

1                   IN THE SUPREME COURT OF THE UNITED STATES

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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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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONERS

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

This case can get complicated quickly because the word "jurisdiction" means a lot of different things to a lot of different people in a lot of different contexts, and the parties have advanced both broad and narrow theories for resolving the case.

So the thing I can do most helpfully at the beginning, I think, is to frame where I believe the real dispute in the case lies.

The FCC claims the authority to interpret Section 332(c)(7) of the Communications Act with the force of law, and my argument today is limited to the question -- that threshold jurisdictional question, which we call interpretive jurisdiction, Iowa Utilities 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 --

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. They  
12 have power to make the rules needed to carry out the  
13 provisions of the Act. And 332 is -- counts as a  
14 provision of the Act. So why isn't it just a proper  
15 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. What the Fifth Circuit did, acknowledging a  
20 circuit conflict, was decided that the FCC's assertion  
21 that you are right is itself entitled to Chevron  
22 deference.

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

25 MR. GOLDSTEIN: Yes.

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

8 But I mean, at some point, I will hope  
9 you -- I hope you will go into what I'd call the  
10 question of, we have a statute just as Justice Ginsburg  
11 said. It's an expert statute. It is a statute in an  
12 agency that has all kinds of discretionary authority.  
13 It includes an important substantive question about what  
14 the relation is with the cable television in this  
15 area -- post -- not cable, but, you know, the broadcast  
16 posts. And so all these factors here which suggest, of  
17 course, Congress, which is not expert, would have wanted  
18 the FCC to figure this one out.

19 MR. GOLDSTEIN: Okay. I --

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

23 (Laughter.)

24 MR. GOLDSTEIN: Justice Breyer, I do want to  
25 talk about it. I do --

1 JUSTICE BREYER: You don't have to talk  
2 about it now, but you can talk about it whenever you  
3 want.

4 (Laughter.)

5 MR. GOLDSTEIN: I appreciate it. I'd like  
6 to talk about the things you want to hear me talk about.

7 I am very conscious of the fact, let me say,  
8 that the Court limited this grant of certiorari to the  
9 first question presented, which was the abstract Chevron  
10 question, so I just don't want to jump the gun --

11 JUSTICE GINSBURG: But the abstract question  
12 isn't really presented. I mean, just to follow on what  
13 I asked you first, here is a phrase, "a reasonable  
14 time." And the Commission interprets that phrase in a  
15 reasonable way.

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

19 MR. GOLDSTEIN: Justice Ginsburg, you and  
20 Justice Breyer have both asked me to turn to that  
21 question, so I'm going to do it. The only point I'm  
22 making is that all of these questions assume that we are  
23 right on the question presented, which I think we  
24 obviously are. So I'm happy to move on, but I just did  
25 not want to hurry past the legal question on which you

1 granted certiorari.

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

4 (Laughter.)

5 MR. GOLDSTEIN: All right.

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

9 MR. GOLDSTEIN: I mean -- what I mean by  
10 it --

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

16 MR. GOLDSTEIN: Yes.

17 JUSTICE SCALIA: Okay? Would that be a  
18 jurisdictional question?

19 MR. GOLDSTEIN: That would. That would  
20 be --

21 JUSTICE SCALIA: Okay. What if the statute  
22 just said, The FCC shall not establish time limits  
23 within which the States must act. Is that  
24 jurisdictional?

25 MR. GOLDSTEIN: That is a different kind of

1 jurisdictional question. It is a jurisdictional  
2 question.

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

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

18 And as we have rehearsed, to be honest,  
19 every one of your Chevron opinions deals with this  
20 question: Just, did the agency have the power to  
21 interpret this statutory provision with the force of  
22 law? You and all of your colleagues from the Court have  
23 always decided that question de novo.

24 JUSTICE SCALIA: I -- I don't think so. In  
25 fact, I think we have said in -- in a number of

1 opinions -- and certainly I have said in a  
2 concurrence -- that the jurisdictional question, like  
3 any other question, an alleged jurisdictional question,  
4 like any other one, is to be decided with deference to  
5 the agency.

6 Now, if you talk -- if you want to limit  
7 your proposal --

8 MR. GOLDSTEIN: I do.

9 JUSTICE SCALIA: -- to the -- to the entry  
10 question --

11 MR. GOLDSTEIN: I do.

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

20 That seems to me a question of, you can call  
21 everything that's ultra vires in excess of the agency's  
22 jurisdiction, you can. But that's not -- that's not  
23 what we mean by the entry jurisdictional question, does  
24 the agency have authority to administer this Act.

25 MR. GOLDSTEIN: Okay. Justice Scalia, the

1 place where -- I do limit myself to the entry point and  
2 the place where you and I are going to disagree is  
3 whether the entry point is just the generic question,  
4 does the FCC administer the whole Act or the somewhat  
5 more narrow question, does the FCC administer this  
6 statutory provision.

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

16 And to say that the jurisdiction of the  
17 agency or the authority of the agency does not extend to  
18 rules seems a little odd at first. I recognize the  
19 federalism problems and so forth.

20 MR. GOLDSTEIN: Yes. Okay. The answer to  
21 your question is yes and the best example is this  
22 statute. It is uncontested and incontestable that the  
23 FCC does not administer all of the Communications Act.  
24 This Court so held squarely in the Louisiana Public  
25 Service Commission case, in which there Congress added

1 to the Communications Act sections 251 and 252.

2 And there was a provision in that statute  
3 that said -- that limited the scope of the FCC's power,  
4 as we say section 332(c)(7) does. We will have to go  
5 through that and debate that, but the Communications Act  
6 is plainly -- and there are other provisions as well.  
7 But the best example is the Louisiana PSC case. And  
8 so --

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

16 MR. GOLDSTEIN: That is correct. I would  
17 only cabinet it in the following way. And there's --  
18 the question on which you granted certiorari is, does  
19 the FCC get Chevron deference in its assertion that it  
20 gets to interpret 332(c)(7) with the force of law. I  
21 think --

22 CHIEF JUSTICE ROBERTS: All right. Now, the  
23 reason -- the reason we are hearing all about  
24 jurisdiction and it's kind of dressed up --

25 MR. GOLDSTEIN: Yes.

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

6 MR. GOLDSTEIN: It's that --

7 CHIEF JUSTICE ROBERTS: If it weren't for  
8 that, if it were some other type of provision, we  
9 wouldn't call it jurisdiction, but we would just say the  
10 FCC doesn't get deference to it.

11 MR. GOLDSTEIN: It would be a very easy  
12 jurisdictional question. We rely on two provisions of  
13 332(c)(7) to establish the proposition that Congress did  
14 not intend the general rulemaking authority in section  
15 201(b) of the Communications Act to extend to 332(c)(7).  
16 And those are --

17 JUSTICE SCALIA: That's -- that's no  
18 different from our holding in any case that the agency  
19 has no authority to issue this rule. It has rulemaking  
20 authority, but this rule goes too far, which is to say  
21 Congress did not give the agency authority to go this  
22 far.

23 MR. GOLDSTEIN: Justice Scalia --

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

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

10 But it is always as -- you have always  
11 approached that question as judges, first, we decide  
12 does the FCC have the power to implement this statute?

13 JUSTICE KAGAN: Mr. Goldstein, at one level  
14 you are right. It's just a level that doesn't help you  
15 very much. I mean, it's true that always there is an  
16 initial question of whether an agency is entitled to  
17 Chevron deference. But usually the way we answer that  
18 question is just this: We say is this the agency's  
19 organic statute? Yes.

20 Does that organic statute provide the agency  
21 with lawmaking power? Yes. Has the agency acted in  
22 accordance with that -- under that lawmaking power?  
23 Yes. Well, then, the agency gets deference. We go on  
24 to the next thing, which is Step 1 and Step 2.

25 So, you know, what we don't do is this sort

1 of provision by provision, subsection by subsection, did  
2 Congress have a special intent as to this subject matter  
3 or that subject matter or the other subject matter?

4 We've just had some very simple rules about what gets  
5 you into the box where an agency is entitled to  
6 deference.

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

14 Here are my three cases: Louisiana Public  
15 Service Commission. Provision by provision, the Court  
16 looked de novo at the question of whether sections 251  
17 and 252 of the Communications Act were subject to the  
18 general rulemaking power. It said no.

19 Adams Fruit, another case where the  
20 Secretary of Labor had general rulemaking authority over  
21 the agricultural worker protection statute. And the  
22 Court looked specifically at the private right of action  
23 and said: Your authority doesn't extend here.

24 And the last one is Meade, where the Customs  
25 Service has the general authority to administer that

1 statute. And instead, the Court looked at the specific  
2 provision involved and it said, do you have lawmaking  
3 authority with respect to these interpretive rulings?

4 And so it has always done some --

5 JUSTICE SCALIA: Did it say in all of those  
6 cases, we give no deference to the agency's contrary  
7 determination because this is a jurisdictional question?  
8 Did it say anything like that?

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

10 JUSTICE SCALIA: I didn't think so.

11 MR. GOLDSTEIN: Justice Scalia, I will tell  
12 you this, I am not overclaiming the cases. I am  
13 describing what happened in them, particularly on the  
14 axis of whether the Court went provision by provision.

15 JUSTICE SCALIA: Very often I could decide a  
16 case -- you know, the lower courts are running away from  
17 the question of deference vel non because things have  
18 been so confused by Meade. So they simply decide the  
19 question assuming no deference to the agency. That  
20 doesn't prove that in that particular case the agency  
21 wouldn't have been entitled to deference.

22 MR. GOLDSTEIN: Justice Scalia, let me tell  
23 you why --

24 JUSTICE SCALIA: Whether it was or not, it  
25 would have come out this way. So those three cases

1 don't prove what you say they prove.

2 MR. GOLDSTEIN: Justice Scalia, here's why I  
3 disagree. I picked three cases for a very specific  
4 reason, in that each of those three cases rejected the  
5 assertion of jurisdiction. And so that if Chevron were  
6 applying, the Court would have had to find that the  
7 statute was unambiguous. And it didn't do that in any  
8 of those cases.

9 JUSTICE KENNEDY: And could you add that in  
10 those three cases, or at least Meade, some respect was  
11 given to the agency's due.

12 MR. GOLDSTEIN: Yes, absolutely.

13 JUSTICE KENNEDY: It was just not the sort  
14 of deference that -- under Chevron.

15 MR. GOLDSTEIN: Absolutely.

16 JUSTICE KAGAN: But take Meade, Mister -- --  
17 I'm sorry.

18 MR. GOLDSTEIN: I did. I agreed with  
19 Justice Kennedy vociferously. That was the end of my  
20 answer.

21 (Laughter.)

22 JUSTICE KAGAN: Meade presented -- whatever  
23 you think of Meade, it's a very different question from  
24 this, because what the majority in Meade said was that  
25 the agency wasn't entitled to deference because it was

1 acting by way of these opinion letters that weren't --  
2 that didn't have the force of law. So that's the  
3 threshold question is, does the agency have power to  
4 make rules with the force of law and is the agency  
5 exercising that power?

6 That is a threshold question that has been  
7 set by this Court. It's a very different kind of  
8 question from provision by provision, subsection by  
9 subsection, did -- did Congress think that the agency  
10 had authority over this particular subject matter or  
11 not.

12 MR. GOLDSTEIN: Okay. I have two -- I have  
13 three answers. They will be brief. Louisiana Public  
14 Service Commission and Adams Fruit are as I described  
15 them. The reason that Meade is helpful to me is on a  
16 different axis than you've described. And that is that  
17 the agency there had a general -- generally applicable  
18 authority in which it could have urged that its  
19 authority to issue those rulemakings, that it was  
20 entitled to deference on its view of its power to issue  
21 rulings with the force of law.

22 But the third thing that I want to say  
23 is let me just take --

24 JUSTICE SCALIA: Before you get to that, I'm  
25 really surprised at your response to Justice Kennedy

1 that you agree that, even where the agency has no  
2 jurisdiction, although you won't give Chevron deference,  
3 you will give whatever the other kind of deference.

4 MR. GOLDSTEIN: Skidmore.

5 JUSTICE SCALIA: Why would you give Skidmore  
6 deference if some non-jurisdictional agency comes in and  
7 says, hey, by the way, court, you know, I think this is  
8 the right answer? Oh, we will listen to that  
9 respectfully. We won't necessarily give you Chevron --  
10 why would you give it any deference at all if there is  
11 no jurisdiction?

12 MR. GOLDSTEIN: Because, Justice Scalia,  
13 Skidmore deference is, as you know, of course -- and you  
14 have been a very powerful critic of it, obviously, in  
15 your opinions -- that it is the -- you give the agency  
16 the respect of the persuasiveness of its opinion. And I  
17 took -- or I -- the part of the comment that I was  
18 agreeing with Justice Kennedy was -- is, as Justice  
19 Ginsburg has suggested, the FCC understands the  
20 Communications Act.

21 JUSTICE KENNEDY: And you might also have  
22 said, it seems to me, that that assumes the issue,  
23 assumes the premise. The question is, is there  
24 jurisdiction or not.

25 MR. GOLDSTEIN: And that --

1 JUSTICE KENNEDY: If you say there is no  
2 jurisdiction, why do you give deference, that assumes  
3 the very step, the very question we are trying to  
4 resolve.

5 JUSTICE SCALIA: And that's all you think  
6 that Skidmore deference means? You will listen to  
7 opinions that make sense, right?

8 MR. GOLDSTEIN: We -- the Court has -- I am  
9 quoting the Court.

10 JUSTICE SCALIA: But just to agency opinions  
11 it makes sense, not to --

12 MR. GOLDSTEIN: It more than makes sense,  
13 Justice Scalia. I think that there is a common sense  
14 element to this, and that is that the FCC, we recognize  
15 that it has its expertise. The question is, do we have  
16 to, when the statute is ambiguous, as it will often be,  
17 do we have to accept as a matter of law their view that  
18 they do have jurisdiction? I do want to --

19 JUSTICE GINSBURG: Mr. Goldstein, in  
20 following that, it seems to me you -- you are basing  
21 your argument on what is said in 7(a). And that  
22 preserves the authority of the local governments. But  
23 the provision that we are talking about is (b), and (b)  
24 says limitations, authority that the local governments  
25 do not have, and among those limitations is that they

1 have to act within a reasonable time.

2 MR. GOLDSTEIN: Yes.

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

7 MR. GOLDSTEIN: All right. You and  
8 Justice Breyer have encouraged me to get to the merits  
9 question, so let me turn the corner, if I might, to how  
10 we think a court would look at this question de novo.  
11 We have two points. One is the statutory provision, and  
12 this is going to be at pages 1 and 2 of the cert  
13 petition, if you have that copy in front of you.

14 The statute -- and so, Justice Ginsburg, I  
15 am going to answer your question, but I want to make a  
16 couple of quick points about our offensive argument  
17 about why it is Congress didn't intend the FCC to  
18 implement the statute with the force of law.

19 It begins with preservation of local zoning  
20 authority. Subsection (a) says: "Except as provided in  
21 this paragraph, nothing in this Act" -- which includes  
22 Section 201(b) -- "shall limit or affect the authority  
23 of a State or local government with respect to this  
24 subject matter."

25 Then in subsection (b)(5) --

1 Justice Ginsburg, you said the essence of the statute is  
2 (b). In subsection (b)(5), Congress located the  
3 enforcement power of this statute in the courts. Any --  
4 and this is it at the bottom of 2: "Any person  
5 adversely affected by any final action or failure to act  
6 by a State or local government or any instrumentality  
7 thereof" --

8 JUSTICE GINSBURG: But you are skipping over  
9 (2), which is the phrase "reasonable time."

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

14 JUSTICE GINSBURG: Just on a practical  
15 level --

16 MR. GOLDSTEIN: Yes.

17 JUSTICE GINSBURG: -- what sense does it  
18 make to read this to say that each time there is a  
19 dispute that comes to the Court, the Court will decide  
20 in that particular case, with no guide at all, what the  
21 reasonable time is?

22 MR. GOLDSTEIN: I will now turn to that  
23 question. It makes enormous sense and it was explained  
24 by the conferees in the conference report at page 209 of  
25 the petition appendix. And what happened here is that

1 the House version of the bill instructed the FCC to  
2 conduct a rule-making and the rule-making would set  
3 standards for establishing a reasonable period of time.

4 The Senate came along, which had no such  
5 provision and said, No, we are going to have a provision  
6 that instead says that nothing else in the Act will  
7 apply to this question; that you will go to the courts  
8 rather than to have a rule-making. The rule-making must  
9 be canceled, and then explained its intent. And So if I  
10 could just read that to you very quickly --

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

13 MR. GOLDSTEIN: Yes.

14 JUSTICE SCALIA: There are innumerable  
15 statutes which, after giving of the agency rule-making  
16 authority, provide judicial -- you know, review under  
17 this statute shall be held in such-and-such a court.  
18 There is no conflict whatever between a statement that  
19 any person affected can sue in Federal court and the  
20 possession by an agency of rule-making authority. The  
21 two simply don't conflict.

22 MR. GOLDSTEIN: Justice Scalia, my point is  
23 that it is a point in our favor, particularly when you  
24 compare -- (b)(5) has two parts, in addition to the  
25 statutory history which told the FCC to cancel the

1 rule-making on this point. Subsection (b)(5) says you  
2 go on the reasonable period of time provision, you go to  
3 the courts; and on questions related to radio frequency  
4 emissions, which is also covered by (c)(7)(A), you go to  
5 the FCC.

6 And what the conferees explained quite  
7 clearly, Justice Ginsburg, is that you can have two  
8 different definitions of what a reasonable period of  
9 time is. And that is a general -- this is -- the first  
10 one is what the FCC would expect to implement, and that  
11 is a reasonable period of time is a general national  
12 standard, a kind of baseline. What they said is a  
13 presumption of 90 or 150 days. And that's what we think  
14 generally the FCC will decide how long it takes to act  
15 on a wireless application.

16 Or you could think about reasonable period  
17 of time as within the locality. And that is, is the  
18 locality following its ordinary standards for resolving  
19 siting applications and not discriminating against  
20 wireless applications. And that -- the latter is what  
21 Congress intended, and it makes every sense in the world  
22 in the context of this statute that Congress wanted  
23 that, because, first, it has always been the case that  
24 State and local -- that wireless siting and all siting  
25 decisions are decided by localities, not by the Federal

1 Government.

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

4 MR. GOLDSTEIN: That, Justice Ginsburg --  
5 just to put this in context, the government says that  
6 the FCC was concerned that the wireless companies  
7 wouldn't know when to go to court. They cite no case in  
8 which that was ever an issue, neither the wireless  
9 companies nor them.

10 JUSTICE KENNEDY: Well, I wouldn't know when  
11 to go to court. Let me ask you this: Suppose there is  
12 a provision of this statute which is very difficult to  
13 understand.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE KENNEDY: Does that bear on the  
16 Chevron Step Zero analysis on the question of what you  
17 call jurisdiction?

18 MR. GOLDSTEIN: It does, Justice Kennedy.

19 JUSTICE KENNEDY: All right. It seems to me  
20 that Justice Ginsburg identifies a real point. I was  
21 looking at this statute and I say, you know, How do I  
22 know when this agency has failed to act? I don't --  
23 that's just a very obscure data point.

24 MR. GOLDSTEIN: Okay. Two things, Justice  
25 Kennedy. First is, I will tell you that Congress

1 consciously used phrases, "reasonable period of time"  
2 and "substantial evidence contained in a written record"  
3 -- those are the subdivisions of subparagraph (b), which  
4 Justice Ginsburg was pointing to, because those are  
5 judicially administered standards.

6           And I will just read you one sentence from  
7 the conference report: "The phrase 'substantial  
8 evidence contained in a written record' is the  
9 traditional standard used for judicial review of agency  
10 actions," the agency here being the locality.

11           And, Justice Kennedy, on your question --

12           JUSTICE GINSBURG: Where does that say  
13 anything about what you just read about what is a  
14 reasonable time?

15           MR. GOLDSTEIN: Yes.

16           JUSTICE KENNEDY: Was that at 209?

17           MR. GOLDSTEIN: That was at 210,  
18 Justice Kennedy.

19           There is a similar passage relating to  
20 "reasonable period of time." It's quite clear. I  
21 believe the conference report is four or five pages  
22 long. When you have the opportunity to read it again, I  
23 think you will see that Congress was adopting local  
24 standards, a local -- a local approach to deciding this  
25 question, against a broader framework.

1 Can I just answer Justice Kennedy's --

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

4 MR. GOLDSTEIN: Sure.

5 JUSTICE SOTOMAYOR: I have read a lot of  
6 briefs in this case and I don't have any idea what to  
7 tell a lower court, how to articulate the tests or how  
8 to apply it.

9 MR. GOLDSTEIN: Yes.

10 JUSTICE SOTOMAYOR: Given that you started  
11 with saying it's almost impossible to talk about what's  
12 jurisdictional and what's an application of  
13 jurisdiction. So articulate the test and tell me what I  
14 tell the lower courts.

15 MR. GOLDSTEIN: The lower courts decide de  
16 novo whether the agency was given the power to interpret  
17 a particular provision with the force of law. That's  
18 the entry point question, the threshold question. All  
19 of this works --

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

23 MR. GOLDSTEIN: It did not --

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

1 I still haven't quite understood, other than in the  
2 academic literature, what the difference between Step  
3 Zero and Step One is, and so there is an ambiguity and  
4 now the agency is given deference. So where in this  
5 conversation is there --

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

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

21 No communications provider, so far as we are  
22 aware, was ever thrown out of court for coming in too  
23 late, for a failure to act, because every day the State  
24 and locality didn't act is regarded as an alleged  
25 violation and it doesn't take away from jurisdiction to

1 go to court. There are no cases that support their  
2 concern.

3 If I could reserve the remainder of my time?

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 General Verrilli?

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

7 ON BEHALF OF THE RESPONDENTS

8 GENERAL VERRILLI: Mr. Chief Justice, and  
9 may it please the Court:

10 Let me start with a central point that I  
11 think cuts through most of the arguments that Petitioner  
12 has made this morning.

13 Chevron does apply to a court's review of an  
14 agency's determination of jurisdiction, but only after a  
15 court concludes that Congress has delegated to the  
16 agency generally the authority to make rules carrying  
17 the force of law, and that the rule in question was  
18 promulgated in exercise of that authority.

19 JUSTICE KENNEDY: As -- as to that specific  
20 provision?

21 GENERAL VERRILLI: No, in general. I think  
22 that the language this Court used, taken from Mead, last  
23 term in Astrue, in the unanimous opinion for the Court  
24 in Mayo the term before, was is the authority -- is the  
25 agency vested with authority generally to make rules.

1 CHIEF JUSTICE ROBERTS: Well, that's right,  
2 but your argument it seems to me can't be -- let's say  
3 you have a general statute and you've got a provision at  
4 the beginning that says this is -- authority to  
5 interpret this is delegated to the agency. And you go  
6 along, but then all of a sudden in, you know, section  
7 123 it says it doesn't get any deference interpreting  
8 this provision. Now, you would not say that the first  
9 general one controls the specific withdrawal of  
10 deference, would you?

11 GENERAL VERRILLI: I would not, Mr. Chief  
12 Justice.

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

20 You can read it that way, they say, because  
21 7(a) says nothing shall limit what the State can do  
22 other than what's here in the statute. And if you let  
23 the FCC, if you give them deference, you're letting  
24 something else limit what the State can do.

25 So why -- and then you dispute, it seems to

1 me, just whether that you should call that jurisdiction  
2 or not, because people think of jurisdiction as meaning,  
3 oh, you don't get through the door. But if what they  
4 mean by jurisdiction is simply that the agency gets no  
5 deference on this point, then it seems to me everybody's  
6 saying the same thing.

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

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

19           CHIEF JUSTICE ROBERTS: Ambiguity in the  
20 provision that says, agency, you get no deference, or  
21 ambiguity in the substantive provision at issue?

22           GENERAL VERRILLI: Either one, because --

23           CHIEF JUSTICE ROBERTS: Well, but if there's  
24 no ambiguity on the provision that says you get no  
25 deference, then it doesn't matter whether there's

1 ambiguity on the subsidiary one, right?

2 GENERAL VERRILLI: That's correct. But if  
3 there is ambiguity on the first, our position is that  
4 Chevron applies and that the agency gets deference so  
5 long as it's a permissible construction of the statute,  
6 and that's true whether you call it jurisdiction or  
7 whether you call it substance.

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

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

23 And the reason that IMLA gives for stating  
24 that position is exactly the same reason that Mr.  
25 Goldstein gives for stating his position, which is that

1 you're talking about an agency action in excess of the  
2 scope of its delegated authority and once you say that,  
3 there's no Chevron deference.

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

12           American Hospital Association is certainly  
13 one such case where the -- the NLRB had general  
14 rulemaking authority, there was a statutory provision  
15 that said bargaining units needed to be determined by  
16 the NLRB in each case. And the argument was made that  
17 that ought to be understood as a carveout from the  
18 NLRB's general authority requiring case-by-case  
19 decisionmaking with respect to bargaining units, and the  
20 Court rejected that argument, saying that -- that in  
21 that case, whatever ambiguity there was in the statute  
22 ought to be resolved under Chevron in favor of the  
23 agency.

24           Schor, CFT v. Schor, is a comparable case,  
25 and I would submit Iowa Utilities Board is a case --

1 JUSTICE SOTOMAYOR: All right. General  
2 Verrilli, let's go back to the question presented and  
3 break down your argument. Is it your position that what  
4 the Court asks first is whether Congress has spoken  
5 clearly on the agency having authority or not? Is that  
6 subject to de novo review?

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

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

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

19 Once that is satisfied under de novo review,  
20 Chevron kicks in. Now, Step 1 of Chevron is, of course,  
21 de novo review using the normal tools of statutory  
22 construction to answer the question whether Congress has  
23 spoken clearly on the issue of whether the agency has  
24 authority. If the answer is that Congress has, then  
25 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? If  
7 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. And we  
12 think this is what the Court uniformly and routinely  
13 does in 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 that  
18 case. That case was decided in 1986. Congress added  
19 the sections Mr. Goldstein referred to, 251 and 252 of  
20 the Communications Act, in 1996. And what Louisiana  
21 Public Service Commission did was define the outer  
22 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. That  
2 seems to me, had you had run that through the Chevron  
3 analysis, it'd be a pretty straightforward Chevron Step  
4 1 case.

5 Adams Fruit, the Court held specifically in  
6 Adams Fruit that the plain meaning of the statutory  
7 provision at issue foreclosed the agency's  
8 interpretation. And that's at 494 U.S. at page 646. So  
9 that was a Chevron Step One case. It then did go on to  
10 say, with respect to Chevron Step Two, that even if we  
11 were going to think about granting the agency deference  
12 here, they wouldn't get it.

13 But I think the reasons -- if you map the  
14 reasoning of Adams Fruit onto this case, it supports our  
15 position and not Mr. Goldstein's. What the Court said  
16 in Adams Fruit was that the Department of Labor did have  
17 the authority to implement the substantive provisions of  
18 the Agricultural Workers Protection Act, including the  
19 substantive provisions governing motor vehicle safety.  
20 What it didn't have was the authority to restrict  
21 judicial remedies available for the private cause of  
22 action created under the statute.

23 Well, if you map that onto here, what the  
24 FCC has done here with respect to the reasonable time  
25 provision in 332(c)(7)(B) of the statute was to provide

1 a rule of decision for the substantive provision of the  
2 Act, leaving to the courts the decision of what remedy,  
3 if any, there would be for a violation of those  
4 substantive provisions.

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

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

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

24 So what you'd look at here is it's the FCC  
25 that is in charge of national communications, of which

1 this is part. There is a specific provision, as your  
2 colleague points out, that says "but don't interfere  
3 with the States when they are citing stuff." But then  
4 there is a limitation to that specific provision which  
5 consists of six or seven parts, all of which maintain a  
6 lot of authority in the FCC or rules about what they are  
7 not supposed to do. And then here it uses the word  
8 "reasonable."

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

16           GENERAL VERRILLI: So --

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

23           GENERAL VERRILLI: Two points. First,  
24 applying that approach, I think it's pretty clear that  
25 one would uphold the FCC's judgment here. Second, I

1 understand that that's Your Honor's approach. I  
2 don't --

3 JUSTICE BREYER: I didn't make it up. It  
4 was Louis Jaffe.

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

7 JUSTICE SCALIA: That's no better. Louis  
8 Jaffe isn't even a member of the Court.

9 (Laughter.)

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

22 JUSTICE BREYER: I mean, I think I can show,  
23 which I will spare you at the moment, all the cases like  
24 Meade are consistent with what I said. And cases that  
25 are not consistent are consistent with Judge Friendly

1 said years ago, where he said there is no coherence to  
2 the Supreme Court's cases in this area; when they like a  
3 result, they say they have deference, and when they  
4 don't like it, they say they don't.

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

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

14 GENERAL VERRILLI: I guess --

15 JUSTICE SCALIA: -- a description of the  
16 Chevron --

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

19 GENERAL VERRILLI: With respect to the issue  
20 that's in front of the Court now, I think -- what my  
21 friends on the other side are asking is actually for an  
22 additional layer of complexity in the analysis, even  
23 after the general authority is established to make rules  
24 with the force of law, and even after it's established  
25 that the rule at issue is -- has been done in the

1 exercise of that, my friends on the other side suggest  
2 that there is another layer of de novo review there to  
3 answer the question of whether this particular  
4 provision --

5 CHIEF JUSTICE ROBERTS: Right, well --

6 GENERAL VERRILLI: -- gives authority to act  
7 with the force of law.

8 CHIEF JUSTICE ROBERTS: Your friend on the  
9 other side has another set of arguments about why you  
10 should treat this particular provision differently, and  
11 that is because it concerns the authority, or lack  
12 thereof, of state and local government agencies. Now,  
13 does that play any role at all in your analysis?

14 GENERAL VERRILLI: Yes.

15 CHIEF JUSTICE ROBERTS: We are not talk --  
16 you know, obviously the dividing line between state  
17 authority and federal authority is a more significant  
18 one than some of the other questions as to which  
19 agencies get deference, which is whether rates are  
20 reasonable or not reasonable. And this provision is  
21 written in terms of the preservation of state authority.

22 And your view would give the federal agency  
23 deference under Chevron, very considerable deference, in  
24 defining when there should be federal authority and when  
25 there should be state. Is that at all a pertinent

1 consideration?

2           GENERAL VERRILLI: It is definitely a  
3 pertinent consideration, Mr. Chief Justice, and let me  
4 talk about that in general and then move to the  
5 specifics in this case.

6           In general it's a pertinent consideration  
7 that is accommodated within the Chevron framework. At  
8 Chevron Step One, the Court applies the normal tools of  
9 statutory construction. The normal tools of statutory  
10 construction include a clear statement rule, they  
11 include the presumption against preemption, and this  
12 Court --

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

16           GENERAL VERRILLI: Well, when the question  
17 is whether Congress -- let me try to use this with a  
18 specific case, the Solid Waste of Cook County case.  
19 That's a case in which the Court declined -- it didn't  
20 say that that issue there was exempt from Chevron  
21 analysis. It applied the Chevron framework, and it said  
22 it's Step One of Chevron because the migratory bird rule  
23 pushed to the very outer limits of Congress's commerce  
24 clause authority, that the Court was going to apply a  
25 clear statement rule in that situation before assuming

1 that --

2 CHIEF JUSTICE ROBERTS: Who has that -- who  
3 has to be clear on their statement? Which way?

4 GENERAL VERRILLI: Congress has to be clear  
5 in its --

6 CHIEF JUSTICE ROBERTS: That it intended to  
7 intrude upon state authority?

8 GENERAL VERRILLI: To give that authority to  
9 that extent, exactly.

10 JUSTICE KENNEDY: But the agencies have no  
11 historic responsibility or tradition, quite unlike  
12 Article III courts, of safeguarding the federal balance.

13 GENERAL VERRILLI: But Chevron Step One is,  
14 of course, applied by the courts, Justice Kennedy, and  
15 that's where the protection comes in, and with respect  
16 to this particular --

17 JUSTICE SCALIA: I don't understand the  
18 question, to tell you the truth. This matter is not  
19 left with the States. It's going to be decided by a  
20 federal instrumentality, right? Either by the agency,  
21 which says 30 days is the rule, or by federal courts,  
22 which perhaps could issue opinions that say 30 days is  
23 the rule.

24 I mean, this -- you know, it's an  
25 interesting separation of powers question within the

1 federal government, but I don't see how it's a question  
2 of whether it's the states or the federal government  
3 that's going to call the tune here. It's going to be  
4 the federal government, isn't it?

5 GENERAL VERRILLI: That is the -- was going  
6 to be my specific point in response to your question,  
7 Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: No, it wasn't going  
9 to be that. That -- the idea that there is no  
10 difference between the federal judiciary defining the  
11 limits between state and federal power, and having an  
12 agency of unelected bureaucrats responsible to the  
13 executive saying when the state controls and when the  
14 federal controls, those are vastly different  
15 propositions.

16 GENERAL VERRILLI: Yes, but there is a third  
17 variable here and that's what's key, which is in this  
18 situation, in 332(c)(7)(B), the limitations provision,  
19 Congress has spoken unambiguously and said that the  
20 following limitations on local zoning authority must be  
21 respected.

22 CHIEF JUSTICE ROBERTS: Yes.

23 GENERAL VERRILLI: And no one has suggested  
24 that that was at the outer limit of Congress's commerce  
25 clause authority or anywhere closer to it.

1 CHIEF JUSTICE ROBERTS: But it also said, it  
2 also said in (7)(a) that those are the only limits, not  
3 add on to this any limits that unelected bureaucrats  
4 might decide to impose, and will give them -- and the  
5 courts must give them vast deference in enforcing those  
6 limits.

7 JUSTICE KENNEDY: Unelected federal  
8 bureaucrats.

9 (Laughter.)

10 GENERAL VERRILLI: But I do think -- I do  
11 think that what Justice Scalia said is correct, that the  
12 question here is not whether the States will decide.  
13 The question at the end of the day is whether the agency  
14 will be able to exercise its usual authority to  
15 interpret reasonable --

16 JUSTICE SCALIA: Don't you think that the --

17 GENERAL VERRILLI: -- whether federal courts  
18 will make those decisions on a case-by-case basis --

19 JUSTICE SCALIA: Don't you think that the  
20 issue of whether unelected federal bureaucrats should  
21 decide it or unelected federal judges should decide it  
22 is an issue of separation of powers rather than an issue  
23 of -- of federal/state relations?

24 GENERAL VERRILLI: I do think -- in that  
25 respect I think this case is really just like Iowa

1 Utilities Board in that the argument there --

2 CHIEF JUSTICE ROBERTS: Is it AT&T versus --

3 GENERAL VERRILLI: Yes.

4 CHIEF JUSTICE ROBERTS: Okay.

5 GENERAL VERRILLI: In that -- the argument  
6 there was that you ought not to interpret the FCC to  
7 have authority to implement particular rules because  
8 Congress gave to State public utility commissions the  
9 responsibility to carry out and execute the rules and  
10 then to federal courts the power to review them and cut  
11 the FCC out. And the argument there was that respect  
12 for States ought to lead you to conclude not to apply  
13 Chevron deference to the agency --

14 JUSTICE BREYER: Okay. Now --

15 CHIEF JUSTICE ROBERTS: But in rejecting  
16 that argument in Section 2 of the opinion, the author of  
17 that opinion in nowhere, in no place applied Chevron  
18 deference in answering that question. It was entirely  
19 de novo, unlike in Section 3 when it was finally  
20 decided, Okay, we've got the answer here and now we will  
21 defer to the agency on the substance of the  
22 determination.

23 GENERAL VERRILLI: I -- I understand that  
24 the petitioners made that argument, Mr. Chief Justice.  
25 I read the opinion differently, and if I could, I'll

1 explain why.

2 In Section 2 and looking at pages 384 and  
3 385 of the opinion. After the Court had established  
4 that there was general authority under Section 201(b) to  
5 implement the provisions of the Act, which I do think  
6 the Court established de novo and we would agree that  
7 that's appropriate, the Court then moved on to consider  
8 these specific jurisdictional questions.

9 And the Court looked at the provision of the  
10 statute which gave authority to the State commissions  
11 and then considered the argument that one ought to infer  
12 from that, that the FCC's cut out of the process, and  
13 the opinion of the Court says: "We think this  
14 attributes to that task a greater degree of autonomy  
15 than the phrase 'establish any rates' necessarily  
16 implies."

17 Seems to me what the Court was saying there,  
18 and then on the next page says something very similar  
19 about the next argument that the -- that the challengers  
20 were making in that case. And I think --

21 CHIEF JUSTICE ROBERTS: Does it cite --

22 GENERAL VERRILLI: It does not.

23 CHIEF JUSTICE ROBERTS: -- in Part 2, which  
24 is --

25 GENERAL VERRILLI: It does not, Mr. Chief

1 Justice, but --

2 CHIEF JUSTICE ROBERTS: -- one, two, three,  
3 four, five, six, seven, eight, nine, ten pages of  
4 analysis of the Chevron case?

5 GENERAL VERRILLI: It does not.

6 CHIEF JUSTICE ROBERTS: Does it say they are  
7 applying Chevron deference?

8 GENERAL VERRILLI: It does not. But the  
9 conclusion -- I think my -- my friend has suggested that  
10 we weren't accurate in our discussion of the concluding  
11 paragraph of this phrase. But I would like to turn the  
12 Court's attention to that because I think we were. This  
13 is at page 397 of the opinion. Okay.

14 There is a sentence that starts: "The 1996  
15 Act can be read to grant most promiscuous rights to the  
16 FCC vis a vis the State commissions and to competing  
17 carriers vis a vis the incumbents, and the Commission  
18 has chosen in some instances to read it that way. But  
19 Congress is well aware that the ambiguities it chooses  
20 to produce in the statute will be resolved by the  
21 implementing agency. We can only enforce the clear  
22 limits that the 1996 Act contains, which in the present  
23 case invalidate only Rule 319."

24 Now, the jurisdictional dispute was the  
25 dispute between the FCC -- the FCC vis a vis the State

1 commissions over who had the authority to implement the  
2 rules.

3           So while I agree, Mr. Chief Justice, that  
4 Chevron is not cited in that section 2 of the opinion,  
5 the tenor of that discussion does seem to me to say that  
6 the Court was looking, once it had established general  
7 authority, for clear evidence that Congress had intended  
8 to carve out from that general authority the particular  
9 provisions at issue, and because the provisions to which  
10 the challengers pointed did not necessarily imply an  
11 intent on the part of Congress to carve it out, that the  
12 Court wasn't going to find a carveout. So I do think  
13 that really the analysis in Iowa Utilities Board is  
14 quite consistent with that --

15           JUSTICE BREYER: I dissented in that, I  
16 think.

17           GENERAL VERRILLI: Yes, you had a different  
18 view.

19           JUSTICE BREYER: Right. So I agree with  
20 you, this flows a fortiori from the majority. But I  
21 didn't think -- this is what I wonder -- is -- you say  
22 unelected Federal bureaucrats. Administrative law is  
23 about Federal administration. That is Federal  
24 administrative law. And I've heard here people say  
25 we're talking about them adding something. I didn't

1 think that's what was at issue. I thought that there is  
2 a word in the statute, "reasonable," and what the  
3 administrators did at the FCC was to interpret that  
4 word.

5 Am I right or wrong?

6 GENERAL VERRILLI: That's certainly how we  
7 understand the situation, Justice Breyer, that the  
8 agency --

9 JUSTICE BREYER: What was added? What was  
10 added?

11 GENERAL VERRILLI: It interpreted the  
12 meaning of the language "reasonable time" to give it  
13 more precise content, to allow -- to deal with the  
14 failure to act situation.

15 JUSTICE GINSBURG: Can you tell me, what is  
16 -- what is the ambiguity? Because I looked at (b). (B)  
17 is limitations. Limitations is on the State, and then  
18 it uses the phrase of what the State cannot do. The  
19 State has to conform to a reasonable time. What is  
20 ambiguous about this?

21 GENERAL VERRILLI: Well, our view, Justice  
22 Ginsburg, is that there isn't any ambiguity, that the  
23 rule ought to be upheld no matter what standard of  
24 review applies, in fairness to my friends on the other  
25 side. But I do think this points up the problems going

1 down the road. They are suggesting is --

2 JUSTICE SCALIA: I thought "reasonable" was  
3 what people were talking about as being ambiguous,  
4 although I don't think "ambiguous" is the proper word.  
5 "Reasonable" is vague. You don't know exactly what it  
6 means, right?

7 GENERAL VERRILLI: I took that -- I think  
8 that's it's -- it's certainly susceptible to further  
9 elaboration in that sense. But I took Justice Ginsburg  
10 to be asking me about the ambiguity with respect to the  
11 authority of the (7)(A)--

12 JUSTICE BREYER: Reasonable -- reasonable is  
13 uncertain who. Who has -- it doesn't tell us who had  
14 the authority.

15 GENERAL VERRILLI: Right. And in fairness  
16 to my friends, and as the Chief Justice has just  
17 indicated, it's an inference from (7)(A), and I suppose  
18 an inference from (7)(B)(v), and that the courts are in  
19 the process. But I do think this points up the  
20 difficulty is that if you -- if you look at the  
21 provision that the FCC's actually implementing here,  
22 it's not a jurisdictional provision; it's a normal  
23 substantive standard. The FCC is giving it more precise  
24 content. That's what an agency's job is. It's doing  
25 its job here.

1 CHIEF JUSTICE ROBERTS: You're talking about  
2 (7)(B).

3 GENERAL VERRILLI: Yes, (7)(B)(ii), right,  
4 exactly.

5 CHIEF JUSTICE ROBERTS: What is there about  
6 (7)(A) that you think is ambiguous?

7 GENERAL VERRILLI: We think it's clear that  
8 the FCC has authority, given (7)(A), because of the  
9 "except as provided in this paragraph" argument. It's I  
10 think our friends on the other side who say that it's  
11 (7)(A) that creates uncertainty about whether the FCC  
12 has the authority to implement the reasonable time  
13 provision in (7)(B)(ii) -- and I think that points up  
14 the problem with adding this additional step to the  
15 analysis.

16 Once the Court has satisfied itself that the  
17 agency has general rulemaking authority, it's not going  
18 to be hard to cobble together inferences to make  
19 comments on de novo review that the -- that the agency  
20 lacked the authority to implement a particular provision  
21 with the force of law.

22 And I think you're adding needless  
23 complexity, and I do think -- the reason I suggested  
24 earlier that I think this is a Pandora's box is because  
25 I do not think there's at the end of the day a

1 principled line that can be drawn between what my friend  
2 describes as interpretive authority questions and the  
3 kind of who, what, when, where, substantive questions,  
4 substantive jurisdictional questions that Respondent  
5 IMLA is focused on.

6           In each of those situations, the argument is  
7 that the agency has acted in excess of its statutory  
8 authority. And if that's sufficient to justify de novo  
9 review in the first instance, it's sufficient to justify  
10 de novo review in the second instance. And if that's  
11 the case, then I would submit that you have really  
12 unravelled Chevron. The good work that that doctrine  
13 does to stabilize the development of administrative law  
14 is gone.

15           There will be an argument in every case that  
16 -- that de novo review is required, and in every case in  
17 which a court agrees that de novo review is required,  
18 once the court has interpreted the statute as a matter  
19 of de novo review, then you have ossification of the  
20 administrative process because that interpretation is  
21 locked.

22           CHIEF JUSTICE ROBERTS: Well, but your  
23 argument there is basically saying when the statute says  
24 something is reasonable, it means that the Commission  
25 doesn't have -- it's a jurisdictional question whether

1 it's reasonable or unreasonable. But it seems to me  
2 that this provision is quite a bit different. It talks  
3 about the authority of a State. And usually when we are  
4 talking about the authority of which entity can govern,  
5 we view that as jurisdictional.

6 There may well be cases at the margin that  
7 are -- that are difficult. But your argument is  
8 basically reasonable or unreasonable is the same as  
9 State or Federal.

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

13 CHIEF JUSTICE ROBERTS: No, no, I'm not  
14 talking about the federalism values. I'm talking about  
15 your argument that, oh, once you say you can draw a  
16 jurisdictional line here, people will argue you can draw  
17 it everywhere.

18 GENERAL VERRILLI: Well, I do -- I do think  
19 that's true, and I think that the arguments that are  
20 being made by my friend on the other side demonstrate  
21 that. But I guess what I would say in this situation in  
22 particular is that -- we're really not -- the fact that  
23 it does involve the Federal and State authorities  
24 doesn't change the analysis, because applying Chevron in  
25 the normal way, one would not conclude that Congress has

1 spoken clearly and restricted the agency's authority,  
2 and there is no means -- there's no basis to apply a  
3 clear statement rule here because Congress clearly had  
4 the authority to impose the limitations that it imposed  
5 in subsection (B) and those are direct limitations on  
6 the State authority, and Congress made that judgment.  
7 It isn't the agency weighing in on its own to decide  
8 that State or local authorities should be subject to  
9 limitations.

10           These are judgments that Congress made and  
11 the agency is implementing them in very much the same  
12 way that the Court found it was appropriate for the  
13 agency to implement the preemptive scope of the word  
14 "interest" in the National Bank Act in the Smiley case.

15           JUSTICE SCALIA: Mr. Verrilli, why isn't it  
16 an easy answer to the whole case to read (7)(A). Except  
17 as provided in this paragraph. Nothing in this chapter  
18 shall limit or affect the authority of State or local  
19 government? Okay? Except as provided in this  
20 paragraph.

21           And then later in the paragraph, in the  
22 subsection entitled "limitations," it says "a State or  
23 local government shall act on any request for  
24 authorization within a reasonable period of time."

25           GENERAL VERRILLI: That's why --

1 JUSTICE SCALIA: That's a limitation.

2 CHIEF JUSTICE ROBERTS: That's exactly  
3 right. That limits it. And -- and the question then is  
4 of course whether that's enforced in court -- enforced  
5 in court or before the agency. Right?

6 GENERAL VERRILLI: No. I think the question  
7 is whether the agency has the authority to flesh out the  
8 substantive standard that the court will subsequently  
9 apply --

10 CHIEF JUSTICE ROBERTS: Whether the standard  
11 is defined in -- by direct judicial review or by the  
12 agency, with deference to the agency.

13 GENERAL VERRILLI: I agree with  
14 Justice Scalia, because -- because I do think that no  
15 matter what view of the matter the Court takes, the  
16 FCC's rule ought to be upheld, but I do think that the  
17 positions my friends on the other side are advocating  
18 threaten to unravel the Chevron framework and  
19 destabilize administrative law. And I would urge the  
20 Court not to do it.

21 JUSTICE SOTOMAYOR: General, if the agency  
22 had said reasonable is 30 days, period, and not done  
23 what it did, which was create a rebuttable presumption,  
24 would that have been appropriate? Would we have had to  
25 uphold that? And if not, I think -- how would we have

1 struck it down? What step?

2 GENERAL VERRILLI: You've analyzed that  
3 under Step 2 of Chevron, Justice Sotomayor. You decided  
4 the permissible construction of the statute, whether  
5 it's reasonable or whether it's arbitrary and  
6 capricious, that would depend on what the record looked  
7 like. But certainly, a court would exercise review over  
8 that.

9 If the Court has nothing further?

10 CHIEF JUSTICE ROBERTS: Thank you, General.

11 Mr. Goldstein, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

13 ON BEHALF OF THE PETITIONERS

14 JUSTICE KENNEDY: Chevron is at an end.  
15 It's unravelled.

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

19 (Laughter.)

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

1 of Chevron on whether they 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 think  
7 with respect, it's not silliness. You have been running  
8 as fast as you can away from the arguments that IMLA has  
9 presented that in every case it's a who, what, where,  
10 you know, or how question and that we have to answer  
11 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 case and that  
2 is a distinct inquiry. Once you decide that they have  
3 that delegated authority over that provision, then, as  
4 this Court has done in every case --

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

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

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

24 JUSTICE KAGAN: I guess I'm still waiting  
25 for -- for the -- the way in which your inquiry is

1 different from IMLA's inquiry.

2 MR. GOLDSTEIN: It is, because I am only  
3 asking the threshold question, did Congress give the  
4 agency the power to interpret this statutory provision  
5 with a question of law. And that is a different -- I'll  
6 give you an illustration and that is, there is an  
7 extended discussion of this question in the FCC's order.  
8 It had no difficulty identifying that as a separate  
9 inquiry. I did want to just turn to the merits --

10 Let me just say that the Solicitor General's  
11 argument about whether the 201(b) authority extends to  
12 332(c)(7) is a great illustration of our argument on the  
13 question presented. Because that's a lawyer's argument.  
14 There was not a word that my friend said about there was  
15 a technical question of communications law and how  
16 wireless citing facilities operate.

17 That's the kind of question that Congress  
18 gives to agencies. It is not the threshold lawyer's  
19 issue, does this statute read this far? I would only  
20 encourage you on the merits question, which is not  
21 included in the question presented, which you didn't  
22 grant certiorari on, that is, the application of de novo  
23 review to this statute to pay more attention than I  
24 think this argument has given it, because it wasn't the  
25 core issue briefed in the case, obviously, to what

1 Congress did in this statute.

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

9           Thank you.

10           CHIEF JUSTICE ROBERTS: Thank you, counsel.

11           The case is submitted.

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

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<b>A</b>	<p><b>addition</b> 23:24</p> <p><b>additional</b> 40:22 52:14</p> <p><b>administer</b> 10:13 10:17,24 11:4,5 11:23 15:25</p> <p><b>administered</b> 26:5</p> <p><b>administration</b> 49:23</p> <p><b>administrative</b> 38:19 40:8 49:22,24 53:13 53:20 56:19</p> <p><b>administrators</b> 50:3</p> <p><b>adopted</b> 5:10 61:5</p> <p><b>adopting</b> 26:23</p> <p><b>advanced</b> 4:15</p> <p><b>adversely</b> 22:5</p> <p><b>advocating</b> 56:17</p> <p><b>affect</b> 21:22 55:18</p> <p><b>agencies</b> 32:21 37:13 41:12,19 43:10 60:18</p> <p><b>agency</b> 6:12 9:20 10:5,24 11:17 11:17 12:12,13 13:18,21,25 14:16,20,21,23 15:5 16:19,20 17:25 18:3,4,9 18:17 19:1,6,15 20:10 23:15,20 25:22 26:9,10 27:16 28:4 29:16,25 30:5 30:19 31:4,13 31:20 32:4 33:1 33:6,23 34:5,16 34:23 35:7 36:11 37:21 38:9 39:18</p> <p>40:10 41:22 43:20 44:12 45:13 46:13,21 48:21 50:8 52:17,19 53:7 55:7,11,13 56:5 56:7,12,12,21 58:15,25 59:7,8 59:9,15,16 60:4</p> <p><b>agency's</b> 10:21 11:8 14:18 16:6 17:11 29:14 31:13 32:19 35:2 36:7 51:24 55:1</p> <p><b>ago</b> 40:1</p> <p><b>agree</b> 10:14 19:1 31:8 47:6 49:3 49:19 56:13</p> <p><b>agreed</b> 17:18</p> <p><b>agreeing</b> 19:18</p> <p><b>agrees</b> 53:17</p> <p><b>agricultural</b> 15:21 36:18</p> <p><b>AL</b> 1:3,7,17</p> <p><b>alleged</b> 10:3 28:24</p> <p><b>allow</b> 50:13</p> <p><b>alpha</b> 6:6</p> <p><b>ambiguities</b> 48:19</p> <p><b>ambiguity</b> 28:3 28:10,11 31:11 31:18,19,21,24 32:1,3,22 33:21 50:16,22 51:10</p> <p><b>ambiguous</b> 20:16 28:9 38:12 50:20 51:3,4 52:6</p> <p><b>American</b> 15:12 33:12</p> <p><b>analysis</b> 25:16 36:3 40:22 41:13 42:21</p> <p>48:4 49:13 52:15 54:24</p> <p><b>analyzed</b> 35:9,10 57:2</p> <p><b>analyzing</b> 35:13</p> <p><b>answer</b> 5:18 11:20 14:17 17:20 19:8 21:15 27:1 28:17 34:8,13 34:22,24 37:21 41:3 46:20 55:16 58:10 59:22</p> <p><b>answering</b> 46:18</p> <p><b>answers</b> 18:13</p> <p><b>APPEARANC...</b> 1:25</p> <p><b>appendix</b> 22:25</p> <p><b>applicable</b> 18:17</p> <p><b>application</b> 24:15 27:12 58:23 60:22</p> <p><b>applications</b> 24:19,20</p> <p><b>applied</b> 42:21 43:14 46:17</p> <p><b>applies</b> 32:4 42:8 50:24</p> <p><b>apply</b> 23:7 27:8 29:13 42:24 46:12 55:2 56:9 59:20</p> <p><b>applying</b> 17:6 38:24 48:7 54:24</p> <p><b>appreciate</b> 7:5</p> <p><b>approach</b> 15:10 26:24 37:17 38:24 39:1,6</p> <p><b>approached</b> 14:11</p> <p><b>appropriate</b> 33:9 47:7 55:12 56:24</p> <p><b>arbitrary</b> 57:5</p> <p><b>area</b> 6:15 38:10 40:2</p> <p><b>argue</b> 54:16</p> <p><b>arguing</b> 12:10</p> <p><b>argument</b> 1:23 3:2,5,8 4:3,8,22 20:21 21:16 29:6 30:2 33:7 33:16,20 34:3 46:1,5,11,16 46:24 47:11,19 52:9 53:6,15,23 54:7,15 57:12 58:14,17,20 60:11,12,13,24</p> <p><b>arguments</b> 6:4 29:11 41:9 54:19 58:8</p> <p><b>arises</b> 31:17</p> <p><b>Arlington</b> 1:3 4:4</p> <p><b>Article</b> 43:12</p> <p><b>articulate</b> 27:7 27:13</p> <p><b>articulated</b> 9:16</p> <p><b>articulation</b> 15:9</p> <p><b>asked</b> 7:13,20 59:1</p> <p><b>asking</b> 40:21 51:10 60:3</p> <p><b>asks</b> 34:4 35:2</p> <p><b>assertion</b> 5:20 12:19 17:5 32:20</p> <p><b>Association</b> 33:12</p> <p><b>assume</b> 7:22</p> <p><b>assumes</b> 19:22 19:23 20:2</p> <p><b>assuming</b> 16:19 42:25 58:3</p> <p><b>Astrue</b> 29:23</p> <p><b>attention</b> 48:12 60:23</p> <p><b>attributes</b> 47:14</p>
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