttable  
20 presumption, would that have been appropriate? Would we  
21 have had to uphold that? And, if not --

22                   GENERAL VERRILLI: I think --

23                   JUSTICE SOTOMAYOR: How would we have struck  
24 it down? What step --

25                   GENERAL VERRILLI: You -- you would analyze

1 that under Step Two of Chevron, Justice Sotomayor. You  
2 decide whether that's a permissible construction of the  
3 statute, whether it's reasonable or whether it's  
4 arbitrary and capricious, that would depend on what the  
5 record looked like. But, certainly, a court would  
6 exercise review over that matter.

7 If the Court has nothing further?

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, General.

10 Mr. Goldstein, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

12 ON BEHALF OF THE PETITIONERS

13 JUSTICE KENNEDY: Chevron is at an end.

14 It's unravelled.

15 MR. GOLDSTEIN: I -- I've heard, and I  
16 regret that I have contributed to such a horror. This  
17 is silliness.

18 (Laughter.)

19 MR. GOLDSTEIN: The Court has -- we have  
20 cited to you 17 cases of yours in which you have always  
21 looked at the entry point question de novo, and on  
22 the -- the idea that we're making this more complicated  
23 makes no sense to me because what the government  
24 wants -- and you see this in the Fifth Circuit's  
25 decision -- is a surround of Chevron on whether they

1 have authority.

2 Go through that entire process, and then go  
3 through it again, assuming that you do believe they have  
4 that authority. There's not a step that we're adding to  
5 the inquiry.

6 JUSTICE KAGAN: Well, Mr. Goldstein, I  
7 think, with respect, it's not silliness. You have been  
8 running as fast as you can away from the arguments that  
9 IMLA has presented, that, in every case, it's a who,  
10 what, where -- you know, or how question and that we  
11 have to answer that.

12 But the question that General Verrilli  
13 raises, I think, is a fair question, is how your  
14 argument, which says that we have to consider in each  
15 case as to each statutory provision whether an agency  
16 has interpretive authority is any different from IMLA's  
17 argument that we have to consider with -- in respect to  
18 every case whether we're dealing with a when, what, who,  
19 where question, or a how question. It's the same  
20 argument; isn't it?

21 MR. GOLDSTEIN: No, it is not. This Court  
22 has said, time and again, including in Meade, that the  
23 precondition to the application of Meade is a  
24 determination that Congress delegated authority to the  
25 agency to interpret the statute with the force of law.

1                   And that has to be asked in every single  
2 case, and that is a distinct inquiry. Once you decide  
3 that they have that delegated authority over that  
4 provision, then, as -- as this Court has done in every  
5 case --

6                   JUSTICE KAGAN: Of course, there's a  
7 threshold question, but the threshold question has  
8 always been is the agency interpreting its organic  
9 statute and is -- does that statute give the agency  
10 rule-making authority and is that what the agency is  
11 exercising?

12                  MR. GOLDSTEIN: We are at loggerheads,  
13 Justice Kagan. I believe that Louisiana Public Service  
14 Commission and Adams Fruit are just simply contrary to  
15 that. It also doesn't make any sense to believe that  
16 Congress gave the agency this 201(b) authority and then  
17 implicitly gave the agency the authority to decide how  
18 far 201(b) extends. This is just a question-begging  
19 exercise.

20                  They say we have this general authority. I  
21 ask, does that general authority apply to this  
22 particular provision in the Act? And they say, well,  
23 our general authority gives us the power to answer even  
24 that question, and that is not correct.

25                  JUSTICE KAGAN: Well, I guess I'm still

1 waiting for -- for the -- the way in which your inquiry  
2 is different from IMLA's inquiry.

3 MR. GOLDSTEIN: It is because I am only  
4 asking the threshold question, did Congress give the  
5 agency the power to interpret this statutory provision  
6 with a question of law?

7 And that is a different -- I'll give you an  
8 illustration, and that is there is an extended  
9 discussion of this question in the FCC's order. It had  
10 no difficulty identifying that as a separate inquiry. I  
11 did want to just turn to the merits -- let me just say  
12 that the Solicitor General's argument about whether the  
13 201(b) authority extends to 332(c)(7) is a great  
14 illustration of our argument on the question presented  
15 because that's a lawyer's argument.

16 There was not a word that my friend said  
17 about there was a technical question of communications  
18 law and how wireless siting facilities operate. That's  
19 the kind of question that Congress gives to agencies.  
20 It is not the threshold lawyer's issue, does this  
21 statute read this far?

22 I would only encourage you, on the merits  
23 question, which is not included in the question  
24 presented, which you didn't grant certiorari on, that  
25 is, the application of de novo review to this statute,

1 to pay more attention than, I think, this argument has  
2 given it because it wasn't the core issue briefed in the  
3 case, obviously, to what Congress did in this statute.

4           There was a version of the statute that gave  
5 the FCC the very authority that it is claiming here.  
6 That was the House version of the bill that was rejected  
7 in Congress, in conference, Congress adopted this  
8 version, ordered the FCC to cancel the rule-making and  
9 reserve this power to the courts, the -- the authority  
10 to decide what is a reasonable period of time.

11           Thank you.

12           CHIEF JUSTICE ROBERTS: Thank you, counsel.

13           The case is submitted.

14           (Whereupon, at 11:03 a.m., the case in the  
15 above-entitled matter was submitted.)

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