Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under 47 U.S.C. 332(c)(7)(B)(ii), a state or local government must act "within a reasonable period of time" on a request for authorization to construct or modify "personal wireless services facilities." The question presented is as follows:

Whether the Federal Communications Commission has authority to interpret the phrase "a reasonable period of time," as that term is used in Section 332(c)(7)(B)(ii), in order to guide federal courts when they resolve lawsuits brought under 47 U.S.C. 332(c)(7).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a)[1] is reported at 668 F.3d 229. The order of the Federal Communications Commission (Pet. App. 69a-171a) is reported at 24 F.C.C.R. 13,994. The order of the Federal

[1] Unless otherwise specified, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 11-1545.

Communications Commission on reconsideration (Pet. App. 172a-195a) is reported at 25 F.C.C.R. 11,157.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2012. Petitions for rehearing were denied on March 29, 2012 (Pet. App. 196a-197a). The petitions for a writ of certiorari were filed on June 22, 2012, and June 27, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An effective national wireless telecommunications network requires the construction of cellular phone towers and antenna sites, but local residents sometimes resist the erection of such facilities in their communities. As a result, "zoning approval for new wireless facilities is both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 F.C.C.R. 10,785, 10,833 ¶ 90 (1997).

Congress has attempted to balance those competing federal and local concerns. As part of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. Congress enacted 47 U.S.C. 332(c)(7), which reflects a deliberate compromise between two competing aims: preserving the traditional role of state and local governments in regulating the siting of wireless telecommunications facilities, while facilitating the rapid deployment of wireless telephone service nationwide.

Section 332(c)(7) contains two parts. The first part, entitled "General authority," generally preserves the zoning authority of state and local governments "over decisions regarding the placement, construction, and modification of personal wireless service facilities" (such

as cell towers and transmitters) "[e]xcept as provided in this paragraph." 47 U.S.C. 332(c)(7)(A). The second part, entitled "Limitations," "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). For example, that part provides that regulations imposed by state and local governments may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i).

In addition, to expedite the processing of wireless facility siting applications, Section 332(c)(7)(B)(ii) provides that a state or local government "shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. 332(c)(7)(B)(ii) (emphasis added). The statute does not define the phrase "reasonable period of time." If a state or local government does not act on a wireless facility siting request within such a period, however, any person "adversely affected by" the government's "failure to act * * * may, within 30 days after such * * * failure to act, commence an action in any court of competent jurisdiction," and the "court shall hear and decide such action on an expedited basis." 47 U.S.C. 332(c)(7)(B)(v). Although the 30-day period for seeking judicial review begins to run from the date on which the "failure to act" occurs, the statute does not specify when a "failure to act" takes place, nor does it otherwise define that term.

2. In July 2008, CTIA—The Wireless Association (CTIA), a trade association of wireless telephone service providers, filed a petition for a declaratory ruling with the Federal Communications Commission (FCC or Commission). CTIA Pet. for Declaratory Ruling, WT Docket No. 08-165 (filed July 11, 2008) (CTIA Pet.). In its petition, CTIA asked the Commission to clarify the meaning of "failure to act" in Section 332(c)(7)(B)(v). *Id.* at 17-27. CTIA pointed out that, because the statute "does not explain when a 'failure to act' accrues" under Section 332(c)(7)(B)(v), "such a failure" was often "impossible to pinpoint." *Id.* at 20. That statutory ambiguity created a dilemma for wireless service providers because a party that wishes to challenge a local government's "failure to act" must file suit "within 30 days after such * * * failure to act." 47 U.S.C. 332(c)(7)(B)(v). CTIA explained that, without knowing when a failure to act occurs, wireless carriers faced the choice of either "endur[ing] further delay" in the hope that government action will be forthcoming—"and possibly miss[ing] the 30-day window" to file suit—or "incur[ring] the substantial costs and additional time" associated with a lawsuit that may be dismissed as premature because "insufficient time has passed for the siting authority to have 'failed to act.'" CTIA Pet. 20 (brackets omitted).

3. The FCC's Wireless Telecommunications Bureau issued a public notice seeking comment on CTIA's petition. Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA*, 23 F.C.C.R. 12,198 (2008). After reviewing the resulting record, the FCC issued a declaratory ruling granting in part and denying in part the petition. Pet. App. 69a-171a.

As a threshold matter, the Commission determined that it had "the authority to interpret Section 332(c)(7)." Pet. App. 87a. The FCC noted that several sections of the Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*—specifically, Sections 1, 4(i), 201(b), and 303(r)—grant the Commission authority to interpret and implement the Act's provisions. Pet. App. 87a-88a (citing 47 U.S.C. 151, 154(i), 201(b), 303(r)). It concluded that "[t]hese grants of authority necessarily include * * * Section 332(c)(7)." *Id.* at 88a.

The Commission observed that "it is not clear from the Communications Act *what* is a reasonable period of time to act on an application" under Section 332(c)(7)(B)(ii) "or *when* a failure to act occurs" under Section 332(c)(7)(B)(v). Pet. App. 111a. The agency determined that "it is in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction." *Id.* at 97a. The interest in certainty was especially acute, the Commission explained, because the record before the agency revealed "a significant number of cases" of "unreasonable delays" in the wireless facility siting process. *Id.* at 98a. Such delays had "obstructed the provision of wireless services," *id.* at 100a, as well as "the deployment of advanced wireless communications services," *id.* at 102a, and public safety and emergency services like "wireless 911" service, *id.* at 105a.

To that end, the agency adopted presumptively reasonable processing deadlines that were "based on actual practice as shown in the record." Pet. App. 111a. The deadlines were designed to provide guidance to wireless providers, zoning authorities, and courts by "ensuring that the point at which a State or local authority 'fails to

act' is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress." *Ibid.*

The large majority of zoning authorities that participated in the proceeding before the agency stated that they processed applications for wireless collocation (*i.e.*, the modification or augmentation of existing wireless facilities) within 90 days, and other wireless siting requests (involving the construction of new facilities) within 150 days. Pet. App. 117a-120a. The Commission therefore found "90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations." *Id.* at 115a. The Commission made clear that, although the 90- and 150-day timeframes established by the declaratory ruling were "presumptively" reasonable, *id.* at 97a, state and local governments would "have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable," *id.* at 112a. The Commission created rebuttable presumptions because it recognized that "certain cases may legitimately require more processing time," *id.* at 107a, and that "courts should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications," *id.* at 108a-109a.

The Commission also allowed for "further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases." Pet. App. 112a. For example, the timeframes "may be extended" in any case "by mutual consent of the * * * wireless service provider and the State or local government," and any such extension will toll "the commencement of the 30-day pe-

riod for filing suit" under Section 332(c)(7)(B)(v). *Id.* at 120a. In addition, when an applicant fails to submit a complete application, "the time it takes for [the] applicant to respond to a [zoning authority's] request for additional information will not count toward" the presumptive processing timeframe, so long as the authority "notifies the applicant within the first 30 days that its application is incomplete." *Id.* at 124a.

4. The FCC denied petitions for reconsideration. Pet. App. 172a-195a.

5. The court of appeals denied a petition for review. Pet. App. 1a-68a. As relevant here, the court applied the test prescribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), and determined that the Commission had reasonably construed the scope of its authority to interpret Section 332(c)(7)(B). Pet. App. 34a-51a.

The court of appeals explained that nothing in the Communications Act "unambiguously preclude[s] the FCC from establishing the 90- and 150-day time frames" for processing tower siting applications. Pet. App. 41a. In reaching that conclusion, the court rejected the suggestion that Section 332(c)(7)(A) bars the Commission from interpreting the limitations contained in Section 332(c)(7)(B). While recognizing that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)," the court observed that Section 332(c)(7)(A) is silent as to "[w]hether the FCC retains the power" to interpret and implement the limitations expressly imposed by Section 332(c)(7)(B). *Id.* at 41a. "Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction," the court reasoned, "one would expect it to have done so

explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC." *Id.* at 41a-42a. As the court construed the statute, however, Section 332(c)(7)(A) "did not clearly remove the FCC's ability to implement the limitations set forth in [Section] 332(c)(7)(B)." *Id.* at 42a.

Likewise, the court of appeals found nothing in Section 332(c)(7)(B)(v), the statute's judicial-review provision, that clearly prohibits the FCC from interpreting the restrictions imposed by Section 332(c)(7)(B)(ii). The court reasoned that "[a]lthough [Section] 332(c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under [Section] 332(c)(7)(B)(ii)," it "does not address the FCC's power * * * to issue an interpretation of [Section] 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision." Pet. App. 42a-43a. Citing the Sixth Circuit's decision in *Alliance for Community Media* v. *FCC*, 529 F.3d 763, 776 (2008), cert. denied, 129 S. Ct. 2821 (2009), the court concluded that "there is nothing inherently unreasonable about reading [Section] 332(c)(7) as preserving the FCC's ability to implement [Section] 332(c)(7)(B)(ii) while providing for judicial review of disputes under [Section] 332(c)(7)(B)(ii)." Pet. App. 44a.

The court of appeals then examined whether the 90- and 150-day time frames adopted by the agency reflected a permissible interpretation of the statute. Holding that the statutory phrases "reasonable period of time" and "failure to act" were "ambiguous and subject to FCC interpretation," Pet. App. 52a-53a, the court concluded that "the FCC's 90- and 150-day time frames are based on a permissible construction" of the statute "and are thus entitled to *Chevron* deference." *Id.* at 54a.

ARGUMENT

Petitioners assert (Pet. 13-16; 11-1547 Pet. 11-14) that the decision below contributes to a conflict among the circuits on whether the rule of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), applies to an agency's interpretation of a statute that defines the agency's authority. Although there is some disagreement among the courts of appeals on that issue, that abstract question is not presented by this case. Nor is there merit to petitioners' suggestion (Pet. 30-32; 11-1547 Pet. 24-37) that the FCC ruling at issue here creates significant federal interference with the zoning authority of state and local governments. Congress, not the FCC, established federal standards and limitations governing local zoning authority over wireless communications facilities. The court of appeals correctly held that the FCC has authority to interpret 47 U.S.C. 332(c)(7)(B), and it correctly upheld the agency's interpretation of that provision. Its decision upholding the FCC's ruling does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld the FCC's interpretation of Section 332(c)(7)(B). That provision requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed," but it does not define the phrase "reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). The FCC reasonably interpreted that phrase by adopting presumptions, based on the actual experience of state and local governments, regarding the periods of time that will be considered reasonable. Pet. App. 111a.

As the agency charged with administration of the Communications Act, the FCC has authority to interpret the Act's ambiguous provisions, including Section 332(c)(7). Several sections of the Communications Act confirm the agency's broad authority to do so. For example, 47 U.S.C. 151 directs the Commission to "execute and enforce the provisions of this [Act]." Section 201(b) empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. 201(b); see 47 U.S.C. 154(i) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions"). And Section 303(r) authorizes the agency to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]." 47 U.S.C. 303(r). Citing those provisions in this case, the Commission correctly determined that it "has the authority to interpret Section 332(c)(7)." Pet. App. 87a. The court of appeals, in turn, correctly applied *Chevron* in upholding both that determination and the Commission's interpretation of Section 332(c)(7) itself.

2. Petitioners contend (Pet. 13-21; 11-1547 Pet. 11-15) that this Court should grant review to resolve a conflict among the courts of appeals as to whether courts should apply *Chevron* when examining an agency's interpretation of the scope of its own statutory authority. They note that while the court below "appl[ies] *Chevron* to an agency's interpretation of its own statutory jurisdiction," other "courts of appeals have adopted different approaches to the issue." Pet. 13-14 (quoting Pet. App. 36a-37a). In particular, the Seventh and Federal Cir-

cuits review de novo an agency's determination of the scope of its authority. See *Durable Mfg. Co.* v. *United States Dep't of Labor*, 578 F.3d 497, 501 (7th Cir. 2009); *Bolton* v. *MSPB*, 154 F.3d 1313, 1316 (Fed. Cir. 1998), cert. denied, 526 U.S. 1088 (1999).

a. The decision below does not create a direct conflict with the Seventh and Federal Circuit cases cited by petitioners. Unlike in those cases, the statutory interpretation at issue here does not implicate the agency's jurisdiction to make rules or adjudicate particular disputes. It merely permits the FCC to offer guidance to the courts, which remain the ultimate arbiters of disputes over whether state or local governments have addressed wireless siting applications "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). In that respect, this case is similar to *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), in which this Court held that even though Congress had directed state commissions to resolve interconnection disputes arising under Section 252 of the Communications Act, the FCC could nevertheless exercise its general rulemaking authority under 47 U.S.C. 201(b) "to guide the state-commission judgments" made under Section 252. *Id.* at 385.

b. In any event, the issue raised by petitioners is not properly presented by this case because petitioners assert here (as they did below) that the "plain language" of Section 332(c)(7)(A) precludes the FCC from interpreting the provisions of Section 332(c)(7)(B). Indeed, the crux of petitioners' argument is that the court of appeals erred in identifying any ambiguity in Section 332(c)(7). See, *e.g.*, Pet. 24-25 (arguing that "the plain language" of Section 332(c)(7)(A) "is clear," and that "[t]he FCC's reading cannot be squared with [Section] 332(c)(7)(A)'s plain language"); see also 11-1547 Pet. 16-24. If peti-

tioners were correct, it would therefore make no difference whether the court of appeals applied *Chevron* or conducted de novo review: under either standard of review, the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

Thus, although dressed in the garb of a general question of administrative law—whether *Chevron* applies to an agency's interpretation of its own statutory authority—petitioners' real argument is simply that the FCC and the court of appeals misinterpreted Section 332(c)(7). That issue is not the subject of any circuit conflict, and it does not warrant this Court's review. Even if the issue did warrant review, it would be more appropriate for the Court to consider it in a case—unlike this one—involving the application to a concrete set of facts of the time limits set out in the FCC's ruling.

c. In any event, even if the court of appeals had engaged in de novo review, there is no reason to believe that the court would have reached a different conclusion about the Commission's authority. As noted, Section 201(b) authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. 201(b). This Court has held that the authority granted by Section 201(b) extends to provisions of the 1996 Act (such as 47 U.S.C. 332(c)(7)) because those provisions were "inserted into the Communications Act." *AT&T*, 525 U.S. at 377. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) (upholding an FCC declaratory ruling that interpreted ambiguous provisions of the Communications Act). Citing *AT&T*, the court of appeals correctly reasoned that "Congress surely recognized that it was legislating against the

background of the Communications Act's general grant of rulemaking authority to the FCC." Pet. App. 41a-42a. That "general grant of authority would ordinarily extend to amendments to the Communications Act, like [Section] 332(c)(7)(B)'s limitations, in the absence of specific statutory limitations on that authority." *Id.* at 42a.

Petitioners maintain that Section 332(c)(7)(A) specifically limits the FCC's authority to interpret the restrictions established by Section 332(c)(7)(B). Pet. 24. As the court of appeals pointed out, however, Section 332(c)(7)(A) merely "prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. It says nothing about the FCC's authority to interpret the limitations imposed by Section 332(c)(7)(B). "Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly." *Ibid.* "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," *AT&T*, 525 U.S. at 397, and as the court of appeals observed, "Congress certainly knew how to specifically restrict the FCC's general authority over the Communications Act as it clearly restricted the FCC's ability to use that authority in other contexts." Pet. App. 42a (citing 47 U.S.C. 152(b), which explicitly denies the FCC jurisdiction over "intrastate" communications service).

Petitioners' reliance (Pet. 25-26) on *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355 (1986), is misplaced. In *Louisiana Public Service Commission*, the Court held that 47 U.S.C. 152(b) barred the FCC from preempting certain intrastate telecommunications regulations. 476 U.S. at 370-376. The Court based that deci-

sion on "the express jurisdictional limitations on FCC power contained in" Section 152(b). *Id.* at 370. With limited exceptions, Section 152(b) provides that "nothing in this [Act] shall be construed to apply or *to give the Commission jurisdiction* with respect to" certain matters concerning intrastate communication service. 47 U.S.C. 152(b) (emphasis added). By contrast, no provision of the Act expressly limits the Commission's authority to interpret Section 332(c)(7)(B). And as this Court has recognized, "Commission jurisdiction always follows where the Act applies." *AT&T*, 525 U.S. at 380. That is true even when the Act applies to matters that the FCC does not typically regulate, such as intrastate telecommunications or local zoning authority. See, *e.g.*, *id.* at 378 n.6 (notwithstanding the traditional practice of allowing the States to regulate intrastate telecommunications, the 1996 Act "unquestionably" has "taken" certain aspects of "the regulation of local telecommunications competition away from the States").

Petitioners argue that Section 332(c)(7)(A), like Section 152(b), clearly limits the FCC's interpretive authority. Pet. 26. To the contrary, Section 332(c)(7)(A)—unlike Section 152(b)—makes no mention of the FCC or its jurisdiction. It simply states: "Except as provided in [Section 332(c)(7)], nothing in this [Act] shall limit or affect" state or local authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). The court of appeals correctly read that provision to "prohibit[] the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. In other words, Section 332(c)(7)(A) bars the agency from construing the text of provisions of the Act outside of Section 332(c)(7) to im-

pose substantive restrictions on state or local regulation of wireless facility siting.[2] Thus, contrary to petitioners' assertion (Pet. 26), Section 332(c)(7)(A) imposes substantial limits on the FCC's authority even if it is not read to "fence off" the interpretation of Section 332(c)(7)(B).

None of the other "interpretive tools" cited by petitioners (Pet. 27-29) demonstrates that Congress clearly intended to prevent the FCC from interpreting Section 332(c)(7). Although the Conference Report on Section 332(c)(7) stated that the FCC should terminate any pending rulemaking regarding preemption of state or local tower siting authority, see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996), petitioners have pointed to nothing in the legislative history that "indicate[s] a clear intent to bar FCC implementation of the limitations" established by Section 332(c)(7)(B) once the statute was enacted. Pet. App. 48a.

There also is no merit to petitioners' claim (Pet. 28) that the FCC's reading of the statute renders "superfluous" Section 332(c)(7)(B)(v)'s "specific grant of authority to the FCC to address [radio frequency (RF) emission] issues." Section 332(c)(7)(B)(v) distinguishes between disputes involving RF emissions (which the Commission may review) and disputes involving all other issues arising under Section 332(c)(7)(B) (which the courts have exclusive jurisdiction to review). That distinction re-

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[2] For example, although Section 253 of the Communications Act generally authorizes the FCC to preempt state or local regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," 47 U.S.C. 253(a), Section 332(c)(7)(A) precludes the Commission from construing Section 253 to preempt state or local regulation of the construction of wireless communications facilities.

mains relevant under the FCC's reading of the statute. Although the Commission used its general authority to assist the courts by interpreting and clarifying certain provisions of the Communications Act relating to disputes that are subject to court review, the agency recognized that Congress gave the courts exclusive jurisdiction to resolve individual disputes under Section 332(c)(7)(B) that do not concern RF emissions. See, *e.g.*, Pet. App. 108a. In other words, courts have the final say in lawsuits filed under Section 332(c)(7).

Contrary to petitioners' assertion (Pet. 29), the Fifth Circuit's statutory analysis did not ignore the "presumption against preemption." *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 77 (2008). Rather, the court of appeals held that the presumption did not apply here because Section 332(c)(7)(B) clearly "indicated a preference for federal preemption of state and local laws governing the time frames for wireless zoning decisions." Pet. App. 49a; see *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (*Rancho Palos Verdes*) (Section 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities"). The court of appeals correctly recognized that Congress has established federal standards to govern the exercise of state and local zoning authority over wireless service facilities. In view of those federal standards, the court correctly rejected the suggestion that the FCC's declaratory ruling improperly infringed on state or local authority. See *AT&T*, 525 U.S. at 378 n.6 (the presumption against preemption does not apply when Congress has created a "*federal* regime" governing the regulation of local telecommunications competition).

Finally, petitioners identify no plausible reason that Congress would have excepted Section 332(c)(7)(B) from the Commission's general authority to construe ambiguous provisions of the Communications Act. Based on its pre-existing expertise and on the information it acquired through the notice-and-comment process, the FCC was clearly better-positioned than any court to determine what period of time is generally "reasonable" for acting on the pertinent applications. By identifying periods of time for acting that the expert agency views as presumptively reasonable, and by bringing greater consistency and predictability to judicial interpretations of the "reasonable period of time" standard, the declaratory ruling should serve the interests of applicants, regulators, and courts alike. The Commission's issuance of the declaratory ruling thus serves precisely the interests that the agency's gap-filling authority under the Communications Act is generally intended to further. If the agency were disabled from construing Section 332(c)(7)(B), by contrast, each court adjudicating a suit brought under Section 332(c)(7)(B)(v) would be required either to assess the defendant's "reasonableness" without reference to the practices that generally prevail in this context, or to attempt to replicate the inquiry that the FCC in fact conducted. There is no evident reason that Congress would have preferred either of those approaches to the one that the Commission adopted.

3. Petitioners assert (Pet. 30-32; 11-1547 Pet. 24-37) that this case warrants the Court's review because it concerns important issues involving federal infringement of state and local zoning authority. That argument lacks merit.

Contrary to petitioners' suggestion (Pet. 23), the FCC's declaratory ruling did not adopt "a federal zoning

policy." It simply established presumptively reasonable timeframes for processing wireless facility siting applications. As the court of appeals correctly understood, those timeframes "are not hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction." Pet. App. 62a. Ultimately, the courts, not the Commission, will resolve issues of timing in lawsuits brought under Section 332(c)(7).

Petitioners argue (11-1547 Pet. 25) that, as a result of the declaratory ruling, state and local officials "must act within a *definite* time frame or be found to have failed to act at all." That is incorrect. The court of appeals noted that the declaratory ruling did not create "a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a *per se* violation of [Section] 332(c)(7)(B)(ii)." Pet. App. 62a. To the contrary, "under the regime" adopted in the declaratory ruling, state and local officials "will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* at 112a; see *id.* at 62a-63a (noting "a variety of circumstances" that might serve to rebut the presumption and justify a longer period for processing a particular application). The ruling also gives state and local authorities the flexibility to negotiate alternative timeframes to accommodate their particular circumstances. See *id.* at 120a. That sort of accommodation should reduce the alleged litigation burdens and costs that form the crux of petitioners' objections to the declaratory ruling. See Pet. 23, 31.

Petitioners contend (Pet. 31) that the declaratory ruling's impact on state and local governments involves some of the same "factors" that led this Court to con-

clude in *Rancho Palos Verdes* that "a [Section] 1983 remedy was inconsistent with [Section] 332(c)(7)'s statutory scheme." To the contrary, *Rancho Palos Verdes* concerned a very different question: whether a party could seek a remedy under 42 U.S.C. 1983 for an alleged violation of 47 U.S.C. 332(c)(7)(B). The Court there held that Congress—"by providing a judicial remedy different from [Section] 1983 in [Section] 332(c)(7) itself—precluded resort to [Section] 1983." 544 U.S. at 127. In this case, by contrast, the FCC's declaratory ruling is rooted in the language of Section 332(c)(7) itself.

There is no basis for petitioners' assertion (11-1547 Pet. 35) that the declaratory ruling gives applicants an incentive "to run out the clock in order to get tower siting approval." The FCC has not mandated approval of an application if a state or local government fails to act by a certain date. Indeed, the Commission specifically rejected CTIA's proposal that the agency "deem an application granted" if a zoning authority failed to act within the FCC's prescribed timeframe. Pet. App. 108a. Instead, the Commission emphasized that the courts would have the discretion "to fashion appropriate case-specific remedies" based on "the specific facts of individual applications." *Id.* at 108a-109a. Evidence of an applicant's dilatory behavior would also be relevant to a court's determination whether the presumptively reasonable period identified in the declaratory ruling was reasonable in the particular case. Wireless siting applicants would therefore have no good reason to drag out the application process.

Nor can petitioners plausibly claim (11-1547 Pet. 35) that the declaratory ruling "has the effect of giving preferential treatment to telecommunications providers." As the court of appeals correctly noted, "nothing

in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by [Section] 332(c)(7)(B)(ii) itself." Pet. App. 61a. The statutory directive that state and local governments act on such applications within a reasonable period of time reflects Congress's decision to prioritize the processing of wireless siting applications "because other types of state and local zoning decisions are not subject to such a standard." *Ibid.* Furthermore, reviewing courts are directed to "hear and decide" lawsuits brought under the statute "on an expedited basis." 47 U.S.C. 332(c)(7)(B)(v). Hence, it is Congress—not the FCC—that has established priority treatment for wireless siting disputes. The declaratory ruling does nothing more than implement that statutory preference.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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