

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:

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2 of Petitioners.

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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 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 isn't really 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 the 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 cabinet 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 uncontested -- 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 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 would expect to implement, and that is a
24 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 --

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

5 MR. GOLDSTEIN: Yes.

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

9 MR. GOLDSTEIN: It does, Justice Kennedy.

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

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

22 And I will just read you one sentence from
23 the conference report. "The phrase 'substantial
24 evidence contained in a written record' is the
25 traditional standard used for judicial review of agency

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 to 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 to 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 comments 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.

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 friend 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 positions 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 horror. This is
17 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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<p style="text-align: center;">A</p> <p>able 46:20</p> <p>above-entitled 1:22 63:15</p> <p>absolutely 17:19 17:22</p> <p>abstract 7:13,15</p> <p>academic 28:22</p> <p>accept 21:1 29:5</p> <p>accommodate 36:6</p> <p>accommodated 43:12</p> <p>accurate 49:21</p> <p>acknowledging 5:20</p> <p>act 4:21 5:13,14 8:19 9:2,21 10:18,22 11:4 11:9 12:4,6,12 13:21 14:14 15:24 20:2 21:11 22:7,16 23:19 25:3,17 26:13 28:16,20 29:18,19 35:15 36:20,24 37:19 38:3 42:10 48:15 50:2,9 52:3 57:7,16 61:22</p> <p>acted 15:2 54:22</p> <p>acting 18:8</p> <p>action 16:5 22:16 33:24 37:23</p> <p>actions 27:1</p> <p>Adams 16:1 18:21 37:5,6 37:15,17 61:14</p> <p>add 17:16 39:16 46:9</p> <p>added 12:6 36:19 51:23,24</p> <p>adding 51:15 54:4,12 60:4</p> <p>addition 24:12</p>	<p>additional 42:1 54:4</p> <p>administer 10:17,21 11:3 11:9,10 12:3 16:7</p> <p>administered 26:21</p> <p>administration 51:12</p> <p>administrative 39:21 41:10 51:12,13 55:4 55:10 58:15</p> <p>administrators 51:18</p> <p>adopted 5:10 63:7</p> <p>adopting 27:16</p> <p>advanced 4:15</p> <p>adversely 22:16</p> <p>advocating 58:14</p> <p>affect 22:8 57:11</p> <p>agencies 33:19 38:14 42:16,24 44:15 51:22 62:19</p> <p>agency 6:14 9:24 10:9 11:3 11:22,22 12:18 12:19 13:24 14:2,6,23 15:1 15:2,4,11 17:1 17:3 18:7,10 18:12,16,24 19:8,13,23 20:19 24:3,8 26:13,25 27:1 28:11,24 30:11 30:20 31:1,15 31:25 32:9,16 33:2,24 34:4 34:21 35:4,15 35:24 36:7 37:12 38:23 39:11 40:20</p>	<p>41:12 43:2 45:1,18 46:20 47:23 48:6 50:8 51:22 54:7,9,22 56:25 57:4,6 57:25 58:2,7,8 58:18 60:15,25 61:8,9,10,16 61:17 62:5</p> <p>agency's 11:1,13 14:25 16:13 17:18 30:9 32:10 33:17 36:2 37:7 53:14 56:18</p> <p>ago 41:3</p> <p>agree 10:18 19:8 32:4 48:16 50:16 51:8 58:9</p> <p>agreed 17:25</p> <p>agreeing 19:25</p> <p>agrees 55:7</p> <p>agricultural 16:3 37:19</p> <p>AL 1:3,7,17</p> <p>alleged 10:7 29:19</p> <p>allow 52:2</p> <p>Alpha 6:7</p> <p>ambiguities 50:7</p> <p>ambiguity 28:24 29:4,6 32:7,14 32:15,17,20,22 32:25 33:20 34:19 52:5,11 52:24</p> <p>ambiguous 20:25 29:4 39:14 52:9,18 52:18 53:21</p> <p>American 15:18 34:10</p> <p>analysis 26:7 37:3 42:1,18</p>	<p>44:1 49:15 51:2 54:5 56:15</p> <p>analyze 58:25</p> <p>analyzed 36:9 36:10</p> <p>analyzing 36:13</p> <p>answer 5:18 11:25 14:24 18:2 19:15 22:1 27:19 29:12 35:7,12 35:22,24 38:23 42:7 48:6 57:9 60:11 61:23</p> <p>answering 48:3</p> <p>answers 18:20</p> <p>APPEARAN... 1:25</p> <p>appendix 23:12</p> <p>applicable 18:24</p> <p>application 25:4 28:7 60:23 62:25</p> <p>applications 25:7,8</p> <p>applied 44:1,20 48:2</p> <p>applies 33:1 43:13 52:13</p> <p>apply 23:20 28:3 30:8 44:5 47:22 56:20 58:4 61:21</p> <p>applying 17:13 40:1 49:18 56:16</p> <p>appreciate 7:8</p> <p>approach 15:16 27:17 38:19 40:1,4,8</p> <p>approached 14:17</p> <p>appropriate 34:7 48:17 57:5 58:20</p> <p>arbitrary 59:4</p>	<p>area 6:17 39:12 41:4</p> <p>argue 56:7</p> <p>arguing 12:16</p> <p>argument 1:23 3:2,5,8 4:3,8 4:22 21:6 22:2 30:1,23 34:5 34:14,18 35:1 47:9,15,21 48:1,9,21 49:5 53:24 54:21 55:5,13,23 56:6 59:11 60:14,17,20 62:12,14,15 63:1</p> <p>arguments 6:5 30:6 42:13 56:10 60:8</p> <p>arises 32:13</p> <p>Arlington 1:3 4:4</p> <p>Article 44:17</p> <p>articulate 28:2,8</p> <p>articulated 9:20</p> <p>articulation 15:16</p> <p>asked 7:17,24 61:1</p> <p>asking 41:25 52:24 62:4</p> <p>asks 35:2 36:2</p> <p>assertion 5:21 12:25 17:12 33:18</p> <p>Association 34:10</p> <p>assume 8:1</p> <p>assumes 20:4,5 20:12</p> <p>assuming 17:1 44:6 60:3</p> <p>Astrue 30:18</p> <p>attention 49:23 63:1</p> <p>attributes 48:25</p>
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