No. 13-____

IN THE

Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC states that T-Mobile South LLC is a Delaware limited liability company and wholly-owned subsidiary of T-Mobile USA, Inc. T-Mobile USA, Inc. is a Delaware corporation and is a wholly-owned subsidiary of T-Mobile US, Inc. T-Mobile US, Inc. is a Delaware corporation, and is a publicly-traded company listed on the New York Stock Exchange (traded under the symbol TMUS). Deutsche Telekom Holding B.V., a limited liability company (*besloten vennootschap met beperkte aansprakelijkheidraies*) organized and existing under the laws of the Netherlands ("DT B.V."), owns more than 10% of the shares of T-Mobile US, Inc. DT B.V. is a direct wholly-owned subsidiary of T-Mobile Global Holding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Holding"). Holding, is in turn a direct wholly-owned subsidiary of T-Mobile Global Zwischenholding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Global"). Global is a direct wholly-owned subsidiary of Deutsche Telekom AG, an Aktiengesellschaft organized and existing under the laws of the Federal Republic of Germany ("Deutsche Telekom"). The principal trading market for Deutsche Telekom's ordinary shares is the Frankfurt Stock Exchange. Deutsche Telekom's ordinary shares also trade on the Berlin, Düsseldorf, Hamburg, Hannover, München and Stuttgart stock exchanges in Germany. Deutsche Telekom's American Depositary

Shares ("ADSs"), each representing one ordinary share, trade on the OTC market's highest tier, OTCQX International Premier (ticker symbol: "DTEGY"). Deutsche Telekom is an indirect parent of Petitioner T-Mobile South LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T-Mobile South LLC ("T-Mobile") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 731 F.3d 1213 and is reproduced at Pet. App. 1a-18a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 19a-35a.

JURISDICTION

The Eleventh Circuit issued its opinion on October 1, 2013. Pet. App. 1a. On December 20, 2013, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including February 13, 2014. See No. 13A614. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7), provides in relevant part:

(B) LIMITATIONS.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) 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. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

INTRODUCTION

This case presents a repeatedly acknowledged circuit split over a provision of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively the "Act") that is implicated in countless cases – involving any of the approximately 89,000 local authorities across the Nation – every day. Intended to jump-start the deployment of advanced wireless services and remove local obstacles to timely deployment, Section 332(c)(7)(B)(iii) of the Act specifies that any local government's denial of an application for the placement, construction, or modification of a personal wireless facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

According to the majority of the federal courts of appeals to address the issue, this provision dictates that an issuance denying such an application must be separate from the administrative record and "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *Helcher v. Dearborn Cnty. Bd. of Zoning Appeals*, 595 F.3d 710, 718-19 (7th Cir. 2010); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005). But in the decision below, the Eleventh Circuit expressly "rejected" that view and instead joined the Fourth Circuit in holding that a denial letter need only advise the applicant of the fact that the permit has been denied. Pet. App. 12a-14a.

"[T]o the extent that the decision must contain grounds or reasons or explanations," the Eleventh Circuit held that "it is sufficient" if those reasons are purportedly embedded in the administrative record. Pet. App. 13a.

This Court's review is urgently needed to bring uniformity to the law, and this case is the perfect vehicle for doing so. The issue presented is of enormous importance to the Nation's economy – particularly as demand for advanced wireless services continues to surge. The interpretation of Section 332(c)(7)(B)(iii) adopted by the Eleventh and Fourth Circuits not only badly misreads the statute but also, if left to stand, will seriously impede the prompt deployment of wireless services to consumers. In particular, under the Eleventh Circuit's approach, applicants will be forced to engage in the costly and time-consuming process of filing suit to ferret out the underlying reasons for permit denials; and judicial review will be vastly complicated as courts are required to sift through sometimes hundreds or thousands of pages of hearing minutes, transcripts, and correspondence simply to discover the threshold question of the grounds of the local government's decision. Requiring such time-consuming and expensive undertakings directly conflicts with Congress' intent in passing the Telecommunications Act of 1996.

STATEMENT OF THE CASE

1. The United States is rapidly becoming a technologically mobile society. Every year, consumers adopt more wireless telecommunications services. To provide the advanced wireless services that consumers demand, wireless

telecommunications providers must deploy increasingly tightly stitched networks of equipment, such as towers and antennas, to reach the places where consumers live and work. The local government approval process, however, can delay and impede deployment of that necessary infrastructure by "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements." H.R. Rep. No. 104-204, pt. 1, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61 (1996). As a result, "zoning approval for new wireless facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, 12 FCC Rcd. 10785, ¶ 90 (1997).

Congress enacted the Telecommunications Act of 1996 ("1996 Act"), at least in part, to address this problem of "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). In general terms, the 1996 Act radically altered the communications markets and their regulation "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *Id.* (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, preamble, 110 Stat. 56 (1996)). Specific to this case, the 1996 Act amended the Communications Act of 1934 to "impose[] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.*; *see generally City*

of Arlington v. FCC, 133 S. Ct. 1863, 1866-67 (2013). That statutory amendment provides, in part, that any decision by a local authority to deny a wireless siting application for a personal wireless facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This case turns on the meaning of that requirement.

2. In early 2010, Petitioner T-Mobile determined that it needed an additional personal wireless service facility in a residential area in Respondent the City of Roswell, Georgia (the "City"). T-Mobile thus applied to the City for a permit to construct a cell tower disguised as a pine tree on a 2.8-acre, vacant parcel of property. The Planning and Zoning Division of the City's Community Development Department reviewed T-Mobile's application and found that it met all the requirements of the City code's standards for wireless facilities. Pet. App. 4a. The Planning Department further recommended that the City approve the application with certain modifications. *Id.*

Shortly thereafter, the City Council considered the application at a public hearing. The hearing lasted over two hours and comprises 108 pages of transcript. During the first part of the hearing, some T-Mobile representatives and local residents spoke for and against the proposal. Later, certain councilpersons expressed concern or outright opposition to the application. They suggested, among other things, that "other carriers apparently have sufficient coverage in this area"; that the cell tower would be "aesthetically incompatible with the natural setting and surrounding structures"; that the cell

tower might not be able "to provide continuous emergency power for 911 services"; and that it was "difficult really to definitively assess" the "potential loss of resale value" among surrounding homes. Pet. App. 7a-8a, 28a-29a. Another councilperson simply asked follow-up questions of T-Mobile, and a final councilperson never spoke at all. Pet. App. 28a.

At the end of the meeting, one councilperson moved to deny the application, and the members who were present and eligible to vote unanimously passed the motion. No one ever identified which of the various concerns expressed at the meeting and in support of the motion constituted the City's official reasons for denying the permit.

Two days later, the City mailed T-Mobile a letter. The letter stated in full:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. If you have any additional questions please, contact me at [phone number].

Pet. App. 9a. Once again, the City in the letter made no attempt to distill from the varying views expressed by the individual council members any common rationale for the denial reflecting the decision of the council as a whole. Pet. App. 9a.

3. Section 332(c)(7)(B)(v) of the Act affords telecommunications providers thirty days after the denial of a permit to seek judicial review in federal court and requires the court to act on the matter in an expedited manner. 47 U.S.C. § 332(c)(7)(B)(v). Accordingly, T-Mobile timely filed an action in the U.S. District Court for the Northern District of Georgia, challenging the City's denial of its application. Among other provisions of the Act, T-Mobile contended that the City's unexplained denial letter violated Section 332(c)(7)(B)(iii)'s requirement that denials be "in writing and supported by substantial evidence."

The district court granted summary judgment to T-Mobile and ordered the City to allow T-Mobile to install its wireless communications facility. Reading the statutory phrase "in writing and supported by substantial evidence" in context, the district court followed the interpretation of Section 332(c)(7)(B)(iii) adopted by a majority of federal courts of appeals that have addressed the issue. Those courts (four in all) have held that this provision requires a written denial to "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *see also supra* at 3 (collecting other cases). Thus, "[e]ven where [a written administrative] record reflects unmistakably [a] Board's reasons for denying a permit, allowing the written record to serve as the writing would contradict the language of the Act." *Id.* Because the City's denial letter here failed to cite any "specific reasons for the local government's decision,"

the district court held that it violated Section 332(c)(7)(B)(iii). Pet. App. 10a, 34a.

4. The Eleventh Circuit reversed. The court of appeals did not dispute that under the majority interpretation of Section 332(c)(7)(B)(iii) T-Mobile would prevail. But, reaffirming its intervening decision in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit expressly rejected the majority construction of Section 332(c)(7)(B)(iii). Pet. App. 14a; *see also City of Milton*, 728 F.3d at 1284 (acknowledging its decision deepened a "disagree[ment]" among the circuits). Joining the Fourth Circuit, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). The Eleventh Circuit added that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

The Eleventh Circuit ruled that the City had satisfied its standard. The City sent T-Mobile a letter advising that its application had been denied, and it "informed T-Mobile that '[t]he minutes from the aforementioned hearing may be obtained from the city clerk.'" Pet. App. 15a. And those minutes, the Eleventh Circuit believed, "'recount[] all of the reasons for the action on [the] application along with the relevant discussion.'" *Id.* 15a (quoting *City of Milton*, 728 F.3d at 1286) (internal alterations made by Eleventh Circuit).

The Eleventh Circuit remanded to the district court for further proceedings on T-Mobile's remaining claims. Pet. App. 18a.

5. The Eleventh Circuit subsequently denied T-Mobile's petition for rehearing en banc in the *City of Milton* case, thus locking in its construction of Section 332(c)(7)(B)(iii).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuits Are Intractably Split Over What Section 332(c)(7)(B)(iii) Requires.

The federal circuits are divided four-to-two over what it takes to satisfy the "in writing" portion of Section 332(c)(7)(B)(iii)'s requirement that any decision denying a request to place, construct, or modify a personal wireless service facility "be in writing and supported by substantial evidence contained in a written record."

1. The First, Sixth, Seventh, and Ninth Circuits hold that Section 332(c)(7)(B)(iii) requires a denial of a permit application to "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Todd*, 244 F.3d at 60; *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002) (adopting *Todd* rule); *Helcher v. Dearborn Cnty. Bd. of Zoning Appeals*, 595 F.3d 710, 718 (7th Cir. 2010) (same); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005) (same). And at least in the First, Sixth, and Ninth Circuits, "[e]ven where [a written administrative] record reflects unmistakably [a] Board's reasons for denying a permit, allowing the written record to serve as the writing would

contradict the language of the Act." *Todd*, 244 F.3d at 60; *see also New Par*, 301 F.3d at 395 (denial must "(1) be separate from the written record; [and] (2) describe the reasons for the denial"); *MetroPCS*, 400 F.3d at 723 ("local zoning authorities [must] issue a written decision separate from the written record which contains sufficient explanation of the reasons for the decision" to allow judicial review).[1] Decisions thus abound in those jurisdictions holding that local governments violated Section 332(c)(7)(B)(iii) where, as here, written denials advised nothing more than the fact of the denial.[2]

Several other courts have adopted this view as well. The Tenth Circuit applied it in *U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole*, 180 F.

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[1] In *Helcher*, the Seventh Circuit expressly "join[ed] the First, Sixth, and Ninth Circuits[']" construction of Section 332(c)(7)(B)(iii). *Id.* at 595 F.3d at 719. Yet it held that this construction was satisfied by meeting minutes "cit[ing] the specific provisions of the [local o]rdinance that the majority of the voting members found were not met by the application." *Id.* at 722.

[2] *See, e.g., New Cingular Wireless, PCS, LLC v. Town of Candia*, 2010 WL 3211067 (D.N.H. Aug. 11, 2010); *Indust. Tower & Wireless, LLC v. Town of East Kingston*, 2009 WL 799616 (D.N.H. Mar. 26, 2009); *SBA Towers II, LLC v. Town of Atkinson*, 2008 WL 4372805 (D.N.H. Sept. 19, 2008); *Nextel Commc'ns of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F. Supp. 2d 311 (D. Mass. 2002); *ATC Realty, LLC v. Town of Sutton*, 2002 WL 467132 (D.N.H. Mar. 7. 2002); *Cellco P'ship v. Franklin Cnty.*, 553 F. Supp. 2d 838 (E.D. Ky. 2008); *New Par v. Franklin Cnty. Bd. of Zoning Appeals*, 2010 WL 3603645 (S.D. Ohio Sept. 10, 2010); *T-Mobile Cent., LLC v. City of Grand Rapids*, 2007 WL 1287739 (W.D. Mich. May 2, 2007).

App'x 791, 793-94 (10th Cir. 2006).[3] District courts within the Second and Eighth Circuits also have construed Section 332(c)(7)(B)(iii) in accordance with the majority view. *See Omnipoint Commc'ns, Inc. v. Planning & Zoning Comm'n of Wallingford*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000); *Sprint Spectrum L.P. v. County of St. Charles*, 2005 WL 1661496, at *3-5 (E.D. Mo. July 6, 2005).

The courts adopting this view have relied on both text and the statute's purpose. The Ninth Circuit has stressed that the statutory provision's "in writing" directive must be read in conjunction with the requirement that any denial be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). "If such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722. The First Circuit has echoed this concern, stating that "permitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board's rationale." *Todd*, 244 F.3d at 60. An administrative record alone "can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members

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[3] Unpublished decisions in the Tenth Circuit are not precedential, but may be cited for persuasive value in that circuit. 10th Cir. L. R. 32.1(A).

rather than a statement of the reasons that commanded the support of a majority of the board." *Id.*

2. In its decision below, the Eleventh Circuit expressly "rejected" – and thus "refused" to follow – the majority approach. Pet. App. 14a. Joining the Fourth Circuit and reaffirming its own precedent, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). Pet. App. 14a-15a; *see also City of Milton*, 728 F.3d at 1283-84; *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999). The Fourth Circuit has held that such a document alone always satisfies Section 332(c)(7)(B)(iii). *See Winston-Salem*, 172 F.3d at 311-13 (holding that it was sufficient that the zoning board sent the applicant a copy of the first page of its application with the word "DENIED" stamped on it). The Eleventh Circuit has also stated that "to the extent that the [local government's written] decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents" – such as meeting minutes or a transcript of the hearing at which the permit application was denied – "that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285). Those separate documents – as this case illustrates – need not specify which particular arguments voiced in opposition to the application actually carried the day.

3. At this point, the circuit split over the proper interpretation of Section 332(c)(7)(B)(iii) is deeply entrenched and fully developed. The First Circuit

acknowledged in *Todd* that it was rejecting the Fourth Circuit's view as "flawed" and because it believed it "contradict[ed] the language of the Act." 244 F.3d at 60. And every court of appeals to address the issue subsequently has recognized that "the circuits are split in their interpretations of the 'in writing' requirement." *MetroPCS*, 400 F.3d at 721; *see also City of Milton*, 728 F.3d at 1284 ("Other circuits have disagreed with the Fourth."); *Helcher*, 595 F.3d at 717 ("There are differing views among the circuits as to what constitutes an adequate writing."); *New Par*, 301 F.3d at 395 ("Courts have varied considerably in their interpretations of the 'in writing' requirement of 47 U.S.C. § 332(c)(7)(B)(iii).").

Furthermore, the First Circuit's *Todd* decision largely encapsulates the reasoning of one side of the conflict, while the Fourth Circuit's *Winston-Salem* decision basically describes the other. Courts of appeals weighing in after those two decisions have simply chosen sides. Nothing could be gained by further percolation – a reality perhaps evidenced by the fact that the Eleventh Circuit recently denied T-Mobile's request (in the *City of Milton* case) for rehearing en banc on the issue.

II. The Question Presented Is Important And Should Be Resolved Now.

For two overarching reasons, there is a pressing need for this Court to resolve the conflict over whether local governments may deny applications for personal wireless service facilities in documents that do nothing more than advise the applicant of the fact of the denial.

1. The statutory provision at issue in this case is central to the deployment of facilities and services that are a critical component of the Nation's economy. The Federal Communications Commission ("FCC") has explained that:

> Wireless services are central to the economic, civic, and social lives of over 270 million Americans. Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services. Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers.

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, 24 FCC Rcd. 13994, ¶ 3 (2009) ("*2009 Declaratory Ruling*"); *accord Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("*2013 Wireless Broadband NPRM*") ("The ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will depend not only on access to spectrum, but also on the extent to which

they can deploy new or improved wireless facilities or cell sites.").[4]

Indeed, robust deployment is critical if the United States is to keep up with its international counterparts in access to advanced broadband services, with all of the benefits that such access entails. *See, e.g.,* Edward Wyatt, *U.S. Struggles to Keep Pace in Delivering Broadband Service*, N.Y. Times, Dec. 29, 2013, at B1. One recent study, for instance, predicts that continued deployment of our Nation's wireless infrastructure would increase the GDP in 2017 by 1.6% to 2.2% ($259.1 to $355.3 billion in dollar terms) and generate up to 1.2 million net new jobs. *See* Alan Pearce, et al., *Wireless Broadband Infrastructure: A Catalyst For GDP And Job Growth 2013-2017*, at 1 (Sept. 2013), *available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy2.PDF.[5]

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[4] The Executive Branch also has repeatedly recognized the importance to the Nation of deployment of advanced wireless services and identified the need for improvement in the availability of access to broadband services – including specifically wireless broadband services. In his 2011 State of the Union Address, for example, President Obama called for a national wireless innovation and infrastructure initiative to make available high-speed wireless services to at least 98% of Americans. President Barack Obama, State of the Union Address (Jan. 25, 2011); *see also* Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010).

[5] *See also 2013 Wireless Broadband NPRM*, 28 FCC Rcd. 14238, ¶¶ 1, 91, Appendix B ¶ 33 (citing *inter alia*, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012), codified at 47 U.S.C. § 1455(a)); *2009 Declaratory Ruling*, 24 FCC Rcd. 13994,

It is critical, therefore, that the federal courts avoid unduly hampering such deployment. Just last Term, for example, this Court rebuffed a challenge to an FCC order setting specific deadlines within which a local government generally must act on a wireless facility application under Section 332(c)(7)(B). *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶¶ 45-48). The agency had taken this action in order to "remove uncertainty and encourage the expeditious deployment of wireless broadband services." *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶ 32. This Court endorsed that objective. *See City of Arlington*, 133 S. Ct. at 1867 ("In theory, § 332(c)(7)(B)(ii) requires state and local zoning authorities to take prompt action on siting applications for wireless facilities. But in practice, wireless providers often faced long delays.").

Because the Eleventh and Fourth Circuits' interpretation of Section 332(c)(7)(B)(iii) impedes the expeditious deployment of wireless facilities, those courts threaten to hamper economic growth in a substantial part of the country and deprive consumers of the technologically advanced services envisioned by the 1996 Act. Once again, this Court's intervention is necessary to prevent such impairment.

¶ 35 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq.*, and American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)).

2. The Eleventh and Fourth Circuits' interpretation of Section 332(c)(7)(B)(iii) also creates perverse incentives for local governments.

When Section 332(c)(7) was enacted, Congress identified the local government approval process as one of the key impediments to the rapid deployment of wireless services. As a House Committee report noted, under "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" wireless services. H.R. Rep. No. 104-204, pt. 1, at 95 (1995). Thus, in Section 332(c)(7)(B), Congress adopted specific procedural and substantive limitations on local governments – one of which is the requirement that any denials of permits be in writing and supported by substantial evidence. *See* H.R. Rep. No. 104-204, pt. 1, at 95; *City of Rancho Palos Verdes*, 544 U.S. at 115 (the goal of Section 332(c)(7) "was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers . . . [through] impos[ition of] specific limitations on the traditional authority of state and local governments to regulate the location, construction and modification of such facilities"); *see also City of Arlington*, 133 S. Ct. at 1873 (holding Section 332(c)(7)(B) "explicitly supplants" local authority over "matters of traditional state and local concern").

The Eleventh Circuit's and Fourth Circuit's interpretation of Section 332(c)(7)(B)(iii) encourages a return to the type of gamesmanship and delay that that provision was designed to eliminate. Local

governments in those circuits need not provide any official reason for denying applications for the deployment of personal wireless facilities. Instead, they need only send a written document with one word: "denied." Worse yet, local governments need not pinpoint anywhere else their reasons for denying such applications. And they have a strong incentive to avoid doing so. The more forthright and precise a local government is concerning the reasons for its actions, the more susceptible its denial will be to judicial review and potential rejection.

While local governments in the Eleventh and Fourth Circuits may welcome this opportunity to insulate their permit denials from prompt and effective judicial review, this regime flies in the face of the purpose of the 1996 Act. Every day the interpretation is on the books, it distorts the proper operation of permitting processes throughout a large swath of the country. This Court should step in to rectify the situation.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Issue.

For two reasons, this case affords this Court a particularly suitable opportunity to resolve the legal question presented.

1. The facts of this case vividly illustrate the importance of why a local government's denial of such an application must specify reasons for the denial. As is typically the case, the local government hearing at which T-Mobile's application was considered involved testimony from various local citizens and members of the city council. But other members of the council never expressed any clear views. And no one ever made any effort to specify

which of the various concerns voiced over the two-hour-long session – at least one of which flies in the face of the Act[6] – constituted the City's official reason(s) for denying the application. Nor, most importantly, did the City's letter to T-Mobile telling it that the application had been denied identify the City's official reasons for denying the application.

For that very reason, the district court observed that "it is impossible for the Court to discern which of the[] reasons [mentioned at the hearing] motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a. The district court, in other words, found itself completely unable to undertake the review for substantial evidence that the Act demands.

It is unclear whether the Eleventh Circuit believed that the City's reasons for the denial could somehow be discerned from the administrative record. At one point, the court of appeals asserted that "the reasons for the denial could be gleaned from the written transcript and the written minutes of the hearing." Pet. App. 17a. But the Eleventh Circuit never attempted to specify those reasons, instead stating merely that "[t]he minutes in this case summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers" and "reflect the reasons given by

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[6] One councilperson asserted that "other carriers apparently have sufficient coverage in this area," Pet. App. 7a, but the FCC and numerous courts of appeals have made clear that the coverage of other carriers is not lawful grounds for denying a wireless facilities application. *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶ 56 (citing cases).

Councilmember Dr. Betty Price in support of her motion to deny T-Mobile's request." Pet. App. 15a.

The fact that the district judge and the appellate judges apparently disagreed, at least to some extent, over how to read the administrative record highlights exactly why other courts of appeals have held that "local zoning authorities [must] issue a written decision *separate from the written record* which contains sufficient explanation of the reasons for the decision to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *MetroPCS*, 400 F.3d at 723. This case thus affords an especially apt setting in which to consider the courts of appeals' divergent approaches to the question presented.

2. The question presented also is outcome-determinative here. The district court applied the majority interpretation of Section 332(c)(7)(B)(iii) and entered summary judgment in favor of T-Mobile because the City's written denial contained no reasoning whatsoever. Pet. App. 34a. The Eleventh Circuit did not dispute that applying the majority rule dictates that outcome. Instead, the court of appeals reversed solely because it refused to follow the majority rule. Accordingly, the validity of T-Mobile's claim that the City violated Section 332(c)(7)(B)(iii) under the "in writing" clause turns squarely and exclusively on which side of the circuit split is correct.

IV. The Eleventh's Circuit's Holding Is Incorrect.

The Eleventh Circuit reasoned here (and in *City of Milton*) that a "plain reading" of Section 332(c)(7)(B)(iii) requires local governments to do nothing more than to transmit the fact of a permit

denial "in writing." Pet. App. 12a-14a; *accord City of Milton*, 728 F.3d at 1285. Such a document, the Eleventh Circuit concluded, need not contain any reasoning; "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a; *City of Milton*, 728 F.3d at 1285. This analysis misses the mark.

1. We begin with text, and with this Court's familiar admonition that "[s]tatutory interpretation is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks and citation omitted). Thus, each statutory term should be construed "not in isolation, but 'in its proper context.'" *Porter v. Nussle*, 534 U.S. 516, 527 (2002) (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). Indeed, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Such is the case here. By its terms, Section 332(c)(7)(B)(iii) requires denials of requests to build or modify a personal wireless service facility to be "in writing *and supported by substantial evidence*." 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added). Those twin requirements – contained side-by-side in the same sentence – work in tandem. As the Ninth Circuit has explained, "[i]f [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of

the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722. Consequently, when a local government reduces a decision to deny a permit application to written form but fails to identify any reasons for that decision, the locality fails to comply with the statute.

This remains so even where, as here, a local government's written denial includes an invitation to review the minutes of the hearing (or any other administrative proceeding) at which the application was discussed and voted upon – and even where various concerns or objections regarding the application can be found in that record. As the First Circuit has explained, "[a] written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know – as the district court here needed to know – "the rationale of the Council *as a whole* for denying the application." Pet. App. 28a (emphasis added).

2. The Eleventh Circuit implicitly acknowledged that its crabbed interpretation of Section 332(c)(7)(B)(iii) would thwart the provision's purpose of facilitating judicial review. *See City of Milton*, 728 F.3d at 1284-85. But the court of appeals declared

that it was powerless to give effect to that purpose. "We must . . . take the model that Congress has constructed," the Eleventh Circuit asserted, "perceived defects and all." *Id.* at 1284; Pet. App. 14a.

Though cast as judicial modesty, this reasoning actually subverts Congress' work for no legitimate reason. As this Court has said time and again, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, "[i]n determining the meaning of the statute, [courts should] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

The object and policy of Section 332(c)(7)(B) – especially when read against the backdrop of the 1996 Act as a whole – is to prevent local governments from imposing undue "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115; *see also id.* at 127-28 (Breyer, J., concurring) (emphasizing importance of expedited judicial review remedy as part of the congressional scheme). Issuing a denial of an application with no reasoning whatsoever – and thereby making the required expedited judicial review more costly and burdensome, if not downright impossible – is just one such impediment. Therefore, Section 332(c)(7)(B)(iii)'s requirement that denials be "in writing and supported by substantial evidence" is most naturally read as requiring local governments to provide reasons for their decisions in documents

denying permits. That is the only way to guarantee – consistent with Congress's design – that that federal courts are able to conduct substantial evidence review on an expedited basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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