The Effective Prohibition Preemption in Modern Wireless Tower Siting

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I. INTRODUCTION

In recent decades, rapid technological change, the growing importance of the information economy, and increased concern with local zoning values have precipitated conflict in the wireless communications sector over the placement of cellular towers. A war is being waged in federal courts, local zoning board meetings, and the halls of the Federal Communications Commission ("FCC") over the proper structure of local cellular markets and the appropriate role of local governments in the placement of wireless towers. On the one hand, state and local governments have inherent authority over the construction, placement, and appearance of buildings within their jurisdictions.[1] That authority is paired with a political loyalty to local constituencies who are primarily interested in limiting the construction of unsightly wireless towers near their properties. Advocates for strong local zoning authority point to a number of benefits that flow from regulating the use of land, including: reduction in nuisance costs associated with adjacent placement of incompatible uses;[2] protection of the aesthetic character of a neighborhood;[3] and protection of public health.[4] Where construction proposals conflict with these priorities, the delegation of police powers to zoning boards generally affords them a great deal of discretion in granting or denying variance from an approved zoning plan.[5]

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1. *See generally* PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 2:1 (5th ed. 2012). Though great variety exists in the administration of local regulations, zoning ordinances typically lay out contiguous areas within which specific uses are authorized, with alternative uses being precluded unless approved through a variance or special exception. Nick Tinari, *Cell Phone Towers in Residential Areas: Did Congress Let the Pig in the Parlor with the Telecommunications Act of 1996?*, 73 TEMP. L. REV. 269, 272 (2000).

2. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693 (1973).

3. *See generally* T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty., 546 F.3d 1299 (10th Cir. 2008) (describing factors suggested by Kansas courts for use by municipalities in considering zoning changes or special use permits).

4. *See id.* at 1312–13 (zoning decisions often include consideration of "1) the character of the neighborhood, 2) the zoning and uses of nearby properties, 3) the suitability of the property for the uses to which it is restricted, 4) the extent to which the change will detrimentally affect nearby property, 5) the length of time the property has been vacant as zoned, 6) the gain to the public health, safety, and welfare by the possible diminution of value in the developer's property as compared to the hardship imposed on the individual landowners, 7) recommendations of a permanent or professional planning staff, and 8) the conformance of the requested change to the city's master or comprehensive plan."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-779, ENHANCED DATA COLLECTION COULD HELP FCC BETTER MONITOR COMPETITION IN THE WIRELESS INDUSTRY 36–37 (July 2010), *available at* http://www.gao.gov/assets/310/308167.pdf.

5. *See* Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 645 (2d Cir. 1999). Constitutionally, local zoning authorities retain their power to regulate construction through the delegation of a state's police powers to protect the public health, safety, and morality of its citizenry. *See* SALKIN, *supra* note 1, § 2:1. Zoning regulations in the United States have their origins in the New York City ordinance of 1916. *See* Ellickson, *supra* note 2, at 692–93. Following the Supreme Court's decision in *Village of Euclid, Ohio v. Ambler Realty*

Conflict is particularly likely in the case of wireless tower siting applications in urban and suburban areas where neighborhood character is linked, in the eyes of landowners, to the value of individual plots and to the aesthetic character of the area.[6]

Opposite these localized values are federal telecommunications policies, which seek generally to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of telecommunications technologies." [7] The creation of nationwide telecommunications networks, of which personal wireless services are an increasingly important part, often necessitates overcoming localized aesthetic values to roll out the full measure of network benefits to the national population. [8] Wireless networks require comprehensive coverage and ubiquitous facilities nationwide to satisfy consumer expectations of strong mobile signals that provide reliable, high quality service.[9]

To aid in the deployment of advanced communications services, Congress passed section 704 of the Telecommunications Act of 1996 ("the Act"), codified at 47 U.S.C. section 332(c)(7).[10] This subsection of the Act prescribes limitations on the authority of local governments in considering zoning permits for wireless tower siting applications and includes a number of preemptions.[11] When first enacted, these preemptions redefined federal-state relations with regard to wireless tower siting. Congress's balancing of federal and state values resulted in a dynamic preemption scheme that affords neither the FCC nor local zoning boards unilateral authority over

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Co., 272 U.S. 365 (1926), upholding the constitutionality of zoning regulations, local zoning codes spread to every major metropolitan area, except Houston, Texas, and over 97% of cities having a population over 5,000. *See id.* at 692.

6. *See* Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 455–57 (2005) (identifying multiple examples of conflict in urban areas over wireless tower siting ordinances and locations).

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble (1996).

8. *See generally* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, WT Docket No. 08-165, FCC 09-99 (2009) [hereinafter *2009 Declaratory Ruling*] (statement of Chairman Genachowski).

9. *2009 Declaratory Ruling*, *supra* note 8, at para. 35.

10. 47 U.S.C. § 332(c)(7) (2006) (requiring that zoning authorities process wireless tower citing applications within a "*reasonable period of time*," so that "any person adversely affected by any final action or failure to act by a State or local government . . . may, *within 30 days* after such action or failure to act, commence an action in any court of competent jurisdiction," and "[t]he court shall hear and decide such action *on an expedited basis*." (emphases added)).

11. *Id.*

tower placement.[12] Since the passage of the Act, such balancing has coincided with the explosive growth of cellular wireless services, both voice and data.[13] Consumer adoption of new wireless technologies has spurred breakneck innovation in devices and the deployment of technical standards that support ever-increasing demands on wireless bandwidth.[14] Non-uniform rules increase regulatory uncertainty and increase investment costs for wireless carriers, leading to slower wireless build-out and patchy network coverage.[15]

Section 332(c)(7)(B)(i)(II) of the Act ("the Effective Prohibition Preemption" or "the Preemption"), in particular, has caused a great deal of litigation since the Act was passed seventeen years ago. The Preemption provides that "the regulation of the placement, construction, and modification of personal wireless facilities by any state or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[16] Indicative of the tension between federal and state interests discussed above, the federal circuit courts have interpreted the Effective Prohibition Preemption in a number of ways, resulting in a patchwork of inconsistent wireless tower siting rules across the nation.[17] As with other lines of cases interpreting the section 332(c)(7) preemptions,[18] the primary question before the courts is the extent to which local authorities have been preempted by the language of the statute. Some rules grant localities greater flexibility in denying wireless siting applications[19] while others promote competitiveness in the cellular sector by allowing carriers to fill significant gaps in their own coverage, irrespective of their competitors' deployments.[20]

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12. *See* Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 291 (2011) (describing the interjurisdictional balancing of the Telecommunications Act).

13. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Tenth Report*, WT Docket No. 05-71, FCC 05-173 para. 186 (2005) (mobile telephony grew 30% from 2002–2005); *see also* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fifteenth Report*, WT Docket No. 10-133, FCC 11-103 para. 182 (2011) [hereinafter *Fifteenth Report*] (mobile messaging grew 117% from 2008–2011).

14. *Fifteenth Report*, *supra* note 13, at para. 186.

15. *See* AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, WC Docket No. 12-353, at 5–6, 10–11 (filed Nov. 12, 2012).

16. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2006).

17. *See infra* Section II.B.

18. *See, e.g.*, City of Arlington v. FCC, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

19. *See* T-Mobile Ne. LLC v. Fairfax Bd. of Supervisors, 672 F.3d 259 (4th Cir. 2012).

20. *See, e.g.*, MetroPCS, Inc. v. City of San Francisco, 400 F.3d 715, 733 (9th Cir. 2005).

In light of the balanced, pro-competitive policies of the 1996 Act and the dramatic changes in the wireless marketplace since the Act's adoption, the tension between local zoning prerogatives and the federal interest in reliable, ubiquitous advanced wireless networks becomes more pronounced every year. This Note reports on the current state of the circuit split over the Effective Prohibition Preemption, analyzes current FCC interpretations of the statutory text, and recommends both a statutory and administrative solution to adopt a pro-competitive standard for wireless tower siting. Part II describes the development of two circuit splits over the meaning of the Effective Prohibition Preemption and the current state of those splits. In Part III, this Note analyses the Preemption as a valid exercise of Congress's authority and examines the deference owed to the Commission in light of the Supreme Court's recent decision in *City of Arlington v. Federal Communications Commission*. This Part concludes that the Second, Third, and Fourth Circuits have failed to give the Commission the deference it is owed in its interpretation of the Preemption and that the Commission is likely owed deference under *Chevron* in this matter. Further, this Note observes that the Commission's *2009 Declaratory Ruling* interpreting section 332(c)(7) falls short of resolving the multifaceted disputes over the Preemption, leaving zoning authorities with far too much discretion in construing the language of the statute. The Note concludes in Part IV with a proposed statutory amendment that would make explicit the competition-enhancing purposes of the Act. Alternatively, this Note recommends that the Commission supplement its *2009 Declaratory Ruling* to resolve the remaining ambiguities and circuit splits not originally addressed in that order.

II. BACKGROUND

A. History of the Effective Prohibition Preemption

In our system of government, federal law necessarily takes precedence over conflicting state or local laws.[21] Congress may preempt inherent state authority in a number of ways,[22] one of which occurs when federal law directly conflicts with state law.[23] Constitutionally, local zoning

21. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

22. Other methods of preemption exist beyond the direct conflict doctrine. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that a state law can be preempted when "[the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (holding that where Congress has "occupied the field to the exclusion of parallel state legislation," the dominant interest of the Federal Government precludes state intervention).

23. *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

authorities retain their power to regulate construction through the delegation of a state's police powers to protect the public health, safety, and morality of its citizenry.[24] The great challenge for students of federal-state relations is in determining the extent of Congress's pronouncements, few of which are entirely lacking in ambiguity.

In passing the Act, Congress generally preserved the power of state and local governments over wireless siting decisions, but also provided for preempting such power when it conflicted with the Act's policy goals.[25] Before the Act, Congress had placed no restrictions on state and local authority to regulate the placement of wireless towers.[26] Yet, pursuant to the legislature's stated goal of increasing competition in the telecommunications sector,[27] Congress found it prudent to limit the ability of local authorities to stifle competition through heavy-handed zoning regulation.[28] Originally, the House of Representatives proposed to give the FCC direct power over the zoning of wireless towers.[29] The House proposal would have fundamentally altered the landscape of state and federal relations in the wireless telecommunications sector by vesting decision-making power over fundamentally local issues in a federal body. In conference, however, the House's wholesale preemption of local zoning authority was deemed too extreme a measure, and the conferees opted to "preserve[ ] the authority of state and local governments over zoning and land use matters except in the limited circumstances set forth in [the statute]."[30] Rather than completely upend the balance of state and federal power, the enacted text curbed local authority at the edges while preserving local discretion in tower placement, thereby encouraging cost-effective, reliable, and universal telecommunications service.[31]

The resulting section 332(c)(7) preemptions concern the "regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government."[32] Specifically, local authorities "(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the

24. *See* SALKIN, *supra* note 1.

25. 47 U.S.C. § 332(c)(7)(A) (2006).

26. *See generally* 47 U.S.C. § 301 (1988).

27. H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 ("to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition . . . .").

28. *See* 47 U.S.C. § 332(c)(7)(A) (titled "Preservation of local zoning authority").

29. H.R. REP. NO. 104-204(I), § 701, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

30. H.R. REP. NO. 104-458, § 704, at 207–08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

31. Eagle, *supra* note 6.

32. *See* 47 U.S.C. § 332(c)(7)(B)(i) (2006).

effect of prohibiting the provision of personal wireless services."[33] Additionally, Congress preempted state and local authorities from considering the environmental effects of radio frequency emissions, if in compliance with the FCC's rules,[34] and required timely,[35] written decisions supported by substantial evidence.[36] Should a carrier wish to challenge a locality's zoning denial on the basis of one of the aforementioned preemptions, Congress provided for judicial review of adverse decisions by the federal district courts.[37]

After the passage of the Act, wireless providers acted quickly to avail themselves of these new preemptions of state zoning authority.[38] A pattern of litigation emerged whereby individual wireless providers would seek initial zoning board approval; a zoning board would deny the application or variance on concerns of aesthetics, property value, or neighborhood character; and then the provider would quickly file suit for expedited judicial review of the zoning denial.[39] Challengers succeeded in having the courts overturn zoning decisions using a number of the preemptions established in section 332(c)(7).[40] The Effective Prohibition Preemption, in particular, sparked substantial disagreement among the circuit courts, leading to a prolonged circuit split over the meaning of this provision.[41]

In 2008, CTIA–The Wireless Association, seeking to resolve this split and others, petitioned the Commission to issue a declaratory ruling to clarify the provisions of section 332(c)(7) related to the processing of tower siting applications before state and local zoning authorities.[42] After issuing

33. 47 U.S.C. §§ 332(c)(7)(B)(i)(I)–(II) (2006).

34. 47 U.S.C. § 332(c)(7)(B)(iv) (2006).

35. 47 U.S.C. § 332(c)(7)(B)(ii) (2006).

36. 47 U.S.C. § 332(c)(7)(B)(iii) (2006).

37. *See* 47 U.S.C. § 332(c)(7)(B)(v) (2006) ("Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.").

38. Major wireless carriers quickly filed suit after the Act was passed, challenging adverse zoning decisions in courts around the country. *See, e.g.*, AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 153 F.3d 423 (4th Cir. 1998); APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cnty., 196 F.3d 469 (3d Cir. 1999).

39. *See, e.g.*, *AT&T Wireless PCS, Inc.*, 153 F.3d at 424–25.

40. *See, e.g.*, Sprint Spectrum v. Town of Durham, 1998 WL 1537756 (D.N.H. 1998) (holding that denial of zoning variance was not supported by "substantial evidence" as required by 47 U.S.C. § 332(c)(7)(B)(iii)); Nextel Partners, Inc. v. Town of Amherst, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) (town unreasonably discriminated against Nextel in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I)); MetroPCS New York, LLC v. City of Mount Vernon, 739 F. Supp. 2d 409 (S.D.N.Y. 2010) (holding that city unreasonably delayed application to install wireless service facility, resulting in failure to put application on agenda of city planning board for four months after carrier made final submission).

41. *See infra* Sections II.B–II.D.

42. *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for*

proposed rules and hearing comments from industry groups, carriers, and state zoning authorities, the Commission promulgated a final order (the "*2009 Declaratory Ruling*"), which interpreted a number of provisions from that section.[43] This Note concerns the preemption of regulations having the effect of prohibiting the provision of personal wireless service.[44] The following sections address at greater length the circuit splits over section 332(c)(7)(b)(i)(II) and the FCC's *2009 Declaratory Ruling*.

B. The Circuit Split on What Constitutes a Significant Gap in Coverage

As described above, the wireless preemption sections of the Act were particularly contentious, as they regulated the build-out of wireless service facilities during a period in which demand for advanced cellular service, and the infrastructure to support it, was exploding.[45] Quickly, splits emerged in the circuit courts on how the courts should interpret two aspects of the Effective Prohibition Preemption of section 332(c)(7).[46] Most courts evaluating zoning board decisions under section 332(c)(7) followed the basic analytical framework developed in a landmark Second Circuit case interpreting the Effective Prohibition Preemption: *Sprint Spectrum v. Willoth*.[47] In that case, Sprint sought review of an adverse district court decision upholding a ruling of the Planning Board for the Town of Ontario,

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Declaratory Ruling, WT Docket 08-165, at 4 (filed July 11, 2008) [hereinafter *2008 Petition for Declaratory Ruling*].

43. *See generally* Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, FCC 09-99, 24 FCC Rcd. 13994 (2009).

44. Nearly identical language regarding the effective prohibition of telecommunications services occurs in the context of common carrier regulation as well. *See* 47 U.S.C. § 253 (2006) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."). However, the wireless preemptions have generated much more litigation, conceivably because the installation of personal wireless facilities more fundamentally impinges upon local aesthetic and neighborhood character values. *Compare* Timothy J. Tryniecki, *Cellular Tower Sitting Jurisprudence Under the Telecommunications Act of 1996—The First Five Years*, 37 REAL PROP. PROB. & TR. J. 271, 276–85 (2002) (overview of litigation under section 332), *with* Nicholas D. Birck, *Unlocking the Future with Digital Infrastructure and Wireless Technology: How Municipal Wireless Networks Equal Good Urban Planning*, 58 SYRACUSE L. REV. 613, 617 (2008) (discussion of more limited litigation under section 253).

45. Mobile subscribership has increased approximately 700% since the Act was passed in 1996. *See* FCC, SECOND ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES, FCC 97-75, Table 1 (Mar. 1997) (In 1996, mobile subscribership stood at 44 million.); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixteenth Mobile Competition Report*, FCC 13-34, 28 FCC Rcd. 3700, 3708 (2013) [hereinafter *Sixteenth Report*] (In 2011, mobile subscribership stood at 316 million.).

46. *See infra* Table 1.

47. 176 F.3d 630.

New York. The local planning board had rejected Sprint's application to build three communications towers.[48] Sprint argued that unless it was allowed to construct "any and all towers" it deemed necessary, the effect would be to prohibit the provision of wireless services under section 332(c)(7)(B)(i)(II) of the Act.[49] The defendant Planning Board countered by arguing that a local authority should have broad discretion to deny applications as long as it does not ban all wireless service.[50]

The *Willoth* court rejected both Sprint's [51] and the Board's arguments.[52] Setting the stage for later analysis, the *Willoth* court proposed a two-step test for determining whether a variance denial was an "effective prohibition," based on two questions: (1) whether a significant gap in coverage exists; and (2) whether the wireless provider has provided sufficient evidence of the absence of alternatives in bridging the gap.[53] The *Willoth* court acknowledged that a significant gap in coverage existed in the town of Ontario, but rejected Sprint's "all or nothing" application, finding that substantial evidence existed in the record that fewer, less intrusive towers, could serve the municipality by less intrusive means.[54] Apart from the Fourth Circuit, discussed in detail in Part II.C.3, most subsequent cases interpreting the Effective Prohibition Preemption continued to utilize a form of the *Willoth* two-step analysis to determine whether a local zoning board had improperly denied a zoning application or variance which effectively prohibited personal wireless service under section 332(c)(7).

1. The Single Provider Rule

With regard to the first question, *i.e.* whether a significant gap in coverage exists in a given locality, the *Willoth* court established a "single provider rule" to give effect to the Preemption.[55] Under the single provider rule, a coverage gap is deemed significant if "a remote user of [personal wireless] services is unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication."[56] This rule linked judicial relief to whether *any* wireless provider already serves the locality that an

48. *Id.* at 634.
49. *Id.* at 639.
50. *Id.* at 640.
51. *Id.*
52. *Id.*
53. *Id.* at 643 ("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.").
54. *See id.* at 644.
55. *See APT Pittsburgh*, 196 F.3d at 478.
56. Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999); *see also Willoth*, 176 F.3d at 643.

applicant proposed to serve.[57] Under this rule, the Effective Prohibition Preemption could not be triggered if *any* cellular provider already operated in the municipality under consideration. At the time of the Act's passage and in the early years of litigation over the Preemption, this interpretation of the statute made some sense. Wireline telephony was dominant over wireless in all respects—number of subscribers, universality of the network, and pervasiveness in consumers' lives. The theory behind the single provider standard is that if a wireless customer is able to complete calls to the land-based national telephone network, zoning authorities have fulfilled their obligations under the Effective Prohibition Preemption, and a court will not overturn the decision. The wireless revolution had not yet taken hold, and it was primarily viewed as a method for mobile subscribers to gain access to the much more extensive landline network. Under this rule, it is conceivable that a local incumbent could become the monopolist wireless carrier in a particular region by operation of the Preemption, surely a strange result from a statute purporting to "promote competition."[58]

In 2000, the Third Circuit followed the *Willoth* court's lead in adopting the single provider rule in *Omnipoint Communications v. Newtown Township*.[59] In that case, the Third Circuit relied on the same reasoning as the *Willoth* court, namely that the Effective Prohibition Preemption served to preserve the right of consumer to connect to the "national telephone network" through a single wireless carrier.[60] Although the court mentioned Congress's pro-competitive justifications for the Telecommunications Act of 1996 in passing, the *Omnipoint* court undertook no detailed analysis of the competitive effects of the single provider rule in limiting wireless competition.

2. The Multiple Provider Rule

Following the *Willoth* decision and adoption of the single provider rule by the Third Circuit, a separate line of cases developed out of the First Circuit. Initially in *National Tower v. Plainville Zoning Board of Appeals*,[61] and then in *Second Generation Properties v. Town of Pelham*, the First Circuit held that a local zoning authority could be preempted from denying siting applications when petitioning carriers sought to fill a significant gap in their own wireless coverage.[62] The court in *Second Generation Properties* held that the courts should approach the Effective Prohibition Preemption with a focus on maximizing reliability and coverage for

57. *See Willoth*, 176 F.3d at 643.
58. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble (1996).
59. *See* 219 F.3d 240, 243–44 (3d Cir. 2000).
60. *Id.* at 244.
61. Nat'l Tower v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 20 (1st Cir. 2002).
62. Second Generation Props. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002).

consumers, regardless of their current wireless provider.[63] Given the pro-competitive goals of the Act, the court reasoned that denial of any one carrier's construction permit or zoning variance could effectively prohibit the provision of personal wireless services because it denied their customers ubiquitous geographic coverage—without reference to the extent of competitors' networks.[64] Under this rule, a non-incumbent wireless carrier were to sue under the Act's provision for expedited judicial review,[65] then that carrier would be entitled to relief against the zoning board's failure to grant it accommodation to fill a significant gap in coverage.

This version of the first step of effective prohibition analysis has gained significant traction since it emerged out of the First Circuit in 2002.[66] In recent years, the Ninth and Sixth Circuits have adopted this reading of the Effective Prohibition Preemption.[67] In *MetroPCS v. City and County of San Francisco*, the Ninth Circuit adopted the rule that "a local regulation creates a 'significant gap' in service (and thus effectively prohibits wireless services) if the *provider in question* is prevented from filling a significant gap *in its own* service network."[68] More recently, in *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, the Sixth Circuit weighed the comparative value of the single provider rule and the multiple provider rule, choosing to adopt the multiple provider rule as enunciated by the Ninth Circuit in *MetroPCS*.[69]

Additionally, the Federal Communications Commission substantially adopted this rule in the *2009 Declaratory Ruling* interpreting section 332(c)(7).[70] In the *2009 Declaratory Ruling*, the FCC commented on the circuit split between the single provider and multiple provider interpretations of the Preemption.[71] Siding with the First and Ninth Circuits, the Commission concluded that denying an application for the construction of personal wireless service facilities because one or more carriers already serve a given geographic market constitutes an unlawful regulation, triggering the (B)(i)(II) provision.[72] Among other reasons, the Commission found that this interpretation of the Preemption more

63. *Id.* at 634 ("The fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers.").

64. *Id.*

65. *See* 47 U.S.C. § 332(c)(7)(B)(v) (2006).

66. *See, e.g.*, *2009 Declaratory Ruling*, *supra* note 8, at para. 56.

67. *See* T-Mobile Cent. LLC, v. Charter Twp. of W. Bloomfield, 691 F.3d 794, 807 (6th Cir. 2012); *MetroPCS, Inc.*, 400 F.3d at 733.

68. *Id.* at 732.

69. *Charter Twp. of W. Bloomfield*, 691 F.3d at 806.

70. Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), *Declaratory Ruling*, FCC 09-99, 24 FCC Rcd. 13994, paras. 57–58 (2009).

71. *Id.* at para. 56.

72. *Id.*

accurately reflects the Act's "pro-competitive purpose"[73] by mitigating significant coverage gaps which would otherwise "diminish the service provided to their customers."[74]

The Commission found that the statutory language referring to "the provision of personal wireless *services*" in plural implied contemplation by Congress that there be "multiple carriers competing to provide services to consumers."[75] Relying on these provisions and its general expertise in matters of telecommunications competition, the FCC substantially adopted the multiple provider rule in the *2009 Declaratory Ruling*.[76]

3. The Case-by-Case Rule

In addition to the single and multiple provider rules, the Fourth Circuit has charted its own course in interpreting the Effective Prohibition Preemption.[77] The Fourth Circuit takes a less formulaic approach to measuring whether zoning decisions effectively prohibit the provision of personal wireless service, eschewing *Willoth's* two-step framework in favor of a case-by-case analysis.[78] Recognizing that the Supreme Court generally holds federal preemption of state police powers to a high constitutional bar, the Fourth Circuit gives local authorities wide discretion in determining the terms and conditions of local zoning.[79] The Fourth Circuit reasons that by requiring a local zoning board to prove that a significant gap in coverage must be bridged by the least intrusive means, the other circuits have established a presumption which "shifts the burden of production to the local government to explain its reasoning for denying such an application."[80] Similarly, in *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, the Fourth Circuit has interpreted the effective prohibition ban as only becoming effective upon the imposition of a blanket ban on the provision of wireless service.[81]

Following the FCC's *2009 Declaratory Ruling*, the Fourth Circuit continued to hold to its case-by-case interpretation of the Effective Prohibition Preemption.[82] The court supported this rule by identifying the limitations of the Commission's treatment of wireless tower siting

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73. *Id.*

74. *Id.* at para. 61.

75. *2009 Declaratory Ruling*, *supra* note 8, at para. 58 (citing *Second Generation Props.*, 313 F.3d at 634).

76. *2009 Declaratory Ruling*, *supra* note 8, at paras. 58, 61.

77. *See AT&T Wireless PCS, Inc.*, 155 F.3d at 429.

78. *Id.*

79. *See T-Mobile Ne.*, 672 F.3d at 266–67.

80. 360 Degrees Commc'ns Co. v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 87 (4th Cir. 2000).

81. *AT&T Wireless PCS, Inc.*, 155 F.3d at 428.

82. *T-Mobile Ne.*, 672 F.3d at 267 ("[O]ur precedent regarding the interpretation of subsection (B)(i)(II), as detailed in our decision in *Albemarle County*, is unaffected by the FCC's ruling.").

preemption. In 2012, the court noted in *T-Mobile Northeast, LLC v. Fairfax County Board of Supervisors* that the FCC only ruled on the divide between the single provider and multiple provider interpretations of the Preemption, with no mention of the case-by-case analysis conducted by the Fourth Circuit.[83] Indeed, the court cited the *2009 Declaratory Ruling* in support of its move to strengthen the ability of local authorities to act independently of the constraints imposed by section 332(c)(7).[84] By distinguishing its standards from those rejected by the FCC, the Fourth Circuit continues to chart its own course on the judicial standards for reviewing what constitutes a significant gap in wireless coverage.

C. The Circuit Split on Filling the Significant Gap—Differing Evidentiary Standards

Along with disagreements on the first step of *Willoth* (on the definition of a significant coverage gap), the circuits are split on the evidence necessary to justify overturning a zoning board denial.[85] When seeking permission from zoning authorities to construct wireless facilities, carriers often must demonstrate the superiority of their chosen site over viable alternatives. The Act requires that any decisions to deny a request to construct personal wireless facilities "shall be in writing and supported by substantial evidence contained in a written record."[86] In reviewing zoning decisions for violation of the preemption provisions, courts often examine the written record to determine whether the showings presented to the zoning board are sufficient to support reversal of the denial.

The circuits have staked out three primary positions on how an applicant can show that their application would fill a significant coverage gap. The Second, Ninth, Third, and Sixth Circuits have laid out a rule which accepts showings that the proposed tower site is the *least intrusive on the values the denial sought to serve*.[87] In *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, for example, the Sixth Circuit held that T-Mobile, in seeking to fill a significant gap in coverage, "made numerous good faith efforts to identify and investigate alternative sites" which may have been less intrusive.[88] Coupled with the observation that the

83. *See id.*

84. *Id.* (quoting the FCC stating that when "a bona fide local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today").

85. *See infra* Table 1.

86. 47 U.S.C. § 332(c)(7)(B)(iii) (2006).

87. *See Willoth*, 176 F.3d at 643 (holding that "the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-line"); *MetroPCS, Inc.*, 400 F.3d at 735; *APT Pittsburgh*, 196 F.3d at 480; *Charter Twp. of W. Bloomfield*, 691 F.3d at 808.

88. *Charter Twp. of W. Bloomfield*, 691 F.3d at 808.

Township offered no alternatives than the one for which T-Mobile applied, the showing of such good-faith effort was held to be sufficient to satisfy the least intrusive standard.[89]

The First and Seventh Circuits have adopted a more exacting evaluative benchmark, requiring a showing "that there are no other potential solutions to the purported problem."[90] To satisfy this standard, a wireless carrier must demonstrate that *no viable alternatives exist* to the proposed facility site.[91]

Consonant with its concern for case-by-case analysis of wireless siting cases, the Fourth Circuit remains opposed to either formulation, preferring that "reviewing courts [] not be constrained by any specific formulation, but should conduct a fact-based analysis of the record, as contemplated by the Act, in determining whether a local governing body violated subsection (B)(i)(II)."[92] In its *2009 Declaratory Ruling*, the FCC did not issue an opinion on what showings are sufficient to support a challenge to a zoning denial.[93]

D. The Current State of the Splits

As described above, courts interpreting the Effective Prohibition Preemption have developed different rules on how to apply the statutory language, resulting in a number of splits among the circuit courts. The first split addresses whether a *significant gap* in coverage exists and can be answered either by looking to whether there is any personal wireless coverage in a given locality (the single provider rule) or whether there exists a gap in the coverage of any individual wireless carrier (the multiple provider rule). The Second and Third Circuits have adopted this single provider rule while the First, Sixth, Seventh, and Ninth Circuits, along with the FCC, have adopted the multiple provider rule.

A second split, which does not mirror the first split, has developed in answering the *Willoth* court's question whether the wireless provider has provided sufficient evidence of the absence of alternatives in bridging the gap.[94] This split actually only occurs between circuits embracing the

89. *Id.*

90. *Second Generation Props.*, 313 F.3d at 635; *see also* VoiceStream Minneapolis, Inc. v. St. Croix Cnty., 342 F.3d 818, 834–35 (7th Cir. 2003) (agreeing with the First Circuit and holding that "so long as the service provider has not investigated thoroughly the possibility of other viable alternatives, the denial of an individual permit does not 'prohibit or have the effect of prohibiting the provision of personal wireless services'").

91. *Second Generation Props.*, 313 F.3d at 635 (holding that Second Generation Properties had a range of feasible solutions to their coverage problem and were required by the Telecommunications Act to make proactive choices and trade-offs to remedy the situation).

92. *T-Mobile Ne.*, 672 F.3d at 267.

93. *See generally 2009 Declaratory Ruling*, *supra* note 8.

94. *Willoth*, 176 F.3d at 643 ("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive

multiple provider rule, so this Note characterizes it as a sub-split. These two splits, along with the rules governing them are summarized in Table 1 below.

Table 1: Standards and the Circuit Split

		Split 1		
		Single Provider Rule	Multiple Provider Rule	Case-by-Case
Split 2	Least Intrusive Means	2d Circuit, 3d Circuit	9th Circuit, 6th Circuit, FCC [no comment on step two]	4th Circuit does not accept either step of the formula for effective prohibition analysis.
	No Alternative Sites	N/A	1st Circuit, 7th Circuit [7th Circuit: with respect to step two, but not step one]	

III. ANALYSIS

In analyzing the issues presented by the multiple circuit split surrounding the Effective Prohibition Preemption, Section A first looks at character of the preemptions and the intent of Congress in enacting them. Next, Section B analyzes the *Chevron* deference owed the Commission's interpretation of Effective Prohibition Preemption in its *2009 Declaratory Ruling*. Finally, Section C determines which circuit splits survive the FCC's *2009 Declaratory Ruling* and how the courts should address any remaining splits, going forward.

A. Characterizing Federal Preemption of State Police Powers Under the Effective Prohibition Preemption

The circuit splits described above mixed questions of statutory interpretation and administrative law. On its face, section 332(c)(7) limits certain valid exercises of state and local authority.[95] Certainly, some preemptive power is valid; the debate turns on the extent to which Congress intended to preempt local zoning authorities. Generally, courts are cautious in approaching both the content and the scope of valid preemptions of state authority, preferring to let stand valid exercises of state authority which do not "stand[] as an obstacle to the accomplishment

means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines").

95. *See* 47 U.S.C. § 332(c)(7)(B) (2006).

and execution of the full purposes and objectives of Congress."[96] As with many provisions of the Telecommunications Act of 1996, the Effective Prohibition Preemption was the result of many compromises in the legislative process.[97] The House and Senate produced fundamentally different bills that were only reconciled in conference just prior to the passage of the Act.[98]

Textually, the effective prohibition limitation resides in subsection (c)(7) of section 332, titled "Preservation of Local Zoning Authority."[99] On its face, the focus of Congress in enacting this subsection was not to categorically preempt local zoning authority that may conflict with the nationwide provision of wireless services.[100] Rather, the statute establishes narrow limitations on the discretion of state and local authorities pertaining to "[t]he regulation of the placement, construction, and modification of personal wireless service facilities."[101]

Four types of federal preemption of state powers exist within the United States' federal structure: (1) express preemption; (2) implied preemption; (3) conflict preemption; and (4) field preemption.[102] Express preemption occurs when Congress enacts federal legislation expressly invalidating state powers on subject matter within the federal power.[103] Even without an express preemption provision, state law must give way to federal legislation to the extent that Congress impliedly intended to oust state law, it conflicts with a federal statute, or Congress intended federal law to occupy a field exclusively.[104]

With the Act, Congress placed express limitations on the discretion of state and local authorities to discriminate between providers and prohibit the provision of services protected by a federal interest.[105] The Preemption itself, however, is limited by the reservation of local authority with regard to the specifics of tower construction.[106] Indeed, with the exception of section 332(c)(7), Congress specified that "nothing in this chapter shall

96. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

97. *See supra* Part II.A.

98. *See* H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.).

99. 47 U.S.C. § 332(c)(7) (2006).

100. *Cf.* 47 U.S.C. §§ 332(c)(7)(B)(i)–(iv) (2006) (enumerating circumstances of preemption).

101. 47 U.S.C. § 332(c)(7)(B)(i) (2006).

102. Kinley Corp. v. Iowa Utils. Bd., 999 F.3d 354, 358 (8th Cir. 1993) ("Preemption traditionally comes in four 'flavors': (1) 'express preemption,' resulting from an express Congressional directive ousting state law; (2) 'implied preemption,' resulting from an inference that Congress intended to oust state law in order to achieve its objective; (3) 'conflict preemption,' resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it; and (4) 'field preemption,' resulting from a determination that Congress intended to remove an entire area from state regulatory authority.") (citations omitted).

103. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 147–56 (1938).

104. Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1265 (2012).

105. *See* 47 U.S.C. § 332(c)(7)(B) (2006) (titled "Limitations").

106. 47 U.S.C. § 332(c)(7)(A) (2006).

limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services." [107] Accordingly, section 332 leaves in place the general authority of the states to regulate telecommunications services "to ensure the universal availability of telecommunications service at affordable rates." [108] By retaining these elements of state authority, Congress did not intend the federal occupation of the field of wireless telecommunications to the complete exclusion of state authority.[109]

The question confronted by the courts interpreting the Preemption, then, is the exact scope of the limitation of state authority. Of course, statutory language should not be interpreted as "mere surplusage," [110] meaning that the Effective Prohibition Preemption must have some preemptive force to avoid reading the clause out of the statute altogether. By judicially raising the bar to enforcement of the provision beyond the reach of the wireless carriers, the single provider standard does just that—letting zoning authorities frustrate wireless deployment.

The competition-enhancing purposes of the Act contemplate activity of multiple wireless carriers within each local jurisdiction to incentivize the deployment of universal, reliable connections.[111] In this context, prohibition of service can mean unreasonably raising the barriers to entry through the use of zoning regulations. When local zoning authorities deny wireless carriers the zoning permits and variances necessary to build out their competing networks, they read this language out of the statute and potentially hamstring the purpose of the Act—developing robust competition in the telecommunications sector.[112]

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107. *Id.*

108. 47 U.S.C. § 332(c)(3)(A) (2006).

109. *See* Omnipoint Corp. v. Zoning Hearing Bd., 181 F.3d 403, 407 (3d Cir. 1999). Generally, preemption of an entire field is implied where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Here, Congress expressly reserved to the states all rights not limited by section 332(c)(7). 47 U.S.C. § 332(c)(7)(A) (2006).

110. *See* Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) ("[courts should] give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

111. *See 2009 Declaratory Ruling*, *supra* note 8, at paras. 58–61

112. Delay or denial of siting approval can be a constraint on a key input to the wireless telecommunications sector. *See 2008 Petition for Declaratory Ruling*, *supra* note 42, at 4 n.10 (citing App'ns of AT&T Wireless Servs., Inc. & Cingular Wireless Corp., *Memorandum Opinion and Order*, WT Docket No. 04-70, 19 FCC Rcd. 21522, para. 137 (2004) (describing the difficulty of acquiring tower siting permits as a possible obstacle to effective competition in wireless communications)), *available at* http://apps.fcc.gov/ecfs/document/view?id=6520038471.

B. Chevron *Deference in Light of* City of Arlington v. Federal Communications Commission

Following the *2009 Declaratory Ruling*, none of the circuits involved in the effective prohibition split have addressed the question of *Chevron* deference owed to the FCC in the course of interpreting the Effective Prohibition Preemption.[113] However, with the Supreme Court's recent decision in *City of Arlington v. Federal Communications Commission*, the issue of *Chevron* deference in the case of wireless tower siting preemption is likely to become more important. In that case, a Texas municipality challenged the "shot-clock" provisions of the Commission's *2009 Declaratory Ruling*, which prescribed presumptive reasonable timelines for local zoning authorities to rule on variance applications—90 days to process an application for a collocated antenna and 150 days to process all other applications.[114] The City of Arlington framed its challenge as an attack on the supposed deference owed to an administrative agency's interpretation of its own jurisdiction.[115] Arlington contended that courts should not defer to an agency's determination of its own jurisdiction at "*Chevron* Step Zero," based on both separation of powers and federalism principles implicated by the preemptions present in section 332(c)(7).[116] The Court rejected these arguments and concluded that the FCC was, indeed, entitled to deference in interpreting section 332(c)(7).[117] In ruling for the Commission, the Court upheld the *2009 Declaratory Ruling* shot clock rules and explicitly held that the agency was afforded deference in interpreting a statutory ambiguity concerning the agency's jurisdiction.[118] The Court rejected conceiving of section 332(c)(7) as a jurisdictional limitation on the Commission merely because its provisions implicated the relationship between federal and state authorities.[119]

Though *City of Arlington* only addressed the Act's reasonable time requirement,[120] otherwise known as the "shot-clock" rules, the decision is widely regarded as a more generalized administrative law ruling,[121] and

113. Most recently, the Sixth Circuit refused to interpret section 332(c)(7) *de novo*, adopting the multiple provider rule without reference to any deference owed to the Commission. *See generally Charter Twp. of W. Bloomfield*, 691 F.3d 794.

114. *Id.* at 1866–67.

115. *See generally* Brief for Petitioners, *City of Arlington*, 133 S. Ct. 1863 (2013) (No. 11-1545).

116. *Id.* at 11–14.

117. *City of Arlington*, 133 S. Ct. at 1874–75.

118. *Id.*

119. *Id.* at 1873.

120. 47 U.S.C. § 332(c)(7)(B)(ii) (2006).

121. *See* Samuel L. Feder et al., City of Arlington v. FCC*: The Death of* Chevron *Step Zero?*, 66 FED. COMM. L.J. 47, 48 (2013) (framing the decision as a general ruling on administrative law by asserting that "the Supreme Court held that an agency should receive *Chevron* deference for its interpretation of a statutory ambiguity concerning its "jurisdiction"—that is, the scope of its regulatory authority.")

likely applies to other 332(c)(7) preemptions such as section (B)(i)(II). Because the Commission has directly addressed the first step of effective prohibition analysis and the Supreme Court has generally affirmed that deference is owed to the Commission when interpreting section 332(c)(7) in *City of Arlington v. Federal Communications Commission*, it seems to follow that the courts should defer to the FCC in adopting the multiple provider rule as the correct interpretation of the Effective Prohibition Preemption.

However, despite kind words from Justice Scalia in the *City of Arlington* majority opinion, the Commission cannot rest on its laurels and expect deference on other provisions of section 332(c)(7) without a more complete analysis. First, the Court in *City of Arlington* limited its inquiry to the question of whether "a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction,"[122] leaving unaddressed the second question presented in the petition for certiorari: "Whether the FCC may use its general authority under the Communications Act to limit or affect state and local zoning authority over the placement of personal wireless service facilities."[123] Without conducting a detailed *Chevron* two-step analysis with regard to the "shot clock" interpretations of section 332(c)(7)(ii), the Court affirmed the Fifth Circuit's decision to uphold the FCC's interpretation of the provision.[124]

With this background in mind, we proceed to whether the FCC would be entitled to deference with respect to its interpretation of the Preemption. Under the well-known *Chevron* two-step, a court asks two questions to determine whether an agency's interpretation of its organic statute is to be afforded deference: (1) whether the statute is ambiguous; and (2) if the statute is silent or ambiguous with respect to the specific question, the court then asks whether, "the agency's answer is based on a permissible construction of the statute."[125] As discussed above, the FCC, considered both the single provider standard and the multiple provider standard in the *2009 Declaratory Ruling*. After weighing the interests of localities and the nation at large, the FCC adopted the multiple provider standard as more closely aligned with Congress's intent "to improve service quality and lower prices" through the construction of "nationwide wireless networks by multiple wireless carriers."[126]

For an agency interpretation to be afforded deference under *Chevron*, the statute must be ambiguous and the interpreting agency must have proposed a permissible construction.[127] In determining whether a provision

122. *Id.* at 1867–68.

123. Petition for a Writ of Certiorari at i, *City of Arlington*, 133 S. Ct. 1863 (2013) (No. 11-1545).

124. *See generally City of Arlington*, 133 S. Ct. 1863.

125. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

126. *2009 Declaratory Ruling*, *supra* note 8, at para. 61.

127. *Chevron*, 467 U.S. at 842–43.

is ambiguous, a court first looks at the plain language of the statute.[128] In relevant part, section 332(c)(7) specifies that state and local governments "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[129] With respect to the first clause, it is clear that universal bans on the provision of wireless services are prohibited by the statute—most courts have acknowledged as much.[130] The real test of this subsection's ambiguity is in the meaning of "the effect of prohibiting" personal wireless service—the subject of the circuit splits described above.[131] The background for this interpretation is the entirety of the Telecommunications Act of 1996, which Justice Scalia has characterized as "a model of ambiguity or even self-contradiction."[132] The Supreme Court has acknowledged that "contrasting positions of the respective parties and their amici" may demonstrate that a statute "[d]oes embrace some ambiguities."[133] Given the facial uncertainty as to what constitutes an effective prohibition, the extensive litigation debating this term since the provision's enactment, and the continuing disagreement between parties as to the necessary requirements for identifying a significant gap and the record necessary to activate the Preemption, an ambiguity exists in the Effective Prohibition Preemption as to Congress's meaning.

With regard to the second step of *Chevron*, whether the agency adopted a permissible construction of the statute, the Commission would probably also prevail. Generally, the FCC has broad power to administer the its enabling statutes.[134] When the Commission interprets the Act, courts have consistently acknowledged its broad discretion in filling statutory gaps.[135] In the *2009 Declaratory Ruling*, the Commission acknowledged the split among the circuit courts between the multiple provider rule and single provider standard.[136] Recognizing that the Act does not give guidance on what constitutes effective prohibition,[137] the Commission

128. *Id.*

129. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2006).

130. Even the Fourth Circuit has distinguished between blanket bans and the case-by-case analysis it mandates its district courts to conduct. *See T-Mobile Ne.*, 672 F.3d at 267.

131. *Id.* (citing *Albemarle Cnty.*, 211 F.3d at 88 n.1).

132. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

133. Dewsnup v. Timm, 502 U.S. 410, 416 (1992). *But see* De Osorio v. Mayorkas, 695 F.3d 1003, 1016 n.1 (9th Cir. 2012) (M. Smith, J., dissenting) (noting that a circuit split does not always clearly demonstrate ambiguity in a statute).

134. *Iowa Utils. Bd.*, 525 U.S. at 378–79.

135. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (noting that "the Commission has the discretion to fill . . . statutory gap[s]" when Congress is silent on a matter pertaining to the Act.).

136. *2009 Declaratory Ruling*, *supra* note 8, at para. 56 n.175.

137. *See id.* at para. 56 n.176 (quoting Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 48 (1st Cir. 2009) ("Beyond the statute's language, the [Communications Act] provides no guidance on what constitutes an effective prohibition, so courts . . . have added judicial gloss.")) (alteration in original).

undertook to interpret the language of the Preemption anew through a declaratory ruling.[138]

The Commission offered four primary justifications for construing this section to apply "not just to the first carrier to enter into the market, but also to all subsequent entrants."[139] First, the prohibition applies to the "the provision of wireless services," implying contemplation of multiple carriers, rather than a singular service.[140] Second, the single provider rule ignores possible service gaps in the incumbent provider's network, thereby undermining the deployment of personal wireless services and contradicting the intent of the statue.[141] Third, the Commission found a "blanket ban" approach unavailing, finding that "[s]tate and local authority to base zoning regulation on other grounds is left intact by this ruling."[142] Finally, the Commission found the multiple provider standard more consonant with the statutory objectives of section 332(c)(7).[143] The Commission found that their construction of the statute would "improve service quality and lower prices for consumers" by ensuring real competition between wireless carriers nationwide.[144]

Using numbers from CTIA and PCIA, the Commission reported that the cell site deployment was increasing for each of the four major wireless providers.[145] As of December 2012, CTIA reports that its members maintain an estimated 301,779 cell sites, a 5.6% increase in cellular siting since June 2012.[146] The number of towers necessary for the provision of wireless service parallels the growing importance of intermodal competition with voice services and increasing reliance on data services as a complement and substitute for traditional wireless voice. According to the Sixteenth Competition Report, "[m]obile wireless Internet access service could provide an alternative to wireline service for consumers who are willing to trade speed for mobility, as well as consumers who are relatively indifferent with regard to the attributes, performance, and pricing of mobile and fixed platforms."[147] More households than ever rely exclusively on

138. *Id.* at para. 56; *cf. Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

139. *2009 Declaratory Ruling*, *supra* note 8, at para. 57.

140. *Id.* at para. 58. (quoting 47 U.S.C. § 332(c)(7)(B)(i)(II) (2006)).

141. *Id.* at para. 59.

142. *Id.* at para. 60; 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II) (2006).

143. *2009 Declaratory Ruling*, *supra* note 8, at para. 61.

144. *Id.*

145. *Fifteenth Report*, *supra* note 13, at para. 308.

146. *See* CTIA–THE WIRELESS ASS'N, SEMI-ANNUAL YEAR-END 2012 TOP-LINE SURVEY RESULTS (2013), *available at* http://files.ctia.org/pdf/CTIA_Survey_YE_2012_Graphics-FINAL.pdf.

147. *See Sixteenth Report*, *supra* note 45, at 3725.

mobile wireless for their primary voice service.[148] Also, approximately 142.1 million consumers subscribed to mobile wireless Internet at the end of 2011.[149]

This increased reliance on wireless as a primary communications service tends to undermine the rationale given by the Single Provider jurisdictions in justifying a pure call completion standard.[150] Single Provider jurisdictions have tended to place too much reliance on the specific historical circumstances that were in existence at the time the Act was passed while ignoring the explicit purpose of the Act, to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of telecommunications technologies."[151] Neither in the Preemption, nor in the statutory preamble, does Congress wed the efficacy of the statutory language to perpetuating a specific mode of telecommunications access. Rather, the competitive framework envisioned by the Act would enable market entry and produce unpredictable market structures that would evolve over time—"an open marketplace where competition and innovation can move as quick as light."[152] In balancing the deference granted to local zoning authorities, the emergence of an important new telecommunications sector—near-universal, high-speed wireless service—and the clear consumer preference toward faster and more pervasive wireless coverage are appropriate considerations. By ignoring the consequences of interpretations of the Preemption on market structures and access, in favor of a narrow historical reading of congressional purpose, the Single Provider jurisdictions ignore the purpose of the law and potentially stunt access to new technologies.

In addition to the numbers cited by the Commission in its *2009 Declaratory Ruling*, courts considering *Chevron* deference should also weigh the economic benefits of universal 3G and 4G LTE network deployment. As rapid adoption rates have shown, wireless broadband connections have the potential to transform many areas of the American

148. *Id.* at para. 367 ("According to the National Health Interview Survey (NHIS), approximately 34.0 percent of all adults in the U.S. lived in wireless-only households during the first half of 2012.").

149. *Id.* at para. 247. Given trends in smartphone adoption and the rollout of 4G data services, the subscription rates of mobile wireless Internet services will likely only increase.

150. Even if not owed complete deference under *Chevron*, changed economic and social situations often call for courts to reevaluate prior decisions without regard to *stare decisis*. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (stating that "*stare decisis* is not an inexorable command . . . [where a] holding has not induced detrimental reliance of the sort that could counsel against overturning it once there are compelling reasons to do so.").

151. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble (1996).

152. William J. Clinton, Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report (Feb. 8, 1996), *available at* http://clinton4.nara.gov/WH/EOP/OP/telecom/release.html.

economy.[153] Wireless carriers expect to continue investing heavily in mobile connectivity over the next decade, with capital expenditures expected to increase from roughly $12 billion in 2010 to $15 billion in 2015.[154] Mobile application downloads accounted for an estimated $7.3 billion in revenue in 2011, with that number expected to increase to $14 billion in 2012.[155] Sectors as diverse as education, health care, and business experience increased productivity and economic opportunities from high-bandwidth, ubiquitous wireless connections.[156]

When the Second and Third Circuits adopted the Single Provider Rule, local carriers provided wireless services by connecting customers to the nationwide wireline network.[157] No one could have predicted the massive outpouring of capital and consumer interest in always-connected wireless broadband devices. Given the vast benefits offered by ubiquitous, reliable cellular services, and the appropriateness of competition considerations in effective prohibition analysis, as discussed above, the multiple provider rule is a permissible construction of section 332(c)(7)(B)(i)(II), and the Commission will likely be afforded deference in its interpretation of that provision.

Such an interpretation would be buttressed by the need for textual uniformity and internal consistency within the Act. When Congress uses similar text within the same statute, courts generally presume that the same meaning was intended.[158] In the case of the 1996 Telecommunications Act, Congress used nearly identical effective prohibition language in section 253(a) of the Act with regard to the preemption of local zoning authority over traditional wireline common carriers.[159] Fewer circuits have considered this provision when compared with the number that have expounded upon section 332(c)(7),[160] but those that have addressed the meaning of the section 253 effective prohibition clause have given it more

153. EXEC. OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISORS, THE ECONOMIC BENEFITS OF NEW SPECTRUM FOR WIRELESS BROADBAND 7 (2012), *available at* http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf.

154. *Id.* at 40.

155. *Id.* at 7.

156. *Id.* at 9–11. McKinsey estimated that mobile health services could be worth $20 billion in annual revenue. *Global Mobile Healthcare Opportunity*, MCKINSEY & CO. (Feb. 18, 2010), http://www.mckinsey.it/idee/practice_news/global-mobile-healthcare-opportunity.view.

157. *See Cellular Tel. Co.*, 197 F.3d at 70; *see also Willoth*, 176 F.3d at 643.

158. Sprint Telephony PCS, L.P. v. Cnty. of San Diego, 543 F.3d 571, 578–79 (9th Cir. 2008) (quoting Smith v. City of Jackson, 544 U.S. 228, 233 (2005) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.")).

159. 47 U.S.C. § 253(a) (2006) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

160. The lack of developed case law on 47 U.S.C. section 253(a) may result from the lack of a judicial review provision analogous to 47 U.S.C. section 332(c)(7)(B)(v).

preemptive power than the corresponding wireless preemption in section 332.[161] In *Puerto Rico*, the First Circuit struck down a local ordinance that imposed a gross revenue fee on a local telecommunications provider because the ordinance materially inhibited or limited the ability of the provider "to compete in a fair and balanced legal and regulatory environment."[162] This standard links the preemption of local ordinances to competition among carriers and tends to corroborate the multiple provider rule's incorporation of competition analysis into the evaluation of local zoning decisions on wireless tower siting.

In light of the deference afforded the FCC in the *City of Arlington* case and the reasons discussed above, a court addressing evaluating the *2009 Declaratory Ruling's* interpretation of the Effective Prohibition Preemption would likely grant deference to the agency in choosing the Multiple Provider standard. That Rule reflects a congressional preference for market entry and innovation, provides regulatory flexibility to reflect emerging consumer preferences, and interprets the Preemption in a manner consonant with other preemptive language in the statute. But even deference to the FCC's *2009 Declaratory Ruling* does not resolve all outstanding issues surrounding the Preemption. As discussed in the following section, conflict over the Fourth Circuit's case-by-case rule and the evidentiary standards necessary for proving a significant gap in coverage will likely survive the FCC's efforts in this arena.

C. Circuit Splits that Survive the 2009 Declaratory Ruling

Since the *2009 Declaratory Ruling* was issued, district courts in the Second and Third Circuits have consistently ignored the Commission's interpretation of the Effective Prohibition Preemption and have disregarded the *Chevron* deference that the Commission is owed. In *T-Mobile Northeast, LLC v. Incorporated Village of East Hills*, the District Court for the Eastern District of New York did not cite the FCC's declaratory ruling in stating the Second Circuit rule under *Willoth* that "a plaintiff will prevail on a [prohibition of service] claim if it[] shows both that a 'significant gap' exists in wireless coverage and that its proposed facility is 'the least intrusive means' to close that gap."[163] The District Court for the Northern District of New York in *Cellco Partnership d/b/a Verizon Wireless v. Town of Colonie* also failed to cite the *2009 Declaratory Ruling* in holding for the plaintiff for lack of substantial evidence.[164] In a 2011 case, the District

161. *See* Puerto Rico v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006); *see also Sprint Telephony*, 543 F.3d at 578–79; Level 3 Commc'ns, LLC v. City of St. Louis, 477 F.3d 528, 532–33 (8th Cir. 2007).

162. *Puerto Rico*, 450 F.3d at 19.

163. T-Mobile Ne., LLC v. Incorporated Village of East Hills, 779 F. Supp. 2d 256, 274 (E.D.N.Y. 2011).

164. Cellco Partnership d/b/a Verizon Wireless v. Town of Colonie, No. 1:10-cv-581, 2011 WL 5975028 (N.D.N.Y. Nov. 28, 2011).

Court for the Eastern District of Pennsylvania also passed on whether to defer to the FCC's rejection of the Third Circuit's single provider standard.[165] If district courts in the Second and Third Circuits continue to ignore the Commission's interpretation of section 322(c)(7)(B)(i)(II), the split will be perpetuated, leading to differential treatment for carriers operating in different parts of the country.

The continued reliance of the Second, Third, and Fourth Circuits on less competitively neutral standards will be particularly pronounced in the provision of advanced wireless services. Under *City of Arlington*, the courts should probably resolve the multiplicity of differing rules regarding Effective Prohibition Preemption in accord with the deference owed the Commission on its interpretation of section 332(c)(7) in the *2009 Declaratory Ruling*, as discussed above.

Nevertheless, *Chevron* deference will not suffice to resolve all outstanding splits within the circuits with respect to effective prohibition. While the FCC addressed the split between the single and multiple provider standards,[166] it did not even mention the Fourth Circuit's case-by-case analysis of "effective prohibition," nor the evidentiary split in filling the significant gap. Because of the Commission's failure to address these issues, these splits on the implementation of the Effective Prohibition Preemption will continue to remain in force for the foreseeable future.

1. The Fourth Circuit's Case-by-Case Rule and the *2009 Declaratory Ruling*

The Fourth Circuit continues to chart its own course in wireless preemption analysis. The court most recently addressed the Commission's *2009 Declaratory Ruling* in *T-Mobile Northeast, LLC v. Fairfax County Board of Supervisors*.[167] In that case, T-Mobile sought to install three antenna panels on ten-foot extensions to an existing 100-foot cell phone transmission pole, but was denied by the Fairfax County zoning board.[168] Although the Planning Commission staff had issued a report recommending approval of T-Mobile's applications, after public hearing, the Planning Commission denied T-Mobile's application due to the "significant and adverse" visual impact of the proposed facility.[169] An appeal to the Board of Supervisors was unavailing.[170] T-Mobile filed suit, but the district court granted summary judgment in favor of the Board.[171]

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165. Liberty Towers, LLC v. Zoning Hearing Bds. of Falls Twp., No. 10-7149, 2011 WL 6091081, at *6 (E.D. Pa. Dec. 6, 2011).

166. *2009 Declaratory Ruling*, *supra* note 8, at para. 56.

167. 672 F.3d at 262.

168. *Id.* at 262–64.

169. *Id.* at 263–64.

170. *Id.* at 264.

171. *Id.*

On appeal, the Fourth Circuit analyzed their precedent in light of the recently released *2009 Declaratory Ruling*.[172] In its briefs, T-Mobile argued that the FCC had rejected a "blanket ban" approach as "inconsistent with the language and purpose of the [Communications] Act."[173] The court, however, characterized the Commission's ruling as only rejecting blanket prohibitions and distinguished its cases in *Virginia Beach* and *Albemarle*.[174] The reformulated Fourth Circuit approach does not focus its analysis on the number of wireless service providers in a locality. Rather, the Fourth Circuit has instructed reviewing courts to consider wireless siting applications on a "case-by-case basis" in which "bona fide local zoning concern[s]," not the presence of an incumbent carrier, can serve as legitimate grounds for zoning denials.[175] This construction allows plaintiffs to prevail in Effective Prohibition Preemption suits by showing that "a local governing body has a general policy that essentially guarantees rejection of all wireless facility applications" or by demonstrating that the "denial of an application for one particular site is 'tantamount' to a general prohibition of service."[176]

By shifting the focus of effective prohibition analysis away from the enumeration of incumbent carriers, the Fourth Circuit has continued to reject the multiple provider standard adopted in the *2009 Declaratory Ruling*.[177] However, because the Commission's ruling did not directly address the case-by-case rule as laid out in that circuit's precedent, the split will continue because *Chevron* deference cannot be brought to bear on this split.[178]

2. Remaining Sub-Split Within the Multiple Provider Standard on the Evidentiary Standards Necessary to Support a Finding of Effective Prohibition

By the time the Commission adopted the *2009 Declaratory Ruling*, the circuit split over the two-step effective prohibition analysis was well-developed in both the case law[179] and in the academic literature.[180] However, the Commission did not address the second prong of effective

172. *See id.* at 265–66.
173. *Id.* at 265.
174. *Id.*
175. *Id.* at 267 (quoting *2009 Declaratory Ruling*, *supra* note 8, at para. 62).
176. *Id.* at 266.
177. *See 2009 Declaratory Ruling*, *supra* note 8, at para. 56.
178. *See* discussion *supra* Section III.C.
179. *See, e.g.*, *MetroPCS, Inc.*, 400 F.3d at 734–35 (discussing the circuit split on the second step after the "significant gap" test as to "the intrusiveness or necessity of its proposed means of closing the gap").
180. *See, e.g.*, Robert B. Foster, *A Novel Application: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities Under the Telecommunications Act of 1996*, 40 URB. LAW. 521, 530 (2008).

prohibition analysis in its *2009 Declaratory Ruling*.[181] As discussed above, the split in the second step exists between jurisdictions that have adopted the multiple provider rule.[182] In wireless tower siting cases, facts are extremely localized, and claims under the Effective Prohibition Preemption must necessarily be considered in light of specific circumstances under which a zoning application was denied.[183] As a result of this intense localization, evidentiary showings are extremely important to plaintiffs for the purpose of (1) demonstrating a significant gap in a carriers' coverage and (2) showing that a zoning board's denial of a specific application results in an inability to fill the gap within a carrier's network.

There are a number of possible explanations for why the FCC may have avoided ruling on step two of the effective prohibition analysis. First, the primary thrust of the Commission's argument in the *2009 Declaratory Ruling* focuses on the competition-enhancing purpose behind the section 332(c)(7) preemptions and how the multiple provider standard accomplishes increasing carrier competition in the provision of wireless services.[184] The Commission expressly limits its interpretation to preclude only zoning denials "based solely on the presence of other carriers."[185] Specifically, the Commission states that "where a bona fide local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today."[186] Step two of the multiple carrier effective prohibition analysis necessarily evaluates the sufficiency of carrier showings with regard to the existence of a coverage gap and the measures taken by the applicant in mitigating legitimate local zoning concerns over the application.

Both the least intrusive means test and the no viable alternatives tests involve evaluating a carrier's application in light of local zoning concerns. Under the First Circuit's formulation of the no viable alternatives test, that court would have required a showing that "no other feasible sites existed"

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181. *See generally 2009 Declaratory Ruling*, *supra* note 8.

182. To recap, the First and Seventh Circuits require a showing that there are "no alternative sites which would solve the problem." *Second Generation Props.*, 313 F.3d at 629; *see also VoiceStream Minneapolis*, 342 F.3d at 834–35. The Second, Third, Ninth, and Sixth Circuits require a showing that "the manner in which [the carrier] proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *APT Pittsburgh*, 196 F.3d at 480; *see also Omnipoint Commc'ns*, 331 F.3d at 398; Nextel W. Corp. v. Unity Twp., 282 F.3d 257, 266 (2002); *Willoth*, 176 F.3d at 643. The Fourth Circuit stands apart in rejecting a structured analysis of zoning decisions, preferring to rely on a "case-by-case" analysis. *T-Mobile Ne.*, 672 F.3d 259.

183. *Charter Twp. of W. Bloomfield*, 691 F.3d at 798.

184. *See 2009 Declaratory Ruling*, *supra* note 8, at para. 56. The Commission begins its analysis with a narrow observation of the split between the single provider and multiple provider models and ends paragraph 56 with a conclusion limited to the finding that "the fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists." *Id.*

185. *Id.* at para. 62.

186. *Id.*

outside of the proposed site that would remedy the purported gap.[187] Failure to demonstrate that existing towers could not accommodate transmitters capable of covering the carrier's gap and inability to prove the inefficacy of a shorter tower would condemn a carrier's challenge to a zoning denial under this formulation.[188] All of these concerns necessarily implicate the specific facts of the zoning denial and the values on which the zoning application was denied. The FCC's reservation of these issues to local zoning authorities may demonstrate an unwillingness to wade into disputes over zoning values unrelated to purely competitive issues.

Second, the Commission may have elected not to intrude on the judicial prerogatives of Article III courts in hearing appeals from local zoning authorities. Under section 332(c)(7)(B)(v), any person adversely affected by a state or local government final action or failure to act is given the right to "commence an action" in "any court of competent jurisdiction."[189] Also under this section, persons adversely affected by a zoning board's application denial that was based on concerns over "the environmental effects of radio frequency emissions" are given recourse to petition the Commission for relief.[190] Because the FCC was given specific jurisdiction only over denials dealing with RF complaints, it is likely that the *2009 Declaratory Ruling* shied away from making an inordinate number of judgments on how courts should weigh local zoning concerns in evaluating petitions for relief. Though not mentioned explicitly in the *2009 Declaratory Ruling*, the FCC may have adopted a narrow reading of the statute in accordance with the canon of the *expressio unius est exclusio alterius* canon of statutory interpretation. That principle states that "the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas."[191] In this case, the *expressio unius* principle might operate to deny the FCC jurisdiction over complaints related to local zoning board siting decisions because the Commission was granted express jurisdiction over denials relating to RF complaints. By expressly granting this authority to the Commission, the agency may have reasoned that Congress intended to deny it authority to prescribe the substantive sufficiency of zoning board justifications for variance denials. Nevertheless, whatever the reason for avoiding the issue, the Commission never addressed the evidentiary standards necessary to sustain a finding that a board effectively prohibited the provision of personal wireless services. In light of these limitations on the Commission's handling of the Effective Prohibition Preemption, the split on evidentiary standards will likely continue.

187. *Second Generation Props.*, 313 F.3d at 635.
188. *Id.*
189. 47 U.S.C. § 332(c)(7)(B)(v) (2006).
190. *Id.*
191. Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191, 191 (1931).

IV. RECOMMENDATIONS

As discussed above, a number of circuit splits over the meaning the Effective Prohibition Preemption have survived the FCC's *2009 Declaratory Ruling*. Specifically, the second step of *Willoth* and the Fourth Circuit's rejection of *Willoth's* two-step framework survive the *2009 Declaratory Ruling*.[192] The Commission did not adequately address the second step of effective prohibition analysis or the Fourth Circuit's extreme deference to local zoning authorities. Even though *Chevron* deference is likely owed to the agency on its adoption of the multiple provider rule, these issues remain problematic for wireless carriers seeking siting rights in hostile localities and perpetuate uncertainty for local zoning boards on what evidentiary record they must develop for variance denials to survive judicial scrutiny. Below, this Note briefly explores two potential methods of resolving the remaining splits interpreting the Preemption.

A. Congressional Action—Amending Section 332(c)(7)(B)(i)(II) to Include Explicit Consideration of Competitiveness Issues in Preemption Analysis

As a statute aimed at regulating an increasingly dynamic and convergent sector, the Telecommunications Act is beginning to show its age.[193] As formerly siloed sectors begin to deploy IP-based content-delivery solutions, wireless carriers will become just one more way for consumers to access packet-switched bits.[194] Regulatory models that fail to create a level playing field between competing industries will likely result in inefficient allocations of resources and ultimately hurt consumers.

Assurance of reasonable siting access is key to the deployment of next generation wireless technologies.[195] In reforming the Act, Congress could consider including an explicit requirement that local zoning authorities consider the competitive effects of their wireless siting determinations. An amended section 332(c)(7)(B)(i)(II) might read: "shall not prohibit or have the effect of prohibiting the provision of personal wireless services by commercial mobile services providers in a way that impedes competition."

Such an amendment would clarify the text in a number of ways. First, it would codify in the Preemption Congress's concern for enhancing

192. *See 2009 Declaratory Ruling*, *supra* note 8, at paras. 60–61 .

193. *See, e.g.*, Raymond L. Gifford, *The Continuing Case for Serious Communications Law Reform* (Mercatus Ctr., Working Paper No. 11-44, 2011), *available at* http://mercatus.org/sites/default/files/publication/Gifford_Communications_Law_Reform.pdf.

194. *See, e.g.*, Comments of AT&T at 2, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, FCC GN Docket No. 12-353 (rel. Jan. 28, 2013).

195. *See Fifteenth Report*, *supra* note 13, at para. 58.

competition in the telecommunications market. Single provider jurisdictions would no longer be able to ignore values of wireless competitiveness, ubiquity, and reliability when clearly expressed in the text of the statute. As discussed above, the Act contemplates multi-firm activity in the provision of personal wireless services.[196] When courts require only a minimal showing of service by a single carrier to avoid preemption of zoning denials, they read this language out of the statute and thereby frustrate the competition-enhancing purposes of the Act.

Second, local zoning authorities would be incentivized to take competitiveness into account in their zoning determinations. Although the Preemption standards usually only arise in the context of court cases challenging permitting denials, local zoning commissions would have an increased incentive to take a closer look at the carriers' showings on the existence of a significant gap in coverage. As the burden for proving the existence of a significant gap in coverage, requiring the zoning boards to at least consider a Congressionally mandated public policy concern would not impose an undue burden on the zoning authorities. Such filings would provide zoning commissions with knowledge of the operations of the relevant carrier. Additionally, with mobile phone penetration reaching 93.5%,[197] most commissioners likely have personal knowledge of the wireless availability in their areas, to begin with, thereby further mitigating the burden.

Finally, an amendment such as that described above would preclude zoning authorities from enacting moratoria on the siting of wireless infrastructure. In comments on the *Fifteenth Wireless Competition Report*, PCIA reported that rather than denying individual permits or variances, some zoning authorities had adopted policies indefinitely suspending the consideration of wireless tower siting permits.[198] Such across-the-board moratoria are supportable under the Single Provider Rule whereby a locality has not effectively prohibited wireless service where there already exists at least one wireless service provider. This type of activity runs completely counter to the values protected by the Preemption. Under a modified preemption, the reliance that zoning authorities place on the single provider rule would be undercut and these moratoria would not be allowed.

196. *See generally supra* Section III.

197. *Id.* at para. 158.

198. *Id.* at para. 314 n.900 (citing Comments of PCIA at 12, Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, WT Docket No. 10-133 (rel. July 30, 2010) ("These moratoria often apply to collocations as well as new wireless sites.")).

B. FCC Action—Issuing a New Declaratory Ruling to Address the Remaining Circuit Splits

Absent a statutory amendment, the FCC could do more to promote the adoption of uniform preemption rules regarding the Effective Prohibition Preemption. In lieu of a petition to the contrary, the Commission could issue a notice of proposed rulemaking to directly address the evidentiary standards described above. Upon consideration of relevant comments, the Commission could modify the *2009 Declaratory Ruling* to incorporate an interpretation of the second *Willoth* step on evidentiary burdens. Because the Effective Prohibition Preemption has been interpreted by most courts as necessarily implicating the standard by which wireless providers aim to fill a demonstrated gap in coverage, the Commission will be on a firm footing in reevaluating its declaratory ruling to address this issue.

Additionally, if the Commission desires to fully adopt the multiple provider rule nationwide, the Fourth Circuit's case-by-case rule needs to be addressed expressly. As discussed above, the Fourth Circuit has been reluctant to acknowledge the balance between federal and local values embodied by Congress in the Telecommunications Act. Where the other circuits and the FCC have adopted a rule by which zoning decisions may be overcome by a showing of effective prohibition, the Fourth Circuit's case-by-case analysis affords so much weight to local values as to render superfluous the language of the Preemption

The Commission is not ideally situated to resolve this interpretive issue because it holds neither direct nor indirect authority over the Fourth Circuit decision-making. Nevertheless, by addressing the case-by-case rule head on, the Commission can build a record of disapproval of this doctrine, which may be owed *Chevron* deference, and on which other circuits may rely in future Effective Prohibition Preemption cases.

V. CONCLUSION

Issues of federal preemption of state authority are always thorny due to the distributed nature of power in the U.S. system of government. In the case of the Effective Prohibition Preemption, there has been a long history of disagreement over the extent to which the Telecommunications Act of 1996 curtails the power of local zoning authorities to approve or deny zoning permits with respect to wireless towers. Given the increased reliance placed on mobile networks for basic telephone service and its growing economic importance of the connectivity of average Americans, the ability of wireless providers to build out advanced networks is more important than ever. With the Supreme Court's recent ruling in favor of deference to the Commission in *City of Arlington v. Federal Communications Commission* and the history of the Commission's involvement in interpreting section 332(c)(7), the *Willoth* step one circuit

split is likely to be resolved in favor of the multiple provider rule. However, splits remain both with the Fourth Circuit's case-by-case analysis which favors local decision-making over developing competition-friendly rules in multiple provider jurisdictions and in the evidentiary standards necessary to sustain a challenge to zoning variance denials. Congress and the FCC should act to resolve these remaining splits and replace uncertainty with uniform rules for the use of the Effective Prohibition Preemption in resolving disputes between local zoning authorities and cellular carriers in a manner that promotes competition.